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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,	**FILED UNDER AO 2019-6**
Plaintiff-Appellee,	Supreme Court No. 164191
vs.	
NICOLAS LYON,	Court of Appeals No. 360548
Defendant-Appellant.	7th Judicial Circuit No. 21-47378-FH

DEFENDANT-APPELLANT LYON'S REPLY BRIEF IN SUPPORT OF BYPASS APPLICATION FOR LEAVE TO APPEAL

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APPENDIX
(Key Authority)

MICH CONST 1963 art III, § 2

MICH CONST 1963 art III, § 7

1917 PA 196

MCL 767.1, *et seq*.
MCL 767.3
MCL 767.4

MCL 767A.1, *et seq*.

Genesee Prosecutor v Genesee Circuit Judge,
386 Mich 672; 194 NW2d 693 (1972)

In re Colacasides, 379 Mich 69; 150 NW2d 1 (1967)

In re Murchison, 349 US 133 (1955)

In re Oliver, 333 US 257 (1948)

In re Slattery, 310 Mich 458; 17 NW2d 251 (1945)

People v Davis, No. 161398 (Mich Sup Ct Mar 14, 2022)

Soap & Detergent Ass'n v Natural Resources Comm'n,
415 Mich 728; 330 NW2d 346 (1982)

Williams v Pennsylvania, 579 US 1 (2016)

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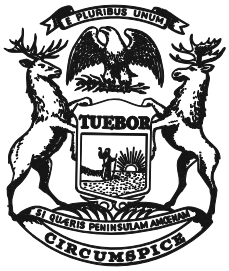
The Constitution

OF THE STATE OF MICHIGAN
OF 1963



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ARTICLE III
General Government

§ 1 Seat of government.

Sec. 1. The seat of government shall be at Lansing.

History: Const. 1963, Art. III, §1, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. I, §2.

§ 2 Separation of powers of government.

Sec. 2. The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

History: Const. 1963, Art. III, §2, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. IV, §2.

§ 3 Great seal.

Sec. 3. There shall be a great seal of the State of Michigan and its use shall be provided by law.

History: Const. 1963, Art. III, §3, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. VI, §§11, 12.

§ 4 Militia.

Sec. 4. The militia shall be organized, equipped and disciplined as provided by law.

History: Const. 1963, Art. III, §4, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. XV, §§1-3.

§ 5 Intergovernmental agreements; service by public officers and employees.

Sec. 5. Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution. Any other provision of this constitution notwithstanding, an officer or employee of the state or of any such unit of government or subdivision or agency thereof may serve on or with any governmental body established for the purposes set forth in this section and shall not be required to relinquish his office or employment by reason of such service. The legislature may impose such restrictions, limitations or conditions on such service as it may deem appropriate.

History: Const. 1963, Art. III, §5, Eff. Jan. 1, 1964.

§ 6 Internal improvements.

Sec. 6. The state shall not be a party to, nor be financially interested in, any work of internal improvement, nor engage in carrying on any such work, except for public internal improvements provided by law.

History: Const. 1963, Art. III, §6, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Art. X, §14.

§ 7 Common law and statutes, continuance.

Sec. 7. The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

History: Const. 1963, Art. III, §7, Eff. Jan. 1, 1964.
Former Constitution: See Const. 1908, Schedule, §1.

[No. 196.]

AN ACT to authorize proceedings for the discovery of crime, and to provide penalties for a violation of such procedure.

The People of the State of Michigan enact:

Complaint, filing of.

SECTION 1. Whenever by reason of the filing of any complaint, which may be upon information and belief, any justice of the peace, police justice or judge of a court of record shall have probable cause to suspect that any crime, offense, misdemeanor or violation of any city ordinance, shall have been committed within his jurisdiction, and that any person may be able to give any material evidence respecting such offense, such justice or judge in his discretion may, and upon the application of the prosecuting attorney, or city attorney in the case of suspected violation of ordinances, shall require such person to attend before him as a witness and answer such questions as such justice or judge may require concerning any violation of law about which he may be questioned; and the proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony, and such witnesses shall be entitled to the same compensation as in other criminal proceedings.

Witness, attendance of.

Compensation.

Apprehension of persons suspected.

SEC. 2. If upon such inquiry the justice or judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person or persons to be guilty thereof, he may cause the apprehension of such person or persons by proper process, and, upon the return of such process served or executed, the justice or judge shall proceed with the case, matter or proceeding in

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like manner as upon formal complaint, and in respect of communicating or divulging any statement made by such witnesses during the course of such inquiry, the justice, judge, prosecuting attorney and other person or persons who may, at the discretion of such justice, be admitted to such inquiry, shall be governed by the provisions of law relative to grand jurors.

Refusal of witness to appear.

SEC. 3. Any witness neglecting or refusing to appear in response to such summons, or to answer any questions which such justice or judge may require material to such inquiry, shall be deemed guilty of a contempt, and shall be punished by a fine not exceeding one hundred dollars or imprisonment in the county jail not exceeding sixty days or both at the discretion of the court: *Provided,* That if such witness, after being so sentenced, shall appear and answer such question, the justice or judge may in his discretion commute or suspend the further execution of such sentence.

Proviso.

Incriminating answers.

SEC. 4. No person shall upon such inquiry be required to answer any questions the answers of which might tend to incriminate him, except upon motion in writing by the prosecuting attorney which shall be granted by such justice or judge, and any such questions and answers shall be reduced to writing and entered upon the docket or journal of such justice or judge, and no person required to answer such questions upon such motion shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him.

Approved May 10, 1917.

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THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

CHAPTER VII
GRAND JURIES, INDICTMENTS, INFORMATIONS AND PROCEEDINGS BEFORE TRIAL

767.1 Courts of record; jurisdiction over prosecutions upon information.

Sec. 1. The several circuit courts of this state, the recorders' courts and any court of record having jurisdiction of criminal causes, shall possess and may exercise the same power and jurisdiction to hear, try and determine prosecutions upon informations for crimes, misdemeanors and offenses, to issue writs and process and do all other acts therein as they possess and may exercise in cases of like prosecutions upon indictments.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17215;—CL 1948, 767.1.

Former law: See sections 1 and 9 of Act 138 of 1859, being CL 1871, §§ 7937 and 7945; How., §§ 9548 and 9556; CL 1897, §§ 11933 and 11941; and CL 1915, §§ 15760 and 15768.

767.2 Applicability of indictment laws to informations.

Sec. 2. All provisions of the law applying to prosecutions upon indictments, to writs and process therein and the issuing and service thereof, to commitments, bail, motions, pleadings, trials, appeals and punishments, or the execution of any sentence, and to all other proceedings in cases of indictments whether in the court of original or appellate jurisdiction, shall, in the same manner and to the same extent as near as may be, be applied to informations and all prosecutions and proceedings thereon.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17216;—CL 1948, 767.2.

Former law: See section 4 of Act 138 of 1859, being CL 1871, § 7940; How., § 9551; CL 1897, § 11936; and CL 1915, § 15763.

767.3 Proceedings before trial; inquiry; summoning witnesses; notification to judge; taking testimony; legal counsel; disqualification of judge.

Sec. 3. Whenever by reason of the filing of any complaint, which may be upon information and belief, or upon the application of the prosecuting attorney or attorney general, any judge of a court of law and of record shall have probable cause to suspect that any crime, offense or misdemeanor has been committed within his jurisdiction, and that any persons may be able to give any material evidence respecting such suspected crime, offense or misdemeanor, such judge in his discretion may make an order directing that an inquiry be made into the matters relating to such complaint, which order, or any amendment thereof, shall be specific to common intent of the scope of the inquiry to be conducted, and thereupon conduct such inquiry. In any court having more than 1 judge such order and the designation of the judge to conduct the inquiry shall be made in accordance with the rules of such court. Thereupon such judge shall require such persons to attend before him as witnesses and answer such questions as the judge may require concerning any violation of law about which they may be questioned within the scope of the order. The proceedings to summon such witness and to compel him to testify shall, as far as possible, be the same as proceedings to summon witnesses and compel their attendance and testimony. The witnesses shall not receive any compensation or remuneration other than witness fees as paid witnesses in other criminal proceedings. The witness shall not be employed in any capacity by the judge or by any person connected with such inquiry, within the scope of the inquiry being conducted. Whenever a subpoena is issued by the judge conducting the inquiry, commanding the appearance of a witness before the judge forthwith upon the service of such subpoena, and, following the service thereof, the witness arrives at the time and place stated in the subpoena, the judge issuing the same shall be forthwith notified of the appearance by the officer serving the subpoena, and the judge forthwith shall appear and take the testimony of the witness. Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. The witness shall have the right to have counsel present in the room where the inquiry is held. All matters revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in section 4. No testimony shall be taken or given by any witness except in the presence of the judge.

Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.

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History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17217;—CL 1948, 767.3;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1965, Act 251, Imd. Eff. July 21, 1965.

Former law: See section 1 of Act 196 of 1917.

767.4 Proceedings before trial; apprehension of suspect; disqualification as examining magistrate; finding as to misconduct in office; disclosures, penalty, exceptions; report of no finding of criminal guilt; period of inquiry; successor judge, appointment.

Sec. 4. If upon such inquiry the judge shall be satisfied that any offense has been committed and that there is probable cause to suspect any person to be guilty thereof, he may cause the apprehension of such person by proper process and, upon the return of such process served or executed, the judge having jurisdiction shall proceed with the case, matter or proceeding in like manner as upon formal complaint. The judge conducting the inquiry under section 3 shall be disqualified from acting as the examining magistrate in connection with the hearing on the complaint or indictment, or from presiding at any trial arising therefrom, or from hearing any motion to dismiss or quash any complaint or indictment, or from hearing any charge of contempt under section 5, except alleged contempt for neglect or refusal to appear in response to a summons or subpoena. If upon such inquiry the judge shall find from the evidence that there is probable cause to believe that any public officer, elective or appointive and subject to removal by law, has been guilty of misfeasance or malfeasance in office or wilful neglect of duty or of any other offense prescribed as a ground of removal, the judge shall make a written finding setting up the offense so found and shall serve said finding upon the public officer, public board or body having jurisdiction under the law to conduct removal proceedings against the officer. The finding shall be a sufficient complaint as a basis for removal of said officer and the public officer, public board or public body having jurisdiction of removal proceedings against the officer shall proceed in the method prescribed by law for a hearing and determination of said charges. Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before the judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting the inquiry, any prosecuting attorney and other persons who may at the discretion of the judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of the judge or after his services with the judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in the inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with the inquiry, who shall disclose or publish or cause to be published any of the proceedings of the inquiry otherwise than by issuing or executing processes prior to the indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related to the proceedings of the inquiry, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both fine and imprisonment in the discretion of the court, and the offense when committed by a public official shall also constitute malfeasance in office. The limitations, restrictions and penalties relating to the uttering, publishing or disclosing of any statement pertaining to any information or evidence, imposed by this section, do not apply to disclosures of information or evidence made by a judge conducting such an investigation to another judge concurrently conducting an investigation as provided in section 3. Upon the termination of the inquiry if the judge shall make no presentment of crime or wrongdoing as to any person whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.

No inquiry or proceeding under this chapter shall continue longer than 6 months unless extended by specific order of the judge or his successor for an additional period not to exceed 6 months.

In the event any judge conducting such inquiry shall be unable to continue because of physical disability, disqualification, termination of office or death, the presiding circuit judge of Michigan shall appoint a successor.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17218;—Am. 1947, Act 33, Imd. Eff. Apr. 4, 1947;—CL 1948, 767.4;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1967, Act 70, Eff. Nov. 2, 1967.

Former law: See section 2 of Act 196 of 1917 and Act 395 of 1921.

767.4a Proceedings before trial; unlawful use or possession of testimony, exhibits or proceedings; exceptions, penalty.

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Sec. 4a. It shall be unlawful for any person, firm or corporation to possess, use, publish, or make known to any other person any testimony, exhibits or secret proceedings obtained or used in connection with any grand jury inquiry conducted prior to the effective date of this act, except in the manner specifically provided herein, and also excepting any information heretofore disclosed before any investigating committee of the Congress of the United States or any agency of the federal government. Any person violating the provisions of this section shall be guilty of a felony.

History: Add. 1951, Act 276, Eff. Sept. 28, 1951.

767.5 Proceedings before trial; failure of witnesses to appear or answer questions; hearing, penalty; commutation or suspension of sentence.

Sec. 5. Any witness neglecting or refusing to appear in response to such summons or to answer any questions which such judge may require as material to such inquiry, shall be deemed guilty of a contempt and after a public hearing in open court and conviction of such contempt, shall be punished by a fine not exceeding $1,000.00 or imprisonment in the county jail not exceeding 1 year or both at the discretion of the court: Provided, That if such witness after being so sentenced shall offer to appear before such judge to purge himself of such contempt, the judge shall cause such witness to be brought before him and, after examination of such witness, the judge may in his discretion commute or suspend the further execution of such sentence.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17219;—CL 1948, 767.5;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951.

Constitutionality: This section, in regard to a contemnor appearing before a judge to purge himself and the discretion of the judge to commute or suspend further execution of a sentence, insofar as criminal contempt is concerned, constitutes an unconstitutional delegation by the legislature to the judicial branch of government of a power which exists only in the executive. People v Joseph, 384 Mich 24; 179 NW2d 383 (1970).

Former law: See section 3 of Act 196 of 1917.

767.5a Disclosing identity of informant; privileged and confidential communications.

Sec. 5a. (1) a reporter or other person who is involved in the gathering or preparation of news for broadcast or publication shall not be required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry authorized by this act, except an inquiry for a crime punishable by imprisonment for life when it has been established that the information which is sought is essential to the purpose of the proceeding and that other available sources of the information have been exhausted.

(2) Any communications between attorneys and their clients, between members of the clergy and the members of their respective churches, and between physicians and their patients are hereby declared to be privileged and confidential when those communications were necessary to enable the attorneys, members of the clergy, or physicians to serve as such attorney, member of the clergy, or physician.

History: Add. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1986, Act 293, Imd. Eff. Dec. 22, 1986.

Compiler's note: At the beginning of subsection (1) of this section, “a” evidently should read “A”.

767.6 Incriminating answers of witnesses; order granting immunity; use of truthful testimony or other information against witness in criminal case; transcript; applicability of secrecy provisions; scope of order.

Sec. 6. (1) Upon inquiry, a witness shall not be required to answer any questions or be convicted for contempt upon refusal to do so If the answers might tend to incriminate him or her.

(2) Upon written motion by the prosecuting attorney or a duly authorized representative of the state in a proceeding described in section 3 of this chapter, the judge may enter a written order granting immunity to the witness. The order shall set forth verbatim the questions the witness refused to answer. A true copy of the motion and order shall be delivered to the witness before he or she answers the questions in the inquiry. The order granting immunity shall extend to all related questions which may be asked of the witness after entry of the order until the judge advises the witness that the immunity no longer applies.

(3) Truthful testimony compelled under the order granting immunity and any information derived directly or indirectly from that truthful testimony shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

(4) All questions and the witness's answers shall be transcribed under the judge's direction. A true copy of the transcript, duly certified by the judge, shall be delivered to the witness as soon as practicable.

(5) The provisions for secrecy provided for in section 3 of this chapter apply to all copies of the motion,

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order, and transcript delivered to the witness. However, the witness may disclose that information to his or her attorney if his or her testimony or any information derived directly or indirectly from that testimony is used against the witness in violation of subsection (3).

(6) An order granting immunity does not extend beyond the scope of an inquiry described in this section or beyond the particular questions set forth in the motion, order, or transcript.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17220;—CL 1948, 767.6;—Am. 1949, Act 311, Eff. Sept. 23, 1949;—Am. 1951, Act 276, Eff. Sept. 28, 1951;—Am. 1999, Act 250, Imd. Eff. Dec. 28, 1999.

Former law: See section 4 of Act 196 of 1917.

767.6a Docket, journal, transcript and record; seal and file; violation of secrecy; available in connection with appeal, order, receipt; destruction of transcripts, notes and records.

Sec. 6a. On termination of any such inquiry lasting not more than 30 calendar days the docket, journal, reporters' notes, transcript and other record of such judge in such inquiry shall be sealed and filed with the clerk of the court having jurisdiction; and if lasting more than 30 calendar days shall be sealed and filed with the clerk of the supreme court of the state of Michigan, where it shall be held secretly in a separate container securely locked. Any person who shall violate the secrecy herein ordered as to such docket, journal, transcript and record shall be punished as provided in section 4 hereof. And the entire transcript and record as to any witness, and so far as material, including any grant of immunity, shall be available to such witness in connection with any appeal or other judicial proceeding where it may be relevant upon such witness filing a petition with the circuit court of the county in which he resides setting forth the proceeding for which such documents are sought and describing the portions of such transcript and record as to such witness only, which such witness requested for such appeal or proceeding; the judge of such circuit court shall issue an order upon the filing of such petition directed to the clerk of the supreme court of the state of Michigan or the clerk of the court, as the case may be, ordering such clerk to make available to such witness all such portions of the transcript and record as shall pertain to such witness and as set forth in the petition. The clerk shall immediately reseal the remaining transcript and records after compliance with such order. The petitioner shall execute to the clerk of the supreme court a receipt for such documents and such documents shall be returned to the clerk immediately upon the termination of such appeal or proceeding for which the same shall have been obtained: Provided, however, upon the petition of the prosecuting attorney of the county in which such inquiry was conducted, or any other interested person, any circuit judge, acting as such in said county, upon determining that there is no further need for preserving and retaining the same, shall enter an order providing for the referring to the supreme court, for the entry of such order or orders as a majority of the court may at any time determine, for the destruction of said transcripts, notes and records, or any part thereof: Provided further, That no such order shall be entered by such circuit judge until at least 6 years after the termination of such inquiry.

History: Add. 1951, Act 276, Eff. Sept. 28, 1951.

767.6b Public accounting by judge; time, filing.

Sec. 6b. Within 90 days after the termination of such inquiry, such judge shall file with the clerk of the court having jurisdiction a public accounting of all monies disbursed by him or disbursed at his direction.

History: Add. 1951, Act 276, Eff. Sept. 28, 1951.

767.7 Grand jury; summoning, procedure.

Sec. 7. Grand juries shall not hereafter be drawn, summoned or required to attend at the sittings of any court within this state, as provided by law, unless the judge thereof shall so direct by writing under his hand, and filed with the clerk of said court.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17221;—CL 1948, 767.7.

Former law: See section 7 of Act 138 of 1859, being CL 1871, § 7943; How., § 9554; CL 1897, § 11939; and CL 1915, § 15766.

767.7a Grand jurors; term of service; recalling.

Sec. 7a. Notwithstanding the provisions of section 1343 of Act No. 236 of the Public Acts of 1961, as added, being section 600.1343 of the Compiled Laws of 1948, the term of service of grand jurors shall be 6 months unless extended by specific order of the judge who summoned such jurors or his successor for an additional period not to exceed 6 months, except that the grand jurors may be recalled at any time by the judge who summoned such jurors or by his successor to conclude business commenced during their term of service.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

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767.7b Grand jury; petition by attorney general or county prosecuting attorneys to convene; jurisdiction; contents of petition.

Sec. 7b. (1) The attorney general may petition the court of appeals of this state to convene a grand jury with jurisdiction over 2 or more counties in this state.

(2) Two or more attorneys who are county prosecuting attorneys in this state may, with the approval of the attorney general, petition the court of appeals of this state to convene a grand jury with jurisdiction over all of the counties in which they are prosecuting attorneys.

(3) A petition to the court of appeals under this section shall contain all of the following:

(a) The name and official title of each petitioner.

(b) The name of each county over which the grand jury is to have jurisdiction.

(c) A statement setting forth probable cause to believe that a crime, or a portion of that crime, has been committed in 2 or more of the counties named in the petition.

(d) A statement setting forth the reasons to convene a grand jury with jurisdiction over all of the counties named in the petition.

(e) The signature of each petitioner.

(f) The date of the petition.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7c Grand jury convened by court of appeals; procedure; jurisdiction.

Sec. 7c. The court of appeals of this state, acting in a 3-judge panel consistent with the Michigan court rules, may convene a grand jury with jurisdiction over 2 or more counties in this state as follows:

(a) If a petition is filed under section 7b(1) by the attorney general, the court of appeals may convene a grand jury with jurisdiction over 2 or more of the counties named in the petition.

(b) If a petition is filed under section 7b(2) by 2 or more attorneys who are county prosecuting attorneys in this state, the court of appeals may convene a grand jury with jurisdiction over 2 or more of the counties named in the petition in which the attorneys are prosecuting attorneys.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7d Grand jury convened by court of appeals; circumstances.

Sec. 7d. The court of appeals may convene a grand jury under section 7c with jurisdiction over 2 or more counties in this state if a petition is properly filed under section 7b, and all of the following circumstances exist:

(a) The petition establishes probable cause to believe that a crime, or a portion of that crime, has been committed in 2 or more of the counties named in the petition.

(b) The petition establishes reason to believe that a grand jury with jurisdiction over 2 or more of the counties named in the petition could more effectively address the criminal activity referred to in the petition than could a grand jury with jurisdiction over 1 of those counties.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7e Grand jury convened by court of appeals; duties of court of appeals.

Sec. 7e. If the court of appeals convenes a grand jury with jurisdiction over 2 or more counties, the court of appeals shall do all of the following:

(a) Designate a judge of the circuit court or of the recorder's court to preside over the grand jury proceedings.

(b) If the petition to convene the grand jury was filed under section 7b(2), designate the prosecuting attorney of 1 of the counties over which the grand jury is to have jurisdiction to assist the grand jury.

(c) Designate the counties from which the jurors shall be drawn from among the counties over which the grand jury is to have jurisdiction.

(d) Designate the number of jurors to be drawn for the grand jury and the number of jurors to be drawn from each county.

(e) Designate the locations for the grand jury proceedings.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7f Grand jury convened by court of appeals; term; extension; dismissal; recall.

Sec. 7f. (1) Except as provided in subsection (2), the term of a grand jury convened under section 7c shall not exceed 6 months.

(2) The court of appeals of this state may order the term of the grand jury extended for an additional period not to exceed 6 months, for good cause shown. The judge presiding over the grand jury proceedings shall

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dismiss the grand jury upon completion of the functions of the grand jury whether or not the maximum term of the grand jury has been met. The grand jurors may be recalled at any time by the presiding judge or his or her successor to conclude business commenced during their term of service.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.7g Grand jury convened by court of appeals; expansion of jurisdiction; petition.

Sec. 7g. (1) If a grand jury has been convened under section 7c(a), and the attorney general seeks to expand the jurisdiction of the grand jury to include 1 or more additional counties, the attorney general may petition the court of appeals under section 7b(1) to convene a grand jury which includes the additional county or counties. If the petition is granted, the court of appeals shall convene a new grand jury pursuant to section 7e and shall dismiss the existing grand jury.

(2) If a grand jury has been convened under section 7c(b) and the prosecuting attorneys of all of the counties over which the grand jury has jurisdiction seek to expand the jurisdiction of the grand jury to include 1 or more additional counties, the prosecuting attorneys of the counties over which the grand jury had jurisdiction and the prosecuting attorneys of the additional counties may, with the approval of the attorney general, petition the court of appeals under section 7b(2) to convene a grand jury with jurisdiction over all of those counties. If the petition is granted, the court of appeals shall convene a new grand jury pursuant to section 7e and shall dismiss the existing grand jury.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.8 Grand jury; juror; grounds for discharge; summoning new juror.

Sec. 8. Any court in which a grand jury may be sitting, may discharge any of the grand jurors for intoxication or other gross misconduct; and in case of such discharge, or in case of the sickness, death or non-attendance of any grand juror, after he shall have been sworn, the court may cause another juror to be summoned from among the bystanders, or inhabitants of the city, township or village having the qualifications required by law, and to be sworn and to serve in his stead.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17222;—CL 1948, 767.8.

Former law: See section 1 of Ch. 164 of R.S. 1846, being CL 1857, § 6010; CL 1871, § 7879; How., § 9490; CL 1897, § 11875; and CL 1915, § 15702.

767.9 Grand jurors; alphabetical list; administration and form of oath.

Sec. 9. The clerk of the court shall prepare an alphabetical list of all the persons returned as grand jurors. When the jury is to be impaneled, the following oath shall be administered to the jurors: "You as grand jurors of this inquest do solemnly swear that you will diligently inquire and true presentment make of all such matters and things as shall be given you in charge; your own counsel and the counsel of the people, and of your fellows, you shall keep secret; you shall present no person for envy, hatred or malice, neither shall you leave any person unpresented for love, fear, favor, affection or hope of reward; but you shall present things truly, as they come to your knowledge, according to the best of your understanding; so help you God".

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17223;—CL 1948, 767.9;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

Former law: See sections 2 and 3 of Ch. 164 of R.S. 1846, being CL 1857, §§ 6011 and 6012; CL 1871, §§ 7880 and 7881; How., §§ 9491 and 9492; CL 1897, §§ 11876 and 11877; and CL 1915, §§ 15703 and 15704.

767.10 Grand jury; affirmation in lieu of oath.

Sec. 10. Any person returned as a grand juror shall be allowed to make affirmation, substituting the word "affirm" instead of the word "swear"; and also the words, "this you do under the pains and penalties of perjury", instead of the words "so help you God".

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17224;—CL 1948, 767.10.

Former law: See section 4 of Ch. 164 of R.S. 1846, being CL 1857, § 6013; CL 1871, § 7882; How., § 9493; CL 1897, § 11878; and CL 1915, § 15705.

767.11 Grand jury; size; foreman, appointment.

Sec. 11. There shall be no more than 17 persons nor less than 13 persons sworn on any grand jury; and after such jurors have been impaneled and have received their charge from the court, they shall retire with the officer appointed to attend them and before they proceed to discharge the duties of their office, the court shall appoint 1 of their number to be foreman and the clerk shall record the same.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17225;—CL 1948, 767.11;—Am. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

Former law: See section 5 of Ch. 164 of R.S. 1846, being CL 1857, § 6014; CL 1871, § 7883; How., § 9494; CL 1897, § 11879; and CL 1915, § 15706.

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767.12 Grand jury; foreman; term, vacancy.

Sec. 12. The foreman appointed by the court in the manner provided in the preceding section, shall be foreman during the whole time they are required to serve; but in case of his death or absence or if he shall be discharged, or excused before the grand jury shall be dismissed, another of such jurors shall be appointed foreman for the residue of such time of service.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17226;—CL 1948, 767.12.

Former law: See section 6 of Ch. 164 of R.S. 1846, being CL 1857, § 6015; CL 1871, § 7884; How., § 9495; CL 1897, § 11880; and CL 1915, § 15707.

767.13 Grand jury; juror; grounds of objection to competency.

Sec. 13. A person held to answer to any criminal charge may object to the competency of any 1 summoned to serve as a grand juror, on the ground that he is the prosecutor or complainant upon any charge against such person; and if such objection be established, the person so summoned shall be set aside.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17227;—CL 1948, 767.13.

Former law: See section 7 of Ch. 164 of R.S. 1846, being CL 1857, § 6016; CL 1871, § 7885; How., § 9496; CL 1897, § 11881; and CL 1915, § 15708.

767.14 Grand jury; no challenge of array or individual juror in other cases.

Sec. 14. No challenge to the array of grand jurors, or to any person summoned as a grand juror, shall be allowed in any other case than that specified in the preceding section.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17228;—CL 1948, 767.14.

Former law: See section 8 of Ch. 164 of R.S. 1846, being CL 1857, § 6017; CL 1871, § 7886; How., § 9497; CL 1897, § 11882; and CL 1915, § 15709.

767.15 Grand jury; witnesses; administration of oath, list.

Sec. 15. The foreman of every grand jury, the attorney general and the prosecuting attorney, or other prosecuting officer who shall be before them, shall have authority to administer all oaths and affirmations, in the manner prescribed by law, to witnesses who shall appear before such jury for the purpose of testifying in any matter of which they may have cognizance, and the foreman shall return to the court, or deliver to the prosecuting officer, a list of all the witnesses sworn before the grand jury in each case in which an indictment shall be found.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17229;—CL 1948, 767.15.

Former law: See section 9 of Ch. 164 of R.S. 1846, being CL 1857, § 6018; CL 1871, § 7887; How., § 9498; CL 1897, § 11883; and CL 1915, § 15710.

767.16 Grand jury; clerk, stenographer; appointment, duties.

Sec. 16. The grand jury may appoint 1 of their number to be their clerk, to preserve minutes of their proceedings and of evidence given before them; which minutes shall be delivered to the prosecuting officer, when so directed by the grand jury. Whenever it appears to the judge that it is necessary he may appoint a stenographer to take the testimony given before the grand jury.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17230;—CL 1948, 767.16.

Former law: See section 10 of Ch. 164 of R.S. 1846, being CL 1857, § 6019; CL 1871, § 7888; How., § 9499; CL 1897, § 11884; and CL 1915, § 15711.

767.17 Grand jury; summoning after dismissal.

Sec. 17. When the grand jury attending any court shall have been dismissed before the court is adjourned without day, they may be summoned to attend again, in the same term at such time as the court shall direct, for the dispatch of any business that may come before them.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17231;—CL 1948, 767.17.

Former law: See section 11 of Ch. 164 of R.S. 1846, being CL 1857, § 6020; CL 1871, § 7889; How., § 9500; CL 1897, § 11885; and CL 1915, § 15712.

767.18 Grand jury; disclosure of indictment for felony.

Sec. 18. No grand juror, stenographer or officer of the court shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17232;—CL 1948, 767.18.

Former law: See section 12 of Ch. 164 of R.S. 1846, being CL 1857, § 6021; CL 1871, § 7890; How., § 9501; CL 1897, § 11886;

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and CL 1915, § 15713.

767.19 Grand jury; testimony to certain facts required.

Sec. 19. Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon complaint against such person for perjury, or upon his trial for such offense; but in no case can a member of a grand jury be obliged or allowed to testify or declare in what manner he or any other member of the jury voted on any question before them, or what opinions were expressed by any juror in relation to any such question.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17233;—CL 1948, 767.19.

Former law: See section 13 of Ch. 164 of R.S. 1846, being CL 1857, § 6022; CL 1871, § 7891; How., § 9502; CL 1897, § 11887; and CL 1915, § 15714.

767.19a Grand jury; order granting immunity to persons giving testimony; application; verified petition; entry of order.

Sec. 19a. The prosecuting attorney may apply to the judge who summoned the jury or his or her successor, or to the presiding judge, for an order granting immunity to any person designated by name and address in the application who might give testimony concerning any matter before the grand jury. The application shall be accompanied by a verified petition of the prosecuting attorney that sets forth the facts upon which the application is based. If the judge to whom the application is presented is satisfied that it is in the interest of justice that immunity be granted to that person, the judge shall enter an order granting immunity to the person, if the person appears before the grand jury and testifies under oath about any matter before the grand jury and set forth in the petition of the prosecuting attorney.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.19b Delivery of immunity order to witness; use of truthful testimony or other information against witness in criminal case; transcript; duration of order granting immunity.

Sec. 19b. (1) A true copy of the order granting immunity shall be delivered to the witness before he or she answers any questions before the grand jury.

(2) Truthful testimony or other information compelled under the order granting immunity and any information derived directly or indirectly from that truthful testimony or other information shall not be used against the witness in a criminal case, except for impeachment purposes or in a prosecution for perjury or otherwise failing to comply with the order.

(3) All questions asked of the witness and his or her answers shall be transcribed. If a witness who has been granted immunity subsequently alleges that he or she is being prosecuted for an offense in violation of the grant of immunity, a true copy of the transcript, duly certified by an officer authorized to administer oaths, shall be delivered to the witness as soon as practicable.

(4) The order granting immunity shall continue in effect until the judge who summoned the jury or his or her successor, in his or her discretion and upon the prosecuting attorney's application, enters an order terminating the order granting immunity and informs the witness of the order of termination.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1999, Act 250, Imd. Eff. Dec. 28, 1999.

767.19c Grand jury; witness, failing to appear, contempt; penalty; purging.

Sec. 19c. Any witness who neglects or refuses to appear or testify or both in response to a summons of the grand jury or to answer any questions before the grand jury concerning any matter or thing of which the witness has knowledge concerning matters before the grand jury after service of a true copy of an order granting the witness immunity as to such matters shall be guilty of a contempt and after a public hearing in open court and conviction of such contempt shall be fined not exceeding $10,000.00 or imprisoned not exceeding 1 year, or both. If the witness thereafter appears before the court to purge himself of such contempt, the court shall order the recalling of the grand jury to afford such opportunity, and after appearance of the witness before the grand jury upon a transcript of the testimony there and then given, the witness shall be brought before the court and after examination, the court shall determine whether the witness has purged himself of the contempt and shall commute the sentence upon a finding that the witness has purged himself.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

Constitutionality: In People v David Johnson, 407 Mich 134; 283 NW2d 632 (1979), the Michigan supreme court held that an indigent witness has a right under the due process clause of the Michigan constitution to the assistance and appointment of counsel at contempt proceedings in respect to a citizens' grand jury which may result in incarceration.

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767.19d Grand jury; perjury.

Sec. 19d. A person who wilfully swears falsely under oath in regard to any matter or thing upon which he is being examined is subject to the penalties of perjury as prescribed by law.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

767.19e Grand jury; right of witness to legal counsel; communications between witness and legal counsel.

Sec. 19e. A witness called before the grand jury is at all times entitled to legal counsel not involving delay. The witness may discuss fully with his or her legal counsel any matter relating to the witness's part in the inquiry without being subject to citation for contempt. The witness has the right to have legal counsel present in the room in which the inquiry is held. All communications between the witness and his or her legal counsel are subject to the requirements of section 19f, and any disclosure of those communications by the witness or his or her legal counsel in violation of section 19f is punishable as provided in section 19f.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.19f Grand jury; publication of testimony prohibited; penalty, exceptions.

Sec. 19f. (1) Except as otherwise provided by law, a person shall not publish or make known to any other person any testimony or exhibits obtained or used, or any proceeding conducted, in connection with any grand jury inquiry. A person who violates this subsection is guilty of a misdemeanor punishable by imprisonment in the county jail for not more than 1 year or by a fine of not more than $1,000.00, or both.

(2) Subsection (1) does not apply to any of the following:

(a) Communications between prosecuting officers for the purpose of presenting evidence before the grand jury, for the purpose of reviewing evidence presented to the grand jury for prospective prosecution, or for any other purpose involving the execution of a public duty.

(b) Communications between law enforcement officers in cases involving violations of chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z.

(3) Subsection (1) applies to, but its application is not limited to, applications and petitions for and orders of immunity and to any transcript of testimony that may be delivered to a witness pursuant to his or her grant of immunity, except that the witness may be privileged to disclose such application, petition, order, and transcript to his or her attorney.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 2002, Act 114, Eff. May 1, 2002.

767.19g Furnishing testimony of witness to person indicted by grand jury.

Sec. 19g. (1) The testimony of any witness before the grand jury shall not be made available to any person indicted by such grand jury prior to the time of trial of the indictment except as otherwise provided by this section.

(2) After the filing of an indictment returned by a citizen's grand jury but prior to trial, upon motion of the defendant made not later than 20 days after the arraignment of the defendant on the indictment, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony which the defendant gave before the grand jury relative to the offense with which he is charged and may direct the prosecuting attorney to furnish to the defendant the testimony which any witness who will testify at the trial gave before the grand jury relative to the offense with which the defendant is charged except those portions adjudged irrelevant, immaterial or excluded for other good cause shown. If the trial judge directs the prosecuting attorney to furnish to the defendant a copy of a witness's testimony, which has been requested in accordance with this subsection, the prosecuting attorney shall furnish such testimony not later than 10 days prior to the time of trial or shall not call that witness to testify at the defendant's trial.

(3) If the trial judge has not directed the prosecuting attorney to furnish a copy of a witness's testimony to the defendant prior to trial, then at such time during the course of the trial when the direct examination of such a witness has been completed, a copy of the witness's testimony before the grand jury relative to the offense with which the defendant is charged, upon the request of the defendant, shall be furnished by the prosecuting attorney to the defendant.

History: Add. 1970, Act 9, Imd. Eff. Mar. 26, 1970;—Am. 1972, Act 53, Imd. Eff. Feb. 21, 1972.

767.20 Grand jury; examination of witnesses; advice on legal matters.

Sec. 20. If requested by the grand jury, the prosecuting attorney or attorney general shall examine witnesses in the presence of the grand jury, and advise the grand jury on legal matters.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17234;—CL 1948, 767.20;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

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Former law: See section 14 of Ch. 164 of R.S. 1846, being CL 1857, § 6023; CL 1871, § 7892; How., § 9503; CL 1897, § 11888; and CL 1915, § 15715.

767.21 Grand jury; prosecutor to subpoena witness.

Sec. 21. The prosecuting attorney and other prosecuting officers, may, in all cases, issue subpoenas for witnesses to appear and testify on behalf of the people of this state; and the subpoena, under the hand of such officer, shall have the same force and be obeyed in the same manner and under the same penalties, as if issued by the clerk or any magistrate.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17235;—CL 1948, 767.21.

Former law: See section 15 of Ch. 164 of R.S. 1846, being CL 1857, § 6024; CL 1871, § 7893; How., § 9504; CL 1897, § 11889; and CL 1915, § 15716.

767.22 Grand jury; appearances to give information; deliberations or vote of grand jury.

Sec. 22. The prosecuting attorney, attorney general, or other prosecuting officer, shall be allowed at all times to appear before the grand jury on his or her request to give information to the grand jury regarding any matter cognizable by the grand jury. No person other than a grand juror shall be present during the deliberations of the grand jury or during the vote of the grand jury upon any matter before the grand jury.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17236;—CL 1948, 767.22;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

Former law: See section 16 of Ch. 164 of R.S. 1846, being CL 1857, § 6025; CL 1871, § 7894; How., § 9505; CL 1897, § 11890; and CL 1915, § 15717.

767.23 Grand jury; indictment, vote required; true bill.

Sec. 23. No indictment can be found without the concurrence of at least 9 grand jurors; and when so found, and not otherwise, the foreman of the grand jury shall certify thereon, under his hand, that the same is a true bill.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17237;—CL 1948, 767.23;—Am. 1970, Act 9, Imd. Eff. Mar. 26, 1970.

Former law: See section 17 of Ch. 164 of R.S. 1846, being CL 1857, § 6026; CL 1871, § 7895; How., § 9506; CL 1897, § 11891; and CL 1915, § 15718.

767.23a Grand jury; indictment; specifying county where offense took place.

Sec. 23a. A grand jury convened under section 7c may indict a person for an offense committed in any county over which the grand jury has jurisdiction. If the grand jury indicts a person under this subsection, the grand jury shall specify in the indictment the county or counties in which the offense took place.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.24 Indictment; crimes; "Theresa Flores's Law"; definitions; Brandon D'Annunzio's law; findings and filing; exceptions for victims under 18; extension or tolling.

Sec. 24. (1) An indictment for any of the following crimes may be found and filed at any time:

(a) Murder, conspiracy to commit murder, or solicitation to commit murder, or criminal sexual conduct in the first degree.

(b) A violation of chapter XXXIII of the Michigan penal code, 1931 PA 328, MCL 750.200 to 750.212a, that is punishable by imprisonment for life.

(c) A violation of chapter LXVIIA of the Michigan penal code, 1931 PA 328, MCL 750.462a to 750.462h, that is punishable by imprisonment for life.

(d) A violation of the Michigan anti-terrorism act, chapter LXXXIII-A of the Michigan penal code, 1931 PA 328, MCL 750.543a to 750.543z, that is punishable by imprisonment for life.

(2) An indictment for a violation or attempted violation of section 13, 462b, 462c, 462d, or 462e of the Michigan penal code, 1931 PA 328, MCL 750.13, 750.462b, 750.462c, 750.462d, and 750.462e, may be found and filed within 25 years after the offense is committed. This subsection shall be known as "Theresa Flores's Law".

(3) Except as provided in subsection (4) for a violation of section 520c or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520d, in which the victim is under 18 years of age, an indictment for a violation or attempted violation of section 136, 136a, 145c, 520c, 520d, 520e, or 520g of the Michigan penal code, 1931 PA 328, MCL 750.136, 750.136a, 750.145c, 750.520c, 750.520d, 750.520e, and 750.520g, may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed or by the alleged victim's twenty-first birthday, whichever is later.

(b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any

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time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 10 years after the individual is identified or by the alleged victim's twenty-first birthday, whichever is later.

(4) An indictment for a violation of section 520c or 520d of the Michigan penal code, 1931 PA 328, MCL 750.520c and 750.520d, in which the victim is under 18 years of age may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 15 years after the offense is committed or by the alleged victim's twenty-eighth birthday, whichever is later.

(b) If evidence of the offense is obtained and that evidence contains DNA that is determined to be from an unidentified individual, an indictment against that individual for the offense may be found and filed at any time after the offense is committed. However, after the individual is identified, the indictment may be found and filed within 15 years after the individual is identified or by the alleged victim's twenty-eighth birthday, whichever is later.

(5) As used in subsections (3) and (4):

(a) "DNA" means human deoxyribonucleic acid.

(b) "Identified" means the individual's legal name is known and he or she has been determined to be the source of the DNA.

(6) An indictment for kidnapping, extortion, assault with intent to commit murder, attempted murder, manslaughter, armed robbery, or first-degree home invasion may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 10 years after the offense is committed.

(b) If the offense is reported to a police agency within 1 year after the offense is committed and the individual who committed the offense is unknown, an indictment for that offense may be found and filed within 10 years after the individual is identified. This subsection shall be known as Brandon D'Annunzio's law. As used in this subsection, "identified" means the individual's legal name is known.

(7) An indictment for identity theft or attempted identity theft may be found and filed as follows:

(a) Except as otherwise provided in subdivision (b), an indictment may be found and filed within 6 years after the offense is committed.

(b) If evidence of the offense is obtained and the individual who committed the offense has not been identified, an indictment may be found and filed at any time after the offense is committed, but not more than 6 years after the individual is identified.

(8) As used in subsection (7):

(a) "Identified" means the individual's legal name is known.

(b) "Identity theft" means 1 or more of the following:

(*i*) Conduct prohibited in section 5 or 7 of the identity theft protection act, 2004 PA 452, MCL 445.65 and 445.67.

(*ii*) Conduct prohibited under former section 285 of the Michigan penal code, 1931 PA 328.

(9) An indictment for false pretenses involving real property, forgery or uttering and publishing of an instrument affecting an interest in real property, or mortgage fraud may be found and filed within 10 years after the offense was committed or within 10 years after the instrument affecting real property was recorded, whichever occurs later.

(10) All other indictments may be found and filed within 6 years after the offense is committed.

(11) Any period during which the party charged did not usually and publicly reside within this state is not part of the time within which the respective indictments may be found and filed.

(12) The extension or tolling, as applicable, of the limitations period provided in this section applies to any of those violations for which the limitations period has not expired at the time the extension or tolling takes effect.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17238;—Am. 1935, Act 144, Eff. Sept. 21, 1935;—CL 1948, 767.24;—Am. 1954, Act 100, Imd. Eff. Apr. 14, 1954;—Am. 1987, Act 255, Eff. Mar. 30, 1988;—Am. 2001, Act 6, Imd. Eff. May 2, 2001;—Am. 2002, Act 119, Eff. Apr. 22, 2002;—Am. 2004, Act 458, Eff. Mar. 1, 2005;—Am. 2005, Act 35, Imd. Eff. June 7, 2005;—Am. 2011, Act 203, Imd. Eff. Oct. 20, 2011;—Am. 2012, Act 363, Eff. Mar. 28, 2013;—Am. 2014, Act 324, Eff. Jan. 14, 2015;—Am. 2017, Act 79, Eff. Oct. 9, 2017;—Am. 2018, Act 148, Eff. Aug. 14, 2018;—Am. 2018, Act 182, Eff. Sept. 10, 2018.

Compiler's note: Enacting section 1 of Act 6 of 2001 provides:

"Enacting section 1. The legislature intends that the extension or tolling, as applicable, of the limitations period provided in this amendatory act shall apply to any of those violations for which the limitations period has not expired at the time this amendatory act takes effect."

Former law: See section 18 of Ch. 164 of R.S. 1846, being CL 1857, § 6027; CL 1871, § 7896; How., § 9507; CL 1897, § 11892; and CL 1915, § 15719.

767.25 Indictment by grand jury; indorsement; presentment; return; filing; inspection.

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Sec. 25. (1) If a person is indicted by a grand jury, the grand jury shall indorse all of the names of the complainants and all of the names of the witnesses on the back of the indictment. The foreperson of the grand jury shall present the indictment to the court in the presence of the grand jury.

(2) If a person is indicted by a grand jury convened under section 7c, the indictment shall remain with the court having jurisdiction over the offense, after the indictment is certified and filed with that court.

(3) If the grand jury indicts a person under subsection (1), the judge presiding over the grand jury proceedings shall return the indictment to any court having proper jurisdiction over the offense.

(4) Except as otherwise provided in this section, the indictment shall be filed with the court and remain with the court as a public record.

(5) If a person is indicted for a felony and the person is not in custody, the indictment shall not be open to inspection by any person other than the attorney general or the prosecuting attorney until the defendant is in custody.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17239;—CL 1948, 767.25;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

Former law: See section 19 of Ch. 164 of R.S. 1846, being CL 1857, § 6028; CL 1871, § 7897; How., § 9508; CL 1897, § 11893; and CL 1915, § 15720.

767.26 Discharge of accused in absence of indictment.

Sec. 26. Any person held in prison on any charge of having committed a crime, shall be discharged if he be not indicted before the end of the second term of the court at which he is held to answer unless it shall appear to the satisfaction of the court that the witnesses on the part of the people have been enticed or kept away, or are detained and prevented from attending the court by sickness or some inevitable accident, and except in the case provided for in the next section.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17240;—CL 1948, 767.26.

Former law: See section 20 of Ch. 164 of R.S. 1846, being CL 1857, § 6029; CL 1871, § 7898; How., § 9509; CL 1897, § 11894; and CL 1915, § 15721.

767.27 Repealed. 1966, Act 266, Eff. Mar. 10, 1967.

Compiler's note: The repealed section pertained to procedure followed when person accused of felony was found to be insane or when he was acquitted of felony upon grounds of insanity.

767.27a-767.27c Repealed. 1974, Act 258, Eff. Aug. 6, 1975.

Compiler's note: The repealed sections pertained to persons incompetent to stand trial.

767.28 Indictment; right of indictee to copy.

Sec. 28. Every person indicted for any offense, who shall have been arrested upon process issued upon such indictment or who shall have duly entered into recognizance to appear and answer to such indictment shall, on demand, be entitled to a copy of the indictment and of all endorsements thereon.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17242;—CL 1948, 767.28.

Former law: See section 22 of Ch. 164 of R.S. 1846, being CL 1857, § 6031; CL 1871, § 7900; How., § 9511; CL 1897, § 11896; and CL 1915, § 15723.

767.29 Discontinuance or abandonment of indictment.

Sec. 29. A prosecuting attorney shall not enter a nolle prosequi upon an indictment, or discontinue or abandon the indictment, without stating on the record the reasons for the discontinuance or abandonment and without the leave of the court having jurisdiction to try the offense charged, entered in its minutes. If a defendant is charged with a major controlled substance offense, in addition to the requirements of this section, the requirements of section 7415 of the public health code, Act No. 368 of the Public Acts of 1978, being section 333.7415 of the Michigan Compiled Laws, shall apply upon the prosecuting attorney's motion to dismiss the charge.

History: 1927, Act 175, Eff. Sept. 5, 1927;—Am. 1929, Act 24, Imd. Eff. Apr. 2, 1929;—CL 1929, 17243;—CL 1948, 767.29;—Am. 1978, Act 77, Eff. Sept. 1, 1978;—Am. 1988, Act 90, Imd. Eff. Mar. 30, 1988.

Former law: See section 23 of Ch. 164 of R.S. 1846, being CL 1857, § 6032; CL 1871, § 7901; How., § 9512; CL 1897, § 11897; and CL 1915, § 15724.

767.30 Warrant for arrest of indictee; issuance, persons.

Sec. 30. A warrant for the arrest of any person indicted may be issued by the court to which the indictment shall be presented, or by any justice of the supreme court, or judge of the court for the county in which such indictment shall be found, or judge of any recorder's court or any court of record having jurisdiction of criminal causes, either in vacation or during the sitting of any such court; but such warrant shall not be issued

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by any other officer.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17244;—CL 1948, 767.30.

Former law: See section 24 of Ch. 164 of R.S. 1846, being CL 1857, § 6033; CL 1871, § 7902; How., § 9513; CL 1897, § 11898; and CL 1915, § 15725.

767.31 Warrant for arrest of indictee; persons to whom directed; place of execution.

Sec. 31. Every warrant shall be directed to the sheriff, constable, police officer or peace officer of the county in which the indictment shall be found, and may be executed in any part of this state.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17245;—CL 1948, 767.31.

Former law: See section 25 of Ch. 164 of R.S. 1846, being CL 1857, § 6034; CL 1871, § 7903; How., § 9514; CL 1897, § 11899; and CL 1915, § 15726.

767.32 Subpoena; witness for defendant; issuance by county clerk, fee.

Sec. 32. The clerk of any county in which an indictment shall be found, upon the application of the defendant, and without requiring any fees, shall issue subpoenas as well during the sitting of any court as in vacation, for such witnesses as the defendant may require, whether residing in or out of the county.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17246;—CL 1948, 767.32.

Former law: See section 26 of Ch. 164 of R.S. 1846, being CL 1857, § 6035; CL 1871, § 7904; How., § 9515; CL 1897, § 11900; and CL 1915, § 15727.

767.33 Subpoena; witness for defendant; disobedience; penalty, civil liability.

Sec. 33. Disobedience to any subpoena issued pursuant to the foregoing provisions, shall be punished in the same manner and upon the like proceedings, as provided by law in other cases; and the person guilty of such disobedience shall be liable to the party at whose instance such subpoena issued in the same manner and to the like extent as in cases of subpoenas issued in any civil suit.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17247;—CL 1948, 767.33.

Former law: See section 27 of Ch. 164 of R.S. 1846, being CL 1857, § 6036; CL 1871, § 7905; How., § 9516; CL 1897, § 11901; and CL 1915, § 15728.

767.34 Witness; issuance of capias.

Sec. 34. Any circuit court or any court of record shall have power to issue capiases, in the first instance, for any witness or witnesses in criminal cases, when it shall satisfactorily appear that such witness or witnesses are material and that there will be danger of the loss of their testimony unless such writ be issued.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17248;—CL 1948, 767.34.

Former law: See section 1 of Act 209 of 1871, being CL 1871, § 7961; How., § 9574; CL 1897, § 11958; and CL 1915, § 15831.

767.35 Material witness in criminal case; danger of loss of testimony; requiring witness to enter into recognizance with surety; commitment to jail.

Sec. 35. When it appears to a court of record that a person is a material witness in a criminal case pending in a court in the county and that there is a danger of the loss of testimony of the witness unless the witness furnishes bail or is committed if he or she fails to furnish bail, the court shall require the witness to be brought before the court. After giving the witness an opportunity to be heard, if it appears that the witness is a material witness and that there is a danger of the loss of his or her testimony unless the witness furnishes bail or is committed, the court may require the witness to enter into a recognizance with a surety in an amount determined by the court for the appearance of the witness at an examination or trial. If the witness fails to recognize, he or she shall be committed to jail by the court, until he or she does recognize or is discharged by order of the court.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17249;—CL 1948, 767.35;—Am. 1980, Act 506, Imd. Eff. Jan. 22, 1981.

Former law: See sections 19, 20, and 22 of Ch. 163 of R.S. 1846, being CL 1857, §§ 5995, 5996, and 5998; CL 1871, §§ 7861, 7862, and 7864; How., §§ 9472, 9473, and 9475; CL 1897, §§ 11856, 11857, and 11859; CL 1915, §§ 15683, 15684, and 15686; and Act 77 of 1871.

767.36 Witness; subpoena by prosecution; necessity of fee.

Sec. 36. It shall not be necessary to pay or tender any fees whatever to any witness subpoenaed on the part of the people of this state in support of any prosecution, but such witness shall be bound to attend as if the fees allowed by law to witnesses in civil actions had been duly paid to him.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17250;—CL 1948, 767.36.

Former law: See section 28 of Ch. 163 of R.S. 1846, being CL 1857, § 6037; CL 1871, § 7906; How., § 9517; CL 1897, § 11902; and CL 1915, § 15729.

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767.37 Indictee; plea on arraignment.

Sec. 37. When any person shall be arraigned upon an indictment, it shall not be necessary in any case to ask him how he will be tried but if, on being so arraigned, he shall refuse to plead or answer or shall not confess the indictment to be true, the court shall order a plea of not guilty to be entered and thereupon the proceedings shall be the same as if he had pleaded not guilty to the indictment. At the arraignment of any person upon an indictment or upon the charge in a warrant, complaint or information the court may accept a plea of nolo contendere and if such a plea is accepted, the court shall proceed as if he had pleaded guilty.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17251;—CL 1948, 767.37;—Am. 1969, Act 334, Imd. Eff. Nov. 10, 1969.

Former law: See section 29 of Ch. 163 of R.S. 1846, being CL 1857, § 6038; CL 1871, § 7907; How., § 9518; CL 1897, § 11903; and CL 1915, § 15730.

767.37a Arraignments; use of 2-way interactive video technology; access to courtroom; court record.

Sec. 37a. (1) A judge or district court magistrate may conduct initial criminal arraignments and set bail by 2-way interactive video technology communication between a court facility and a prison, jail, or other place where a person is imprisoned or detained. A judge or district court magistrate may conduct initial criminal arraignments and set bail on weekends, holidays, or at any time as determined by the court.

(2) A 2-way interactive video technology system used under this section shall enable the accused and the judge or district court magistrate to see, hear, and communicate with each other simultaneously, and shall enable defense counsel and the prosecuting attorney, if present, to be heard by and to communicate simultaneously with the accused, the judge or district court magistrate, and opposing counsel.

(3) Except as otherwise provided by law, the public shall have access to the courtroom or other location, that allows them to view and hear the proceedings.

(4) If proceedings conducted under this section are not recorded by an individual certified by the state court administrative office, the court shall record and maintain an original audiovisual recording of the entire proceedings. A recording made under this subsection shall become part of the court record.

(5) This act does not prohibit the use of 2-way interactive video technology for arraignments on the information, criminal pretrial hearings, criminal pleas, sentencing hearings for misdemeanor violations cognizable in the district court, show cause hearings, or other criminal proceedings, to the extent the Michigan supreme court has authorized that use.

History: Add. 1994, Act 229, Imd. Eff. June 30, 1994;—Am. 2006, Act 655, Imd. Eff. Jan. 9, 2007.

767.38 Indictee; right to trial or admission to bail.

Sec. 38. Every person held in prison upon an indictment shall, if he require it, be tried at the next term of court after the expiration of 6 months from the time when he was imprisoned, or shall be bailed upon his own recognizance, unless it shall appear to the satisfaction of the court that the witnesses on behalf of the people have been enticed or kept away, or are detained and prevented from attending court by sickness, or some inevitable accident.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17252;—CL 1948, 767.38.

Former law: See section 30 of Ch. 163 of R.S. 1846, being CL 1857, § 6039; CL 1871, § 7908; How., § 9519; CL 1897, § 11904; and CL 1915, § 15731.

767.39 Abolition of distinction between accessory and principal.

Sec. 39. Every person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17253;—CL 1948, 767.39.

Former law: See sections 3 and 5 of Ch. 161 of R.S. 1846, being CL 1857, §§ 5939 and 5941; CL 1871, §§ 7805 and 7807; How., §§ 9415 and 9417; CL 1897, §§ 11776 and 11778; CL 1915, §§ 15603 and 15605; and section 19 of Act 77 of 1855, being CL 1857, § 6065; CL 1871, § 7934; How., § 9545; CL 1897, § 11930; CL 1915, § 15757.

767.40 Information; filing; subscription.

Sec. 40. All informations shall be filed in the court having jurisdiction of the offense specified in the information after the proper return is filed by the examining magistrate and by the prosecuting attorney of the county as informant. The information shall be subscribed by the prosecuting attorney or in his or her name by an assistant prosecuting attorney.

History: 1927, Act 175, Eff. Sept. 5, 1927;—Am. 1929, Act 24, Imd. Eff. Apr. 2, 1929;—CL 1929, 17254;—CL 1948, 767.40;—Am. 1955, Act 184, Eff. Oct. 14, 1955;—Am. 1961, Act 11, Eff. Sept. 8, 1961;—Am. 1986, Act 46, Eff. July 1, 1986.

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Former law: See sections 2 and 3 of Act 138 of 1859, being CL 1871, §§ 7938 and 7939; How., §§ 9549 and 9550; CL 1897, §§ 11934 and 11935; and CL 1915, §§ 15761 and 15762.

767.40a Attaching list of witnesses to filed information; disclosing names of res gestae witnesses; sending list to defendant or defendant's attorney; additions or deletions from list; request for assistance in locating and serving process on witness; objection to request; hearing; impeachment or cross-examination of witness.

Sec. 40a. (1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. The request for assistance shall be made in writing by defendant or defense counsel not less than 10 days before the trial of the case or at such other time as the court directs. If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

(6) Any party may within the discretion of the court impeach or cross-examine any witnesses as though the witness had been called by another party.

History: Add. 1941, Act 336, Eff. Jan. 10, 1942;—CL 1948, 767.40a;—Am. 1986, Act 46, Eff. July 1, 1986.

767.41 Inquiry by prosecuting attorney into preliminary examination; statement of reasons for not filing information; direction by court to file proper information.

Sec. 41. The prosecuting attorney of the proper county shall inquire into and make full examination of all the facts and circumstances connected with a case of preliminary examination as provided by law, concerning the commission of an offense where the offender is committed to jail or becomes recognized or held to bail. If the prosecuting attorney determines in a case other than a major controlled substance offense that an information ought not be filed, he shall make and subscribe a statement, in writing, containing his reasons in fact and in law, for not filing an information in the case and shall file that statement with the clerk of the court at and during the term of the court at which the offender is held for appearance. The court may examine the statement, together with the evidence filed in the case and if, upon examination, the court is not satisfied with the statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17255;—CL 1948, 767.41;—Am. 1978, Act 77, Eff. Sept. 1, 1978.

Former law: See section 6 of Act 138 of 1859, being CL 1871, § 7942; How., § 9553; CL 1897, § 11938; CL 1915, § 15765; and Act 147 of 1863.

767.42 Preliminary examination as prerequisite to filing of information; remand where right waived without benefit of counsel; fugitives from justice.

Sec. 42. (1) An information shall not be filed against any person for a felony until such person has had a preliminary examination therefor, as provided by law, before an examining magistrate, unless that person waives his statutory right to an examination. If any person waives his statutory right to a preliminary examination without having had the benefit of counsel at the time and place of the waiver, upon proper and timely application by the person or his counsel, before trial or plea of guilty, the court having jurisdiction of the cause, in its discretion, may remand the case to a magistrate for a preliminary examination.

(2) An information may be filed without a preliminary examination against a fugitive from justice, and any fugitive from justice against whom an information shall be filed may be demanded by the governor of this state of the executive authority of any other state or territory, or of any foreign government, in the same manner and the same proceedings may be had thereon as provided by law in like cases of demand upon indictment filed.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17256;—CL 1948, 767.42;—Am. 1957, Act 38, Eff. Sept. 27, 1957;—Am. 1974, Act 63, Eff. May 1, 1974.

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Compiler's note: Section 2 of Act 63 of 1974 provides: "To give judges, prosecutors, and defense counsel a reasonable opportunity to become aware of and familiar with the time periods and sequence prescribed in this amendatory act and the effects of noncompliance, sections 20 and 21 of chapter 8 of Act No. 175 of the Public Acts of 1927, being sections 768.20 and 768.21 of the Michigan Compiled Laws, as amended by this amendatory act shall take effect May 1, 1974, and apply to cases in which the arraignment on an information occurs on or after that date. The other provisions of this amendatory act shall take effect May 1, 1974 and apply to offenses committed on or after that date."

Former law: See section 8 of Act 138 of 1859, being CL 1871, § 7944; How., § 9555; CL 1897, § 11940; and CL 1915, § 15767.

767.43 Indictment; form generally.

Sec. 43. The indictment may be substantially in the following form:

In the ..... (here give the name of the court) ..... term, 19..... the People of the state of Michigan vs. (here give the name or the description of the accused.)

The grand jury of the county or counties of ..... presents that (here give the name or the description of the accused), (here set forth the offense and transaction, according to the rules herein enunciated).

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17257;—CL 1948, 767.43;—Am. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

767.44 Indictment; forms for particular offenses; bill of particulars.

Sec. 44. The following forms may be used in the cases in which they are applicable but any other forms authorized by this or any other law of this state may also be used:

Adultery—A.B., a married man, committed adultery with C.D.; or A.B. committed adultery with C.D., a married woman.

Affray—A.B. and C.D. made an affray.

Assault—A.B. assaulted C.D.

Assault and Battery—A.B. committed an assault and battery on C.D.

Assault with intent—A.B. assaulted C.D. with intent to murder, or kill, or rob, or maim, or rape (as the case may be).

Arson—A.B. committed arson by burning the dwelling house of C.D.

Attempt—A.B. attempted to steal from C.D.; A.B. attempted to commit larceny of the goods of C.D.; A.B. attempted to commit burglary of a building belonging to C.D. (as the case may be).

Burglary—A.B. committed burglary of the house of C.D. A.B. broke and entered the dwelling house of C.D. in the night time with intent to commit larceny, or murder, or robbery therein (as the case may be).

Conspiracy—A.B. and C.D. conspired together to murder E.F. or to steal the property of E.F. or to rob E.F. (as the case may be).

Forgery—A.B. forged a certain instrument purporting to be a promissory note (or describe instrument or give its tenor or substance).

Larceny—Embezzlement and false pretenses. A.B. stole from C.D. 1 horse of the value of more than 100 dollars.

Murder—A.B. murdered C.D.

Manslaughter—A.B. killed C.D.

Perjury—A.B. appeared as a witness in a case between C.D. and E.F. being heard before the (set forth the tribunal) and committed perjury by testifying as follows: (set forth the testimony).

Rape—A.B. raped or ravished C.D.

Rape (statutory)—A.B. raped or ravished C.D., she C.D. being then under the age of (statutory age) years.

Robbery Armed—A.B. robbed C.D., A.B. being armed.

Robbery—A.B. robbed C.D., A.B. not being armed.

Provided, That the prosecuting attorney, if seasonably requested by the respondent, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17258;—CL 1948, 767.44.

Former law: See section 2 of Act 77 of 1855, being CL 1857, § 6048; CL 1871, § 7917; How., § 9528; CL 1897, § 11913; and CL 1915, § 15740.

767.45 Contents of indictment or information; felony in which motor vehicle used.

Sec. 45. (1) The indictment or information shall contain all of the following:

(a) The nature of the offense stated in language which will fairly apprise the accused and the court of the offense charged.

(b) The time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense.

(c) That the offense was committed in the county or within the jurisdiction of the court. No verdict shall be

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set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury.

(2) If a person is accused of committing or attempting to commit a felony in which a motor vehicle was used, other than a felony specified in section 732(4) or 319(1)(a) to (f) of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being sections 257.732 and 257.319 of the Michigan Compiled Laws, the prosecuting attorney shall include on the complaint and information the statement, "You are charged with the commission of a felony in which a motor vehicle was used. If you are convicted and the judge finds that the conviction is for a felony in which a motor vehicle was used, as defined in section 319 of the Michigan vehicle code, Act No. 300 of the Public Acts of 1949, being section 257.319 of the Michigan Compiled Laws, your driver's license shall be suspended by the secretary of state for a period of 90 days to 2 years." As used in this subsection, "felony in which a motor vehicle was used" means a felony during the commission of which the person accused operated a motor vehicle and while operating the vehicle presented real or potential harm to persons or property and 1 or more of the following circumstances existed:

(*i*) The vehicle was used as an instrument of the felony.

(*ii*) The vehicle was used to transport a victim of the felony.

(*iii*) The vehicle was used to flee the scene of the felony.

(*iv*) The vehicle was necessary for the commission of the felony.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17259;—CL 1948, 767.45;—Am. 1988, Act 123, Eff. July 1, 1988.

Former law: See sections 7 and 13 of Act 77 of 1855, being CL 1857, §§ 6053 and 6059; CL 1871, §§ 7922 and 7928; How., §§ 9533 and 9539; CL 1897, §§ 11918 and 11924; and CL 1915, §§ 15745 and 15751.

767.46 Indictment; amendment of certain parts.

Sec. 46. Any defect, error or omission in the caption, commencement or conclusion of an indictment may be amended.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17260;—CL 1948, 767.46.

767.47 Indictment; effect of repugnant and unnecessary allegations.

Sec. 47. No indictment is invalid by reason of any repugnant allegations contained therein, provided that an offense is charged. All unnecessary allegations shall be rejected as surplusage.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17261;—CL 1948, 767.47.

Former law: See section 8 of Act 77 of 1855, being CL 1857, § 6054; CL 1871, § 7923; How., § 9534; CL 1897, § 11919; and CL 1915, § 15746.

767.48 Indictment; necessity of negativing statutory exception.

Sec. 48. No indictment for any offense created or defined by statute shall be deemed objectionable for the reason that it fails to negative any exception, excuse or proviso contained in the statute creating or defining the offense. The fact that the charge is made shall be considered as an allegation that no legal excuse for the doing of the act exists in the particular case.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17262;—CL 1948, 767.48.

767.49 Indictment; statement of name of individual, association or corporation.

Sec. 49. In any indictment it is sufficient for the purpose of identifying the accused to state his true name, to state the name, appellation or nickname by which he has been or is known, to state a fictitious name, or to describe him as a person whose name is unknown or to describe him in any other manner. In stating the true name or the name by which the accused has been or is known or a fictitious name, it is sufficient to state a surname, a surname and 1 or more christian name or names, or a surname and 1 or more abbreviations or initials of a christian name or names. It is sufficient for the purpose of identifying any group or association of persons, not incorporated, to state the proper name of such group or association (if such there be), to state any name or designation by which the group or association has been or is known, to state the names of all the persons in such group or association or of 1 or more of them, or to state the name or names of 1 or more persons in such group or association referring to the other or others as "another" or "others". It is sufficient for the purpose of identifying a corporation to state the corporate name of such corporation, or any name or designation by which such corporation has been or is known. It is not necessary for the purpose of identifying any group or association of persons or any corporation to state or prove the legal form of such group or association of persons or of such corporation. In no case is it necessary to aver or prove that the true name of any person, group or association of persons or corporation is unknown to the grand jury, complainant or prosecuting officer. If in the course of the trial the true name of any person, group or association of persons or corporation identified otherwise than by the true name, is disclosed by the evidence, the court shall on motion

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of the accused or of the prosecuting attorney, and may without such motion, insert the true name in the indictment wherever the name appears otherwise.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17263;—CL 1948, 767.49.

Former law: See sections 8 and 14 of Act 77 of 1855, being CL 1857, §§ 6054 and 6060; CL 1871, §§ 7923 and 7929; How., §§ 9534 and 9540; CL 1897, §§ 11919 and 11925; and CL 1915, §§ 15746 and 15752.

767.50 Indictment; description of instrument.

Sec. 50. Whenever in an indictment an allegation relative to any instrument which consists wholly or in part of writing or figures, pictures or designs, is necessary, it is sufficient to describe such instrument by any name or description by which it is usually known or by its purport without setting forth a copy or facsimile of the whole or any part thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17264;—CL 1948, 767.50.

Former law: See section 10 of Act 77 of 1855, being CL 1857, § 6056; CL 1871, § 7925; How., § 9536; CL 1897, § 11921; and CL 1915, § 15748.

767.51 Indictment; allegation of time.

Sec. 51. Except insofar as time is an element of the offense charged, any allegation of the time of the commission of the offense, whether stated absolutely or under a videlicet, shall be sufficient to sustain proof of the charge at any time before or after the date or dates alleged, prior to the finding of the indictment or the filing of the complaint and within the period of limitations provided by law: Provided, That the court may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17265;—CL 1948, 767.51.

Former law: See section 8 of Act 77 of 1855, being CL 1857, § 6054; CL 1871, § 7923; How., § 9534; CL 1897, § 11919; and CL 1915, § 15746.

767.52 Indictment; allegation of means of offense.

Sec. 52. The indictment need contain no allegation of the means by which the offense was committed except insofar as the means is an element of the offense.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17266;—CL 1948, 767.52.

767.53 Indictment; allegation of value or price.

Sec. 53. The indictment need not allege the value or price of any property unless the value or price is an element of the offense and in such case it is sufficient to aver that the value or price of the property is less than, equals or exceeds the certain value or price which determines the offense or grade thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17267;—CL 1948, 767.53.

Former law: See sections 8 and 16 of Act 77 of 1855, being CL 1857, §§ 6054 and 6062; CL 1871, §§ 7923 and 7931; How., §§ 9534 and 9542; CL 1897, §§ 11919 and 11927; and CL 1915, §§ 15746 and 15754.

767.54 Indictment; ownership; allegation; proof.

Sec. 54. The indictment need not allege the ownership of any property unless such ownership is necessary to indicate the offense. Proof of possession or right of possession or lien or special property in the person alleged to be the owner shall be sufficient to sustain an allegation of ownership in such person.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17268;—CL 1948, 767.54.

Former law: See section 10 of Ch. 161 of R.S. 1846, being CL 1857, § 5946; CL 1871, § 7812; How., § 9422; CL 1897, § 11783; and CL 1915, § 15610.

767.55 Indictment; allegation of certain matters in the alternative.

Sec. 55. In an indictment for an offense which is constituted of 1 or more of several acts, or which may be committed by 1 or more of several means, or with 1 or more of several intents, or which may produce 1 or more of several results, 2 or more of such acts, means, intents or results may be charged in the alternative.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17269;—CL 1948, 767.55.

767.56 Indictment; allegation of prior conviction.

Sec. 56. Whenever it is necessary to allege a prior conviction of the accused in an indictment, it is sufficient to allege that the accused was at a certain stated time, in a certain stated court, convicted of a certain stated offense, giving the name of the offense, if it have one, or stating the substantial elements thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17270;—CL 1948, 767.56.

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767.57 Pleading; statute or statutory right.

Sec. 57. In pleading a statute or a right derived therefrom it is sufficient to refer to the statute by its title, or in any other manner which identifies the statute and the court must thereupon take judicial notice thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17271;—CL 1948, 767.57.

Former law: See section 13 of Act 77 of 1855, being CL 1857, § 6059; CL 1871, § 7928; How., § 9539; CL 1897, § 11924; and CL 1915, § 15751.

767.58 Pleading; judgment or proceeding.

Sec. 58. In pleading a judgment or other determination of, or a proceeding before any court or officer, civil or military, it is unnecessary to allege the facts conferring jurisdiction on such court or officer, but it is sufficient to allege generally that such judgment or determination was duly given or made or such proceedings had.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17272;—CL 1948, 767.58.

Former law: See section 17 of Act 77 of 1855, being CL 1857, § 6063; CL 1871, § 7932; How., § 9543; CL 1897, § 11928; and CL 1915, § 15755.

767.59 Indictment; unnecessary formal words and phrases.

Sec. 59. The indictment need not allege that the offense was committed or the act done "feloniously" or "traitorously" or "unlawfully" or "with force of arms" or "with a strong hand," nor need it use any phrase of like kind otherwise than to characterize the offense, nor need it allege that the offense was committed or the act done "burglariously", "wilfully", "knowingly", "maliciously", "negligently" nor need it otherwise characterize the manner of the commission of the offense unless such description is necessary to indicate the offense. The indictment need not contain the words "contrary to the statute", "as appears by the record", or any other words of similar import.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17273;—CL 1948, 767.59.

Former law: See section 34 of Ch. 164 of R.S. 1846, being CL 1857, § 6043; CL 1871, § 7912; How., § 9523; CL 1897, § 11908; CL 1915, § 15735; and section 8 of Act 77 of 1855, being CL 1857, § 6054; CL 1871, § 7923; How., § 9534; CL 1897, § 11908; CL 1915, § 15735.

767.60 Indictment; allegations in embezzlement, larceny and false pretense cases.

Sec. 60. In any prosecution for the offenses of embezzlement, larceny, larceny by conversion, or obtaining money or property by false pretenses under the statutes of this state, it shall be sufficient to allege generally in the information or indictment the embezzlement, larceny, larceny by conversion or obtaining by false pretenses of personal property to a certain amount without specifying the particulars of such embezzlement, larceny, larceny by conversion or obtaining by false pretenses, and on the trial evidence may be given of any such embezzlement, larceny, larceny by conversion or obtaining money or property by false pretenses within 6 months next after the time stated in the information or indictment, and it shall be sufficient to maintain the charge in the information or indictment and shall not be deemed at variance if it shall be proved that any personal property was fraudulently embezzled, stolen or obtained by false pretenses within the said period of 6 months.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17274;—CL 1948, 767.60.

Former law: See section 9 of Ch. 161 of R.S. 1846, being CL 1857, § 5945; CL 1871, § 7811; How., § 9421; CL 1897, § 11782; CL 1915, § 15609; and Act 39 of 1927.

767.61 Indictment; description of money, bonds, mortgage and similar instrument in offense relating thereto.

Sec. 61. In an indictment for larceny, larceny by conversion, embezzlement, robbery, obtaining money by false pretenses, receiving stolen property or for any other criminal conversion or misappropriation where the offense relates to money or currency, it shall be sufficient to describe the same under the terms "money", "currency", or "dollars" without specifying the particular character, number, denomination, kind, species, nature or value thereof. Where such indictment relates to promissory notes, certificates of stock, bonds, bills of lading, mortgages or any other negotiable or non-negotiable instruments, or securities or evidence of debt or property, it is sufficient to designate the same by general description without specifying the particular number or denomination thereof.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17275;—CL 1948, 767.61.

Former law: See section 15 of Act 77 of 1855, being CL 1857, § 6061; CL 1871, § 7930; How., § 9541; CL 1897, § 11926; and CL 1915, § 15753.

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767.61a Indictment; offense committed by sexually delinquent person; prosecution; expert testimony provided; examination of witnesses; testimony in open court; record; punishment.

Sec. 61a. In any prosecution for an offense committed by a sexually delinquent person for which may be imposed an alternate sentence to imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life, the indictment shall charge the offense and may also charge that the defendant was, at the time said offense was committed, a sexually delinquent person. In every such prosecution the people may produce expert testimony and the court shall provide expert testimony for any indigent accused at his request. In the event the accused shall plead guilty to both charges in such indictment, the court in addition to the investigation provided for in section 35 of chapter 8 of this act, and before sentencing the accused, shall conduct an examination of witnesses relative to the sexual delinquency of such person and may call on psychiatric and expert testimony. All testimony taken at such examination shall be taken in open court and a typewritten transcript or copy thereof, certified by the court reporter taking the same, shall be placed in the file of the case in the office of the county clerk. Upon a verdict of guilty to the first charge or to both charges or upon a plea of guilty to the first charge or to both charges the court may impose any punishment provided by law for such offense.

History: Add. 1952, Act 234, Eff. Sept. 18, 1952.

767.62 Place of indictment, trial and conviction; receiver of stolen property.

Sec. 62. In the cases where any person shall be liable to prosecution as the receiver of any personal property that shall have been feloniously stolen, taken or embezzled, he may be indicted, tried and convicted in any county where he received or had such property, notwithstanding such theft was committed in another county.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17276;—CL 1948, 767.62.

Former law: See section 31 of Ch. 164 of R.S. 1846, being CL 1857, § 6040; CL 1871, § 7909; How., § 9520; CL 1897, § 11905; and CL 1915, § 15732.

767.63 Place of indictment; removal of stolen property from another county.

Sec. 63. When any property shall be stolen in 1 county and brought into another, the offender may be indicted, tried and convicted in the county into which such stolen property was brought, in the same manner as if such property had been originally stolen in that county; and when such property shall have been taken by burglary or robbery the offender may be indicted, tried and convicted of said burglary or robbery, in the county into which such property was brought in the same manner as if such burglary or robbery had been committed in that county.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17277;—CL 1948, 767.63.

Former law: See section 32 of Ch. 164 of R.S. 1846, being CL 1857, § 6041; CL 1871, § 7910; How., § 9521; CL 1897, § 11906; and CL 1915, § 15733.

767.64 Place and manner of indictment, conviction and punishment; removing stolen property from another state or country; prior conviction or acquittal.

Sec. 64. Every person who shall feloniously steal the property of another, in any other state or country, and shall bring the same into this state, may be indicted, convicted and punished in the same manner as if such larceny had been committed in this state; and in every such case such larceny may be charged to have been committed in any town or city into or through which such stolen property shall have been brought: Provided, That every such person may plead a former conviction or acquittal for the same offense in another state or country; and if such plea be admitted or established, it shall be a bar to any further or other proceedings against such person for the same offense.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17278;—CL 1948, 767.64.

Former law: See section 1 of Act 119 of 1850, being CL 1857, § 5797; CL 1871, § 7606; How., § 9177; CL 1897, § 11592; and CL 1915, § 15347.

767.65 Place and manner of indictment; receiver of property stolen in another state or country.

Sec. 65. Every receiver of personal property that shall have been feloniously stolen, knowing the same to have been stolen, may be indicted, convicted and punished in any county where he received or had such property in the same manner that receivers of personal property stolen in this state are indicted, convicted and punished, notwithstanding such theft was committed in any other state or country.

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History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17279;—CL 1948, 767.65.

Former law: See section 2 of Act 119 of 1850, being CL 1857, § 5798; CL 1871, § 7607; How., § 9178; CL 1897, § 11593; and CL 1915, § 15348.

767.66 Place and manner of indictment; person aiding and abetting thief who removes stolen property from another state or country.

Sec. 66. Every person who shall aid and abet any thief, such thief having brought the stolen property into this state, may be indicted, convicted and punished in the same manner, notwithstanding such theft was committed in any other state or country, that aiders and abettors are punished, where the theft was originally committed within this state.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17280;—CL 1948, 767.66.

Former law: See section 3 of Act 119 of 1850, being CL 1857, § 5799; CL 1871, § 7608; How., § 9179; CL 1897, § 11594; and CL 1915, § 15349.

767.67 Indictment; charging accessory without principal; substantial felony.

Sec. 67. Any number of accessories after the fact, or receivers, buyers, or persons aiding in the concealment of any stolen money, goods, or property may be charged with substantive felonies in the same indictment, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17281;—CL 1948, 767.67.

Former law: See section 5 of Act 77 of 1855, being CL 1857, § 6051; CL 1871, § 7920; How., § 9531; CL 1897, § 11916; and CL 1915, § 15743.

767.68 Indictment; charge of jointly receiving or concealing stolen property; conviction of less than all indictees.

Sec. 68. If 2 or more persons are indicted for jointly receiving, buying or aiding in the concealment of any stolen property, and the evidence shall be that 1 or more persons separately, knowingly received, bought or aided in the concealment of any part of such property, the jury may convict upon such indictment those who are proved to have received, bought or aided in the concealment of any part of such property.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17282;—CL 1948, 767.68.

Former law: See section 6 of Act 77 of 1855, being CL 1857, § 6052; CL 1871, § 7921; How., § 9532; CL 1897, § 11917; and CL 1915, § 15744.

767.69 Indictment for larceny; additional counts; conviction; election between counts unnecessary.

Sec. 69. An indictment for larceny may contain also a count for embezzlement, larceny by conversion, obtaining property by false pretenses or for receiving or having in possession, or aiding in concealing the same property, knowing it to have been stolen, and the jury may convict of any such offense; and the jury may find all or any of the persons indicted, guilty of any of the offenses charged in the indictment. The prosecuting attorney shall not be required to elect between the offenses so charged.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17283;—Am. 1931, Act 309, Eff. Sept. 18, 1931;—CL 1948, 767.69.

Former law: See section 20 of Act 77 of 1855, being CL 1857, § 6066; CL 1871, § 7936; How., § 9547; CL 1897, § 11932; and CL 1915, § 15759.

767.70 Indictment for libel; statement of application to party libelled.

Sec. 70. An indictment for libel need not set forth any extrinsic facts for the purpose of showing the application to the party libelled of the defamatory matter on which the indictment is founded, but it is sufficient to state generally that the same was published concerning him.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17284;—CL 1948, 767.70.

Former law: See section 18 of Act 77 of 1855, being CL 1857, § 6064; CL 1871, § 7934; How., § 9545; CL 1897, § 11930; and CL 1915, § 15757.

767.71 Indictment for murder and manslaughter; charging act.

Sec. 71. In all indictments for murder and manslaughter it shall not be necessary to set forth the manner in which nor the means by which the death of the deceased was caused; but it shall be sufficient in any indictment for murder to charge that the defendant did murder the deceased; and it shall be sufficient in manslaughter to charge that the defendant did kill the deceased.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17285;—CL 1948, 767.71.

Former law: See section 1 of Act 77 of 1855, being CL 1857, § 6047; CL 1871, § 7916; How., § 9527; CL 1897, § 11912; and CL

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1915, § 15739.

767.72 Indictment for manslaughter; added count for abortion; admissibility of dying declaration under either count.

Sec. 72. An indictment or information for manslaughter may contain also a count for procuring or attempting to procure an abortion and the jury may convict of either offense. Dying declarations shall be admissible in evidence in proof of either count.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17286;—CL 1948, 767.72.

767.73 Indictment; perjury; sufficiency of statement.

Sec. 73. An indictment for perjury or for subornation of, solicitation, or conspiracy to commit perjury, is sufficient which indicates the offense for which the accused is prosecuted, the nature of the controversy in respect of which the offense was committed and before what court or officer the oath was taken or was to have been taken, without setting forth any part of the records or proceedings with which the oath was connected, and without stating the commission or authority of the court or other authority before whom the perjury was committed or was to have been committed or the form of the oath or affirmation or the manner of administering the same.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17287;—CL 1948, 767.73.

Former law: See section 3 of Act 77 of 1855, being CL 1857, § 6049; CL 1871, § 7918; How., § 9529; CL 1897, § 11914; and CL 1915, § 15741.

767.74 Indictment; motion to quash; dilatory plea; proof.

Sec. 74. No motion to quash, plea in abatement or other dilatory plea to the indictment, shall be received by any court unless the party offering such plea shall prove the truth thereof by affidavit, or by some other sworn evidence.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17288;—CL 1948, 767.74.

Former law: See section 33 of Ch. 164 of R.S. 1846, being CL 1857, § 6042; CL 1871, § 7911; How., § 9522; CL 1897, § 11907; and CL 1915, § 15734.

767.75 Indictment; certain defects; quashing not allowed; remedy.

Sec. 75. No indictment shall be quashed, set aside or dismissed for any 1 or more of the following defects: (First) That there is a misjoinder of the parties accused; (Second) That there is a misjoinder of the offenses charged in the indictment, or duplicity therein; (Third) That any uncertainty exists therein. If the court be of the opinion that the first and second defects or either of them exist in any indictment, it may sever such indictment into separate indictments or informations or into separate counts as shall be proper. If the court be of the opinion that the third defect exists in any indictment, it may order that the indictment be amended to cure such defect.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17289;—CL 1948, 767.75.

Former law: See section 3 of Act 138 of 1859, being CL 1871, § 7939; How., § 9550; CL 1897, § 11935; and CL 1915, § 15762.

767.76 Indictment; time of objection to defect; amendment; discharge of jury; continuance of cause; double jeopardy; review of action by court.

Sec. 76. No indictment shall be quashed, set aside or dismissed or motion to quash be sustained or any motion for delay of sentence for the purpose of review be granted, nor shall any conviction be set aside or reversed on account of any defect in form or substance of the indictment, unless the objection to such indictment, specifically stating the defect claimed, be made prior to the commencement of the trial or at such time thereafter as the court shall in its discretion permit. The court may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence. If any amendment be made to the substance of the indictment or to cure a variance between the indictment and the proof, the accused shall on his motion be entitled to a discharge of the jury, if a jury has been impaneled and to a reasonable continuance of the cause unless it shall clearly appear from the whole proceedings that he has not been misled or prejudiced by the defect or variance in respect to which the amendment is made or that his rights will be fully protected by proceeding with the trial or by a postponement thereof to a later day with the same or another jury. In case a jury shall be discharged from further consideration of a case under this section, the accused shall not be deemed to have been in jeopardy. No action of the court in refusing a continuance or postponement under this section shall be reviewable except after motion to and refusal by the trial court to grant a new trial therefor and no writ of error or other appeal based upon such action of the court shall be sustained, nor reversal had, unless from

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consideration of the whole proceedings, the reviewing court shall find that the accused was prejudiced in his defense or that a failure of justice resulted.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17290;—CL 1948, 767.76.

Former law: See section 34 of Ch. 164 of R.S. 1846, being CL 1857, § 6043; CL 1871, § 7912; How., § 9523; CL 1897, § 11908; CL 1915, § 15735; and sections 9, 11, 12, and 14 of Act 77 of 1855, being CL 1857, §§ 6055, 6057, 6058, and 6060; CL 1871, §§ 7924, 7926, 7927, and 7929; How., §§ 9535, 9537, 9538, and 9540; CL 1897, §§ 11920, 11922, 11923, and 11925; CL 1915, §§ 15747, 15749, 15750, and 15752.

767.77 Commission to examine out-of-state witness; granting on application of defendant.

Sec. 77. When an issue of fact shall be joined upon any indictment, the court in which the same is pending may, on application of the defendant, grant a commission to examine any material witnesses residing out of this state, in the same manner as in civil cases.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17291;—CL 1948, 767.77.

Former law: See section 35 of Ch. 164 of R.S. 1846, being CL 1857, § 6044; CL 1871, § 7913; How., § 9524; CL 1897, § 11909; and CL 1915, § 15736.

767.78 Commission to examine out-of-state witness; interrogatories; reading of deposition.

Sec. 78. Interrogatories to be annexed to such commission shall be settled and such commission shall be issued, executed and returned in the manner prescribed by law in respect to commissions in civil cases, and the deposition taken thereon and returned shall be read in the same cases, and with like effect in all respects, as in civil suits.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17292;—CL 1948, 767.78.

Former law: See section 36 of Ch. 164 of R.S. 1846, being CL 1857, § 6045; CL 1871, § 7914; How., § 9525; CL 1897, § 11910; and CL 1915, § 15737.

767.79 Conditional examination of witness for defendant; order; notice to prosecutor.

Sec. 79. After an indictment shall be found against any defendant, he may have witnesses examined in his behalf conditionally on the order of a judge of the court in which the indictment is pending, in the same cases upon the like notice to the prosecuting attorney, and with like effect in all respects as in civil suits.

History: 1927, Act 175, Eff. Sept. 5, 1927;—CL 1929, 17293;—CL 1948, 767.79.

Former law: See section 37 of Ch. 164 of R.S. 1846, being CL 1857, § 6046; CL 1871, § 7915; How., § 9526; CL 1897, § 11911; and CL 1915, § 15738.

767.80, 767.81 Repealed. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

Compiler's note: The repealed sections pertained to residents of this state being required to attend as a witness in a criminal action in another state and bringing out-of-state witnesses into Michigan.

767.82 Repealed. 1974, Act 266, Eff. Apr. 1, 1975.

Compiler's note: The repealed section pertained to charge of taking indecent liberties in indictment for rape or attempted rape.

767.83 Indictment involving intent to defraud; sufficiency of allegations and proof.

Sec. 83. In any prosecution where an intent to defraud is required to constitute the offense, it shall be sufficient to allege in the indictment an intent to defraud without naming therein the particular person or body corporate intended to be defrauded; and on the trial of such indictment, it shall be deemed sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city or township, or any body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person.

History: Add. 1931, Act 309, Eff. Sept. 18, 1931;—CL 1948, 767.83.

767.91 Out of state witnesses; attendance; definitions.

Sec. 91. As used in sections 91 to 95 of this chapter:

(a) "Witness" includes a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

(b) "State" includes any territory of the United States and the District of Columbia.

(c) "Summons" includes a subpoena, order or other notice requiring the appearance of a witness.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.92 Attendance in another state; hearing; summons; custody; fee.

Sec. 92. (1) A judge of a court of record in a state which by law has provided for commanding persons within that state to attend and testify in this state may certify under seal of his court that for purposes of a

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criminal prosecution in his court or a grand jury investigation in his state, a person in this state is required as a material witness for a specified number of days.

(2) Upon presentation of a certificate issued pursuant to subsection (1) to a judge of a court of record in a county where such witness is found, the judge shall fix a time and place for a hearing and make an order directing the witness to appear at the hearing. At such hearing the certificate shall be prima facie evidence of all the facts stated therein.

(3) The judge shall issue a summons with a copy of the certificate attached directing the witness to attend and testify in the court where the criminal prosecution is pending or a grand jury is investigating if he determines at the hearing that:

(a) The witness is material and necessary to the prosecution or investigation.

(b) The attendance and testifying in the prosecution or investigation will not cause undue hardship to the witness.

(c) The laws of the state where the prosecution or investigation is being held and the laws of any other state through which the witness may be required to pass by ordinary course of travel protect the witness from arrest and service of civil or criminal process.

(4) If a certificate recommends that the witness be taken into immediate custody and delivered to an officer of the requesting state to assure his attendance in the requesting state, the judge may direct that the witness be forthwith brought before him for a hearing without notice. If the judge at the hearing is satisfied of the desirability of custody and delivery, for which determination the certificate shall be prima facie proof of desirability, he may order that the witness be forthwith taken into custody and delivered to an officer of the requesting state without issuing a summons.

(5) If a witness, who is summoned pursuant to this section and is paid by an authorized person the sum of 10 cents for each mile of the ordinary traveled route to and from the court where such prosecution or investigation is being held and $5.00 for each day that he is required to travel and attend as a witness, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.93 Attendance from without the state; certificate; fee.

Sec. 93. (1) If a person in a state, which by law provides for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of the court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. The certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

(2) If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents for each mile of the ordinary traveled route to and from the court where the prosecution or investigation is being held and $5.00 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state longer than the period stated in the certificate, unless otherwise ordered by the court. If the witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.94 Immunity of witness.

Sec. 94. (1) If a person comes into this state in obedience to a summons which is issued pursuant to section 93 he shall not while in this state pursuant to such summons be subject to arrest or the service of civil or criminal process in connection with matters which arose before his entrance into this state under the summons.

(2) If a person passes through this state while going to another state in obedience to a summons to attend and testify in that state or while returning therefrom, he shall not while so passing through this state be subject to arrest or the service of civil or criminal process in connection with matters which arose before his entrance into this state under the summons.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

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767.94a Disclosure of certain material or information by defendant to prosecuting attorney; compliance; motion for good cause.

Sec. 94a. (1) A defendant or his or her attorney shall disclose to the prosecuting attorney upon request the following material or information within the possession or control of the defendant or his or her attorney:

(a) The name and last known address of each witness other than the defendant whom the defendant intends to call at trial provided the witness is not listed by the prosecuting attorney.

(b) The nature of any defense the defendant intends to establish at trial by expert testimony.

(c) Any report or statement by an expert concerning a mental or physical examination, or any other test, experiment, or comparison that the defendant intends to offer in evidence, or that was prepared by a person, other than the defendant, whom the defendant intends to call as a witness, if the report or statement relates to the testimony to be offered by the witness.

(d) Any book, paper, document, photograph, or tangible object that the defendant intends to offer in evidence or that relates to the testimony of a witness, other than the defendant, whom the defendant intends to call.

(2) The defendant or his or her attorney shall comply with the disclosure provisions of subsection (1) not later than 10 days before trial or at any other time as the court directs.

(3) A defendant shall not offer at trial any evidence required to be disclosed pursuant to subsection (1) that was not disclosed unless permitted by the court upon motion for good cause shown. A motion under this subsection may be made before or during trial.

History: Add. 1994, Act 113, Eff. Oct. 1, 1994.

Compiler's note: On November 16, 1994, the Michigan Supreme Court entered Administrative Order No. 1994-10, which provides as follows:

"On May 4, 1994, the Governor signed House Bill 4227, concerning discovery by the prosecution of certain information known to the defendant in a criminal case. 1994 PA 113, MCL 767.94a; MSA 28.1023(194a). On November 16, 1994, this Court promulgated MCR 6.201, which is a comprehensive treatment of the subject of discovery in criminal cases.

"On order of the Court, effective January 1, 1995, discovery in criminal cases heard in the courts of this state is governed by MCR 6.201 and not by MCL 767.94a; MSA 28.1023(194a). Const 1963, art 6, § 5; MCR 1.104."

767.95 Short title; uniformity.

Sec. 95. Sections 91 to 95 constitute the uniform act to secure the attendance of witnesses from without a state in criminal proceedings and shall be so interpreted and construed as to effectuate their general purposes to make uniform the law of the states which enact them.

History: Add. 1970, Act 232, Imd. Eff. Dec. 3, 1970.

767.96 Costs of grand jury.

Sec. 96. (1) Except as otherwise provided by law, the costs of a grand jury convened under section 7c(a) shall be borne by this state, and shall be paid from the general fund of this state.

(2) Except as otherwise provided by law, the costs of a grand jury convened under section 7c(b) shall be borne equally by each county over which the grand jury has jurisdiction, and shall be paid by those counties.

History: Add. 1989, Act 204, Imd. Eff. Nov. 1, 1989.

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THE CODE OF CRIMINAL PROCEDURE (EXCERPT)
Act 175 of 1927

CHAPTER VIIA

767A.1 “Prosecuting attorney” defined.

Sec. 1. As used in this chapter, "prosecuting attorney" means the attorney general or the prosecuting attorney for a county, or his or her designee.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.2 Investigative subpoenas; petition for authorization; contents; filing; application for immunity; confidentiality of application; exemption from disclosure.

Sec. 2. (1) A prosecuting attorney may petition the district court, the circuit court, or the recorder's court in writing for authorization to issue 1 or more subpoenas to investigate the commission of a felony as provided in this chapter.

(2) A petition for authorization to issue 1 or more investigative subpoenas under subsection (1) shall contain all of the following:

(a) A brief description of each felony being investigated.

(b) The name of each person who will be questioned or who will be required to produce material described under subdivision (c).

(c) A general description of any records, documents, or physical evidence to be examined.

(d) A brief statement of the facts establishing the basis for the prosecuting attorney's belief that the testimony of the person or examination of the records, documents, or physical evidence is relevant to the investigation of a felony described in the petition.

(3) The petition for authorization to issue 1 or more investigative subpoenas may be filed by the prosecuting attorney with any of the following:

(a) The circuit court of the judicial circuit in which the felony or a portion of the felony is alleged to have been committed or of any judicial circuit in which the prosecuting attorney lawfully maintains an office.

(b) The recorder's court if the felony or a portion of the felony is alleged to have been committed in the city of Detroit or if the prosecuting attorney lawfully maintains an office in the city of Detroit.

(c) The district court of the judicial district in which the felony or a portion of the felony is alleged to have been committed or of any judicial district in which the prosecuting attorney lawfully maintains an office.

(4) A prosecuting attorney may file an application for immunity under section 7 at the time he or she files a petition for authorization to issue 1 or more investigative subpoenas under this section.

(5) An application under this section is confidential and shall not be available for public inspection or copying or divulged to any person except as otherwise provided in this chapter. An application under this section is exempt for disclosure under the freedom of information act, Act No. 422 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.3 Investigative subpoenas; issuance; circumstances; contents and scope of order; additional subpoenas; supplemental petitions; filing.

Sec. 3. (1) A judge may authorize a prosecuting attorney in writing to issue 1 or more investigative subpoenas under this chapter if all of the following circumstances exist:

(a) A petition is properly filed under section 2.

(b) The judge determines there is reasonable cause to believe a felony has been committed.

(c) The judge determines there is reasonable cause to believe that either of the following circumstances exists:

(*i*) The person who is the subject of the investigative subpoena may have knowledge regarding the commission of the felony.

(*ii*) The records, documents, or physical evidence are relevant to investigate the commission of a felony described in the petition.

(2) An order issued by the judge authorizing a prosecuting attorney to issue 1 or more investigative subpoenas under this chapter shall contain all of the following:

(a) A statement identifying each felony to be investigated.

(b) A statement listing each person to whom an investigative subpoena may be issued.

(c) A statement listing the records, documents, or physical evidence subject to production under an investigative subpoena. The statement shall describe the records, documents, or physical evidence with

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sufficient definiteness to permit those records, documents, or physical evidence to be fairly identified.

(3) A prosecuting attorney may issue investigative subpoenas to the extent authorized by the judge in the authorization order.

(4) If additional investigative subpoenas are required to conduct the investigation, the prosecuting attorney may file 1 or more supplemental petitions with the judge who issued the authorization to conduct the investigation requesting those additional investigative subpoenas. A supplemental petition under this subsection may incorporate the original petition for an investigative subpoena by reference. The petition shall be filed in the same manner that an original petition is filed under section 2.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.4 Investigative subpoenas; contents; service of process.

Sec. 4. (1) An investigative subpoena issued by a prosecuting attorney under this chapter shall contain all of the following information:

(a) The name of the person to whom it is directed and his or her address, if known. If the name of the person is not known, the investigative subpoena shall give a general description sufficient to identify the person.

(b) The time and place for taking the person's testimony or for the person to produce the required documents or physical evidence.

(c) A statement that the investigative subpoena is issued pursuant to this section.

(d) A statement identifying the criminal activity being investigated.

(e) A statement describing the records, documents, or physical evidence to be produced. The statement shall describe the records, documents, or physical evidence with sufficient definiteness to permit those records, documents, or physical evidence to be fairly identified.

(f) A statement that the person may object to the investigative subpoena or file reasons for not complying with the investigative subpoena by filing a written statement of objection or noncompliance with the prosecuting attorney on or before the date scheduled for the questioning or the production of the records, documents, or physical evidence. A statement under this subdivision shall also inform the person that the prosecuting attorney may seek an order compelling compliance with the investigative subpoena as provided in this chapter.

(g) A statement that the person may have legal counsel present at all times he or she is being questioned and during the examination of any records, documents, or physical evidence that he or she is required to produce.

(2) The court rules that apply to service of process in civil actions apply to service of investigative subpoenas under this chapter. However, an investigative subpoena shall be served not less than 7 days before the date set for the taking of testimony or examination of records, documents, or physical evidence unless the judge who issued the authorization for that investigative subpoena has shortened that period of time for good cause shown.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.5 Appearance before prosecuting attorney; administration of oaths and affirmations; right to legal counsel; testimony with respect to records, documents or physical evidence; informing person of rights against self-incrimination; furnishing copy of testimony to defendant; effect of failure to provide copy of testimony; furnishing copy of testimony after direct examination of witness.

Sec. 5. (1) A person properly served with an investigative subpoena under this chapter shall appear before the prosecuting attorney and answer questions concerning the felony being investigated or produce any records, documents, or physical evidence he or she is required to produce.

(2) The prosecuting attorney may administer oaths and affirmations in the manner prescribed by law to implement this chapter.

(3) Any person may have legal counsel present in the room in which the inquiry is held. The person may discuss fully with his or her legal counsel any matter relating to the person's part in the inquiry without being subject to citation for contempt.

(4) The prosecuting attorney may require a person having knowledge of any records, documents, or physical evidence subpoenaed under this chapter to testify under oath or acknowledgment with respect to those records, documents, or physical evidence.

(5) The prosecuting attorney shall inform the person of his or her constitutional rights regarding compulsory self-incrimination before asking any questions under an investigative subpoena. This subsection does not apply if the person is granted immunity under section 7.

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(6) If a criminal charge is filed by the prosecuting attorney based upon information obtained pursuant to this chapter, upon the defendant's motion made not later than 21 days after the defendant is arraigned on the charge, the trial judge shall direct the prosecuting attorney to furnish to the defendant the testimony the defendant gave regarding the crime with which he or she is charged and may direct the prosecuting attorney to furnish to the defendant the testimony any witness who will testify at the trial gave the prosecuting attorney pursuant to this chapter regarding that crime except those portions that are irrelevant or immaterial, or that are excluded for other good cause shown. If the defendant requests the testimony of a witness pursuant to this section and the trial judge directs the prosecuting attorney to furnish to the defendant a copy of that witness's testimony, the prosecuting attorney shall furnish a copy of the testimony not later than 14 days before trial. If the prosecuting attorney fails or refuses to furnish a copy of the testimony to the defendant pursuant to this subsection, the prosecuting attorney may be barred from calling that witness to testify at the defendant's trial.

(7) If the trial judge has not directed the prosecuting attorney to furnish a copy of a witness's testimony to the defendant before trial, the prosecuting attorney shall, upon the defendant's request, furnish a copy of that testimony to the defendant after direct examination of that witness at trial has been completed.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.6 Motion to order compliance with subpoena; filing; notice; hearing; court order; order violating statutory privilege or constitutional right prohibited; further protections; disclosure by reporter of informant or related information; circumstances.

Sec. 6. (1) If a person files an objection to, or fails or refuses to answer any question or to produce any record, document, or physical evidence set forth in an investigative subpoena, the prosecuting attorney may file a motion with the judge who authorized the prosecuting attorney to issue the subpoena for an order compelling the person to comply with that subpoena. The prosecuting attorney shall serve notice of the motion under applicable court rules.

(2) If the prosecuting attorney files a motion with the court for an order under subsection (1), the court shall hold a hearing on the motion. The person has the right to appear and be heard regarding the motion and to have legal counsel present.

(3) If the court determines the question or evidentiary request of the prosecuting attorney is appropriate and within the scope of the authorization, the court shall order the person to answer the question or to produce the record, document, or physical evidence.

(4) If the court determines the question or request is inappropriate or outside the scope of the authorization, the court may order the prosecuting attorney to modify the question or the request or may disallow the question or the request.

(5) The court shall not compel the person to answer a question or produce any record, document, or physical evidence if answering that question or producing that record, document, or physical evidence would violate a statutory privilege or a constitutional right. Upon motion by the person and for good cause shown, the court may make any further order in the proceedings that justice requires to protect the person from unreasonable annoyance, embarrassment, oppression, burden, or expense.

(6) A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication is not required to disclose the identity of an informant, any unpublished information obtained from an informant, or any unpublished matter or documentation, in whatever manner recorded, relating to a communication with an informant, in any inquiry conducted under this chapter. A reporter or other person who is involved in the gathering or preparation of news for broadcast or publication is subject to an inquiry under this chapter only under the following circumstances:

(a) To obtain information that has been disseminated to the public by media broadcast or print publication.

(b) If the reporter or other person is the subject of the inquiry.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.7 Order granting immunity.

Sec. 7. (1) The prosecuting attorney may apply to the court for an order granting immunity to any person, designated by name and address in the application, whom the prosecuting attorney intends to require to give testimony concerning any matter investigated under this chapter. The application shall be accompanied by the prosecuting attorney's verified petition setting forth the facts upon which the application is based. If the judge determines it is in the interest of justice to grant immunity, the judge shall enter an order granting immunity to the person if the person appears before the prosecuting attorney and testifies under oath concerning the felony set forth in the petition of the prosecuting attorney. The order granting immunity shall extend to all related questions asked of the person.

(2) The prosecuting attorney shall provide the person with a true copy of the order issued under subsection

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(1) before the prosecuting attorney asks the person any questions. No testimony or other information compelled under the order, or any information directly or indirectly derived from that testimony or other information, may be used against the person in any criminal case, except for impeachment purposes, in a prosecution for perjury, or for otherwise failing to comply with the order granting immunity.

(3) An order issued under this section that grants immunity to a person continues in effect until the judge or his or her successor, in his or her discretion and upon application by the prosecuting attorney, enters an order terminating the order granting immunity and the prosecuting attorney notifies the witness of the order of termination.

(4) Any person granted immunity under this section may have legal counsel present at all times at which he or she is being questioned concerning any matter included within the order granting immunity.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.8 Confidentiality of certain material and information.

Sec. 8. Petitions for immunity, orders of immunity, transcripts of testimony delivered to witnesses pursuant to grants of immunity, and records, documents, and physical evidence obtained by the prosecuting attorney pursuant to an investigation under this chapter are confidential and shall not be available for public inspection or copying or divulged to any person except as otherwise provided in this chapter. Material and information obtained under this act are exempt from disclosure under the freedom of information act, Act No. 442 of the Public Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

767A.9 Knowingly making false statement as perjury; penalty; neglect or refusal to comply with subpoena as contempt; determination that witness has purged himself or herself of contempt; commutation of sentence.

Sec. 9. (1) A person who makes a false statement under oath in an examination conducted under this chapter knowing the statement is false is guilty of perjury punishable as follows:

(a) Except as provided in subdivision (b), by imprisonment for not more than 15 years.

(b) If the false statement was made during the investigation of a crime punishable by imprisonment for life, by imprisonment for life or for any term of years.

(2) A person who neglects or refuses to comply with an investigative subpoena in violation of a court order is guilty of contempt punishable by imprisonment for not more than 1 year or by a fine of not more than $10,000.00, or both. If the witness appears before the court to purge himself or herself of that contempt, he or she shall be allowed to appear before the prosecuting attorney to answer any proper question concerning the matter under investigation, and after the witness appears before the prosecuting attorney, upon transcript of the testimony, the witness shall be brought before the court and after examination, the court shall determine whether the witness has purged himself or herself of the contempt. The court shall commute the sentence if the court finds the witness has purged himself or herself of that contempt.

History: Add. 1995, Act 148, Eff. Oct. 1, 1995.

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386 Mich. 672
Supreme Court of Michigan.

PEOPLE of the State of Michigan ex rel. Robert F. LEONARD, Prosecuting Attorney In and For the County of Genesee, Plaintiff-Appellant,
v.
The Honorable Elza H. PAPP, Genesee County Circuit Judge, 7th Judicial Circuit, Defendant-Appellee.

No. 10.
|
Feb. 25, 1972.

Synopsis

A prosecutor sought a writ of superintending control from the Court of Appeals, Div. 2, challenging the right of the Genesee County Circuit Court, Elza H. Papp, J., to accept, over the prosecutor's objection, a plea to an offense which was not charged nor a lesser included offense. The request was ‘dismissed for lack of jurisdiction,‘ and the People, upon leave granted, asked the Supreme Court to hold that the Court of Appeals had jurisdiction and asked the Supreme Court to retain jurisdiction and enter an order of superintending control. The Supreme Court, Williams, J., held that whether the action was to be viewed in the nature of certiorari, mandamus or prohibition, the Court of Appeals had jurisdiction to entertain the complaint for superintending control. The Court also held that the trial judge on her own initiative had no power to determine, over the objection of the prosecutor, under which of two admittedly applicable statutes prosecution would be instituted, where neither statute represented a lesser included offense of the other.

Plea of guilty annulled and sentence vacated and cause remanded.

Attorneys and Law Firms

***675 **694** Donald A. Kuebler, Chief Asst. Pros. Atty., Flint, Robert F. Leonard, Pros. Atty., Genesee County, for plaintiff-appellant.

Frederick E. Salim, Flint, for defendant-appellee.
Before the Entire Bench.

Opinion

WILLIAMS, Justice.

The matter-of-fact and unpretentious trial and appellate history of this case attests to the acceptance and confidence of the American people in the ability and integrity of the judiciary to exercise the authority of judicial supremacy in determining and delineating the basic constitutional doctrine of separation of

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legislative, executive and judicial powers. It is an awesome power and responsibility and must be exercised both courageously and with understanding and restraint.

There are two issues in this case:
I. Does the Court of Appeals have jurisdiction to entertain a complaint for superintending control which charges that a trial judge acted without authority in accepting, over the objection of the prosecutor, a plea of guilty to an offense not charged by the people or included within the offense charged in the information?

****695** II. Does a trial judge have the authority to accept an offer and plea of guilty over the objection of the ***676** prosecutor to an offense not charged or included in the information?

The defendant, Dana McBride, was bound over to the Genesee Circuit Court after a preliminary examination to stand trial on an information charging possession of a stolen motor vehicle in violation of M.C.L.A. s 257.254; M.S.A. s 9.1954.[1] On the day the case was to go to jury trial the trial judge, apparently on the basis of a previous discussion with defendant and his counsel, granted defendant's motion that he be allowed to plead guilty to unlawfully driving away the automobile of another in violation of M.C.L.A. s 750.413; M.S.A. s 28.645.[2] Before final acceptance of the plea the trial judge asked the prosecutor, 'I take it, Mr. Prosecutor, you are not going to make objections to this.' The prosecutor indicated that the facts supported the charge as originally bound over and that he intended to proceed to trial on the charge as bound over because it was a more serious offense than the typical 'joy riding' case. In overruling the prosecutor's objection the judge said 'Fine, but, Mr. Prosecutor, how many times have you already come up this term where the evidence would show—so you can't always play God as to ***677** which one you are going to permit to plead guilty to a lesser offense or not.'

The trial judge proceeded with the plea taking procedure wherein the defendant admitted that he had stolen a Volkswagen similar to his own, driven it away, exchanged the license plates with his own and taken the car to a farm. The judge concluded: 'Actually, you are really guilty of the higher offense, but the court will accept your plea to the lesser offense. . . .' Subsequently, McBride was sentenced to three and a half to five years at Jackson with execution suspended provided McBride entered the Army. The Army did not accept McBride and the original sentence was reinstated. Defendant was advised of his rights to appeal, 'indigent' counsel and transcript. Claim of appeal was filed in the Court of Appeals and defendant has been admitted to bail pending decision in that court.

In a separate proceeding, the prosecution sought a writ of superintending control from the Court of Appeals challenging the trial court's right over the prosecutor's objection to accept a plea to an offense not charged nor a lesser included offense. This request was 'dismissed for lack of jurisdiction,' on the ground that the proceeding was not one of the 'appeals' authorized by statute, citing M.C.L.A. s 770.12; M.S.A. s 28.1109[3] and Wayne County Prosecutor ****696** v. Recorder's Court Judge.[4] The People, upon leave ***678** granted, ask this Court to hold that the Court of Appeals has jurisdiction to entertain complaints for superintending control under facts such as these and further that we retain jurisdiction of the cause and enter an order of superintending control directing the defendant judge to vacate defendant McBride's guilty plea and sentence and reinstate criminal proceedings based on the information charging violation of M.C.L.A. s 257.254.

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I.—JURISDICTION

In response to the Court of Appeals holding that this proceeding was not an authorized 'appeal'[5] under the statute (M.C.L.A. s 770.12) the People answer that they do not claim the action of the trial judge is reviewable by an 'appeal' under M.C.L.A. s 770.12. The People in effect contend that a writ of superintending control under GCR 1963, 711.3[6] is not an appeal ***679** but rather is an original civil action, here in the nature of mandamus, and as such is a proper method for correcting abuses of jurisdiction by a trial judge.

In People v. Brundage, 381 Mich. 399, 403, 162 N.W.2d 659, 660 (1968), Justice O'Hara writing in a portion of his dissent concurred in by the majority, addressed the relationship between the limited rights of 'appeal' under M.C.L.A. s 770.12 and the writ of superintending control. Speaking of the statute he said:
'We feel obligated to point out that as an expression of legislative policy we accord the statute great weight. However, to the extent that it purports to limit our appellate jurisdiction, it is constitutionally infirm. Our appellate jurisdiction is constitutional. It can neither be enlarged nor restricted by legislative action. The constitution provides:

"The Supreme Court shall have * * * power to issue * * * prerogative and remedial writs; And appellate jurisdiction as provided by rules of the ****697** supreme court.' (Emphasis supplied.)' (Footnote omitted.)

Pursuant to the constitution this Court adopted GCR 1963, 711.3 which supercedes the writs of certiorari, mandamus and prohibition, providing one simplified procedure for reviewing or supervising the actions of lower courts and tribunals.

The use of the office of superintending control by the People in a criminal case to review excesses of jurisdiction was considered by this Court in People v. Flint Municipal Judge, 383 Mich. 429, 175 N.W.2d 750 (1970). In that case the prosecutor filed a complaint for superintending control against a municipal judge alleging an abuse of discretion in failing to bind over a defendant for trial. The court recognized that ***680** the writ of superintending control was a proper method for reviewing a claimed abuse of discretion by the trial judge but affirmed the Court of Appeals' denial of the complaint on the ground that GCR 1963, 711.4 required the writ to be addressed to the first tribunal having competence to hear and act upon it (in that case the circuit court). On the propriety of the use of the writ by the People in these circumstances, however, Chief Justice Brennan said for a unanimous court:
'No argument is made here as to the proper office of superintending control as a means of reviewing the discretion of an examining magistrate. The order of superintending control embraces the functions of the former writ of mandamus. GCR (1963,) 711.3(2).

'Superintending control, like mandamus, lies to require the magistrate to perform a function where the magistrate has a clear legal duty to act.

'The process is not, properly speaking, an appeal. It is rather a whole new lawsuit, with different parties and different purposes. People v. Yeotis is not a criminal case, but is rather an original civil complaint designed to require the defendant municipal judge to perform a clear legal duty.' 383 Mich. 429, 431—432, 175 N.W.2d 750, 751.

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The Supreme Court has by GCR 1963, 711 provided that the Court of Appeals has the power to issue superintending control orders which are in the nature of certiorari, mandamus and prohibition.

This superintending control has nothing to do with the general supervisory superintending control over all courts given to the Supreme Court by art. VI, s 4 of the 1963 Constitution or the supervisory and general control over inferior courts and tribunals within their respective jurisdictions in accordance ***681** with rules of the Supreme Court, given the circuit courts by art. VI, s 13 of the 1963 Constitution.

No general control of inferior courts exists in the Court of Appeals.

Whether this action be viewed in the nature of certiorari, mandamus, or prohibition the writ of superintending control would lie. The writ of certiorari is for review of errors of law and our inquiry is limited to determining 'if the inferior tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law.' In re Fredericks, 285 Mich. 262, 267, 280 N.W. 464, 466 (1938). In Flint Municipal Judge, Supra, we noted that mandamus would lie to require the magistrate to perform a clear legal duty. Here it is contended that the judge acted without jurisdiction and therefore has a clear legal duty to vacate the guilty plea and reinstate the criminal proceedings as filed in the information. The writ of prohibition is a common law remedy designed to prevent excesses of jurisdiction. It is a proper remedy where the court exceeds the bounds of its jurisdiction or acts in a matter not within its jurisdiction. Hudson v. Judge of Superior Court, 42 Mich. 239, 248, 3 N.W. 850, 913 (1879). In this case the facts alleged also support a complaint for a writ ****698** of superintending control in the nature of prohibition.

In People v. Flint Municipal Judge, Supra, the magistrate indisputably had jurisdiction to exercise discretion with respect to the sufficiency of the evidence to bind over the defendant. Without passing on the merits, however, this Court said that the writ of superintending control is a proper method for the People to seek review of the discretion of the examining magistrate.

If the writ may be used to review an exercise of discretion where it is unquestioned that the judge ***682** had the power to exercise some discretion then, A fortiori, the writ may be used to review the action of a lower court when it is claimed that the court lacked the power to exercise Any discretion with respect to the ruling in question.

The Court of Appeals had jurisdiction to entertain the complaint for superintending control for the purpose of determining whether the trial judge acted without jurisdiction or in excess of jurisdiction.[7] Since the cause is now properly before us we retain jurisdiction under our power of superintendence, Const.1963, art. 6, s 4.

II.—THE AUTHORITY OF THE TRIAL JUDGE TO AMEND THE INFORMATION AND ACCEPT A PLEA OVER THE OBJECTION OF THE PROSECUTOR

Whether the trial judge may amend an information and accept a plea Sua sponte and over the objection of the prosecutor raises the question of constitutional separation of powers between the judicial and executive branch.

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At the outset we note that we are not concerned here with the power of a trial judge to permit the amendment of an information where there is no objection by the prosecutor and the defendant waives any necessary arraignment and examination. In addition, because of the trial judge's determination that McBride was 'actually guilty of the higher offense,' we are not concerned with any question of the scope of authorized power under M.C.L.A. s 767.76; ***683** M.S.A. s 28.1016 to amended informations for technical defects or because of variance with the evidence.

The sole question here is whether the trial judge on her own initiative has the power to determine, over the objection of the prosecutor, under which of two admittedly applicable statutes a prosecution will be instituted, where neither statute represents a lesser included offense of the other.

The prosecutor is a constitutional officer whose duties are as provided by law. Const.1963, art. 7, s 4. Lawrence Scudder & Co. v. Emmet County, 288 Mich. 181, 184, 284 N.W. 691 (1939). Schneider v. Shepherd, 192 Mich. 82, 88, 158 N.W. 182 (1916). The conduct of a prosecution on behalf of the People by the prosecutor is an executive act, People v. Dickerson, 164 Mich. 148, 153, 129 N.W. 199 (1910).

We have held in the past that the prosecutor is the chief law enforcement officer of the county and has the right to exercise broad discretion in determining under which of two applicable statutes a prosecution will be instituted. ****699** People v. Lombardo, 301 Mich. 451, 453, 3 N.W.2d 839 (1942); People v. Thrine, 218 Mich. 687, 690, 691, 188 N.W. 405 (1922); People v. Mire, 173 Mich. 357, 364, 138 N.W. 1066 (1912). See also People v. Graves, 31 Mich.App. 635, 636, 188 N.W. 87 (1971); People v. Eineder, 16 Mich.App. 270, 271, 167 N.W.2d 893 (1969); People v. Byrd, 12 Mich.App. 186 (1968) concurring opinion of Levin, J. at 197, particularly footnote 7, 162 N.W.2d 777; People v. Ryan, 11 Mich.App. 559, 561, 161 N.W.2d 754 (1968).

'Acting as prosecutor, judge and jury' is a common description of an unfair and unlawful operation. However innocently and mistakenly, this is what happened in this case. The trial judge assumed the right over the objection of the prosecutor to determine under which of two applicable statutes a prosecution will be instituted. As already indicated such determination is an executive function and a part of ***684** the duties of the prosecutor. For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. Const1963, art. 3, s 2. It also violates our fundamental sense of fair play.

We therefore hold that the trial judge acted without authority in amending the information over the objection of the prosecutor in this case.

It is to be noted that the trial judge in this case apparently thought her authority to amend the information (adding the count of unlawfully driving away the automobile) was justified by the fact that the added offense was, in her opinion, 'lesser included.' Unlawfully driving away the automobile of another in violation of M.C.L.A. s 750.413 is not a lesser offense included in the violation of M.C.L.A. s 257.254 which proscribes possession of a motor vehicle known to be stolen. For an offense to be lesser included it must contain some, but not all of the elements of the higher offense and there must be no additional elements in the 'included' offense which are not a part of the 'higher' offense. The supposed 'lesser' offense here requires proof of driving away the automobile but proof of 'driving away' is not required of the prosecution to secure a conviction of unlawful possession of a motor vehicle known to be stolen. Although related, the two offenses are separate and distinct and the prosecutor has discretion to

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proceed under one or the other or both, if warranted by the facts. People v. Morton, 16 Mich.App. 160, 167 N.W.2d 834 (1969), reversed on other grounds, 384 Mich. 38, 179 N.W.2d 379 (1970); see also People v. Kruper, 340 Mich. 114, 121—122, 64 N.W.2d 629 (1954).

In our holding that the judge here acted without authority we express no opinion on the propriety of ***685** accepting a plea over the objection of the prosecutor where both offenses are charged by the prosecutor, nor do we express an opinion on the propriety of accepting a plea over the objection of the prosecutor to an offense which Is a lesser included offense.

The plea of guilty to M.C.L.A. s 750.413; M.S.A. s 28.645 is annulled and the sentence imposed pursuant to that plea is vacated. The cause is remanded to the trial court for proceedings upon the information as filed by the prosecutor on July 13, 1970.

T. M. KAVANAGH, C.J., and BLACK, ADAMS, BRENNAN, T. G. KAVANAGH and SWANSON, JJ., concur.

All Citations

386 Mich. 672, 194 N.W.2d 693

Footnotes

1 M.C.L.A. s 257.254 provides in pertinent part:
'Sec. 254. Any person who . . . with intent to procure or pass title to a motor vehicle which he knows or has reason to believe has been stolen, shall receive or transfer possession of the same from or to another, or who shall have in his possession any motor vehicle which he knows or has reason to believe has been stolen, . . . shall be deemed guilty of a felony and upon conviction shall be punished by a fine of not more than $5,000.00 or by imprisonment . . . for not more than 10 years . . ..'
In People v. Morton, 384 Mich. 38, 179 N.W.2d 379 (1970) we held that a conviction for possession of a vehicle known to be stolen requires proof of possession with intent to fraudulently transfer title.

2 M.C.L.A. s 750.413 provides in pertinent part:
'Sec. 413. Taking Possession of and Driving Away a Motor Vehicle—Any person who shall, wilfully and without authority, take possession of and drive or take away . . . any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years.'

3 M.C.L.A. s 770.12 provides for limited situations in which a writ of error, an 'appeal,' may be brought by the People direct to the Supreme Court. An appeal may be brought because of (a) a decision quashing an information because of alleged invalidity of a statute on which it is based, (b) from a decision staying a judgment of conviction for insufficiency of the indictment because of the invalidity of the statute on which it was based, or (c) from a decision sustaining a special plea in bar before the defendant has been placed in jeopardy.

4 This case recognized that the writ of superintending control '. . . must be viewed as an appeal in the nature of Certiorari. . . . The scope of review upon such an appeal 'is limited to determining if

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the inferior tribunal, upon the record made, had jurisdiction, whether or not it exceeded that jurisdiction and proceeded according to law'. In re Fredericks (1938), 285 Mich. 262, 267, 280 N.W. 464, 466.

FN* * *

'The fact that the state may not appeal in a criminal case does not preclude the issuance of a writ of Certiorari (superintending control) by an appellate court in favor of the state in a criminal case to determine whether an inferior tribunal is acting without jurisdiction, or in excess of jurisdiction. People v. Price, Supra (People v. Price, 23 Mich.App. 663, 179 N.W.2d 177). See also, State v. Coleman (1937), 58 R.I. 6, 190 A. 791, 109 A.L.R. 787 (and annotation).' 27 Mich.App. 251, 253—254, 183 N.W.2d 333, 335 (1970).

In the Wayne County Prosecutor v. Recorder's Court Judge case, the Court of Appeals held that the trial court had jurisdiction and that the writ did not lie.

5 This case also does not present any question of the right of the People to seek leave to appeal from an adverse decision of the Court of Appeals. On numerous occasions we have granted leave under those circumstances. People v. Earegood, 383 Mich. 82, 173 N.W.2d 205 (1970); People v. Paille #2, 383 Mich. 621, 178 N.W.2d 465 (1970); People v. Brundage, 381 Mich. 399, 162 N.W.2d 659 (1968); People v. Hobdy, 380 Mich. 686, 158 N.W.2d 392 (1968).

6 GCR 1963, 711.3:

'Writs Superseded by Order of Superintending Control. The following writs are superseded and an order of superintending control shall be used in their place:

'(1) Certiorari;

'(2) Mandamus, when directed to an inferior tribunal or officer thereof; and

'(3) Prohibition.'

7 See generally, People v. Brundage, 381 Mich. 399, 403, 162 N.W.2d 659 (1968); In re Huff, 352 Mich. 402, 417—418, 91 N.W.2d 613 (1958); Recorder's Court Judge v. Wayne Circuit Judge, 347 Mich. 567, 572, 80 N.W.2d 481 (1957); People v. Karcher, 322 Mich. 158, 162—163, 33 N.W.2d 744 (1948); Second National Bank & Trust Co. v. Wayne Circuit Judge, 321 Mich. 28, 45, 32 N.W.2d 34 (1948); Wayne County Prosecutor v. Wayne Circuit Judge, 27 Mich.App. 257, 258, 183 N.W.2d 336 (1970); Wayne County Prosecuting Atty. v. Recorder's Court Judge, 27 Mich.App. 419, 421, 183 N.W.2d 577 (1970); People v. Recorder's Judge, 23 Mich.App. 126, 178 N.W.2d 146 (1970); People v. Price, 23 Mich.App. 663, 667, 671, 179 N.W.2d 177 (1970).

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379 Mich. 69
Supreme Court of Michigan.

In the Matter of Gus COLACASIDES.

No. 5.
|
April 19, 1967.

Synopsis
Prosecution for contempt. The Circuit Court for the County of Wayne, Charles Kaufman, J., entered a judgment of conviction of contempt and there was an appeal on leave granted. The Supreme Court, Souris and O'Hara, JJ., held, inter alia, testimony taken from witness who appeared before one-man grand jury and who was ordered to give testimony on promise of immunity from prosecution could not be used in any pending prosecutions against that witness.

Affirmed.

Attorneys and Law Firms

****3** Joseph W. ***74** Louisell and Ivan E. Barris, Detroit, for defendant-appellant.

Frank J. Kelley, Atty. Gen., Robert A. Derengoski, Sol. Gen., by Robert C. Goussy, Asst. Atty. Gen., Lansing, for appellee.

Before the Entire Bench.

Opinion

SOURIS and O'HARA, Justices.

This is an appeal on leave granted by this Court from the circuit court for Wayne county, by-passing the Court of Appeals pursuant to GCR 1963, 852.*

Appellant was found guilty of contempt, by the Honorable Charles Kaufman, a judge of the Wayne circuit court, for refusal to testify in a one-man grand jury proceeding presided over by the Honorable George E. Bowles, also a judge of the Wayne circuit court. Judge Kaufman sentenced appellant to six months' confinement in the Detroit house of correction, or until the expiration of the above designated grand jury, or until such time as he should purge himself of such contempt by answering the questions addressed to him in the grand jury proceeding. Upon his initial refusal to answer the questions, appellant was ordered so to do under a grant of immunity by the grand juror. The grant of immunity was from all subsequent prosecution for any offense concerning which any responsive answer to such questions may

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have tended to incriminate appellant.

Appellant challenges his conviction for contempt on multiple grounds. He contends that the one-man grand jury proceeding from which his contempt conviction resulted is an illegal extension of a prior one-man grand jury beyond the one-year period allowed ***75** such juries by statute and that his contempt conviction, therefore, is void. He also contends that the immunity granted him is not coextensive with his privilege against self-incrimination guaranteed by the Fifth Amendment to the United States Constitution; that, furthermore, the State failed to demonstrate to him the nature and extent of the immunity granted; and that, therefore, his contempt conviction for refusing to answer the grand juror's questions violates his rights guaranteed him by the Fifth Amendment. Finally, he urges that his contempt conviction is void because it arose out of proceedings conducted under our one-man grand jury statute which he claims violates 'the doctrine of separation of powers', by which we presume he means that it violates Article III, s 2, Constitution of 1963 and, as well, that it violates the due process clause of the Fourteenth Amendment to the United States Constitution.

The questions put to him by the grand juror all relate to so-called 'little black books' seized in the appellant's restaurant-tavern. In it are entries purported to be in the handwriting of appellant and allegedly showing payments of money to Detroit police officers presumably as bribes to induce the officers to refrain from enforcing the law as to defendant.

We conclude that the Bowles grand jury is not an illegal extension of a preceding ****4** one-man grand jury; that the immunity granted appellant is as broad as is required by the Fifth Amendment's guarantee against self-incrimination; that the State performed its obligation of advising appellant of its grant of immunity to him; that the one-man grand jury statute does not violate either our State Constitution's separation of powers provision or the Fourteenth Amendment's due process clause; and that, therefore, the appellant's contempt conviction for refusal ***76** to answer the grand juror's questions must be affirmed.

I.

Appellant contends that Grand Juror Bowles exceeded the permissible scope of his inquiry when he put questions to appellant relating to the 'little black books' seized by a previous one-man grand jury presided over by the Honorable Edward S. Piggins, another of the judges of the Wayne circuit court, and that appellant's refusal to answer those questions, therefore, was not conduct punishable as contempt. His theory is that the statute, C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944), imposes a 12-month time limit upon grand juror inquiry into the subject matter of any granted petition for such inquiry and that no subsequent grand juror thereafter can investigate the same subject matter. The pertinent portion of the cited statute, added by P.A.1951, No. 276, reads as follows:

> 'No inquiry or proceeding hereunder shall continue longer than 6 months unless extended by specific order of the said judge or his successor for an additional period not to exceed 6 months.'

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The record before us discloses that while Grand Juror Piggins was conducting his inquiry certain documents came into his possession on the basis of which this appellant and another person were indicted for conspiracy to bribe a Detroit police officer. Judge Piggins served as grand juror for two successive six-month periods ending in August of 1966. Shortly before expiration of the Piggins grand jury, the judges of the Wayne circuit court granted a petition by the Attorney General for another Wayne county one-man grand jury inquiry and Judge Bowles thereafter, on September 8, 1966, was designated by his colleagues to conduct it. On ***77** January 6, 1967, upon Judge Bowles' petition, this Court ordered transferred to Judge Bowles certain of the records of the Piggins grand jury which had been filed with the Clerk of this Court pursuant to C.L.S.1961, s 767.6a (Stat.Ann.1954 Rev. s 28.946(1)). Our order of January 6, 1967 is set forth, in full, in the margin.[1]

****5** Later in January, 1967, appellant was subpoenaed to appear before Grand Juror Bowles and was asked the questions for his refusal to answer which he was cited and subsequently convicted of contempt. The questions related to certain documents transferred by our order to the Bowles grand jury from those deposited with us by the Piggins grand jury. These documents were the evidentiary basis upon which ***78** appellant had been indicted by Grand Juror Piggins for conspiracy to bribe a police officer. Appellant has not yet been tried on this indictment.

We do not accept as correct appellant's construction of the above-quoted provision of the statute, that is to say, that no grand juror may investigate the subject matter of a prior one-man grand jury. The quoted language added to the statute by P.A.1951, No. 276, does not indicate intrinsically the Legislature's purpose, nor has our attention been directed to anything extrinsic of the statutory amendatory language from which we can discern that legislative purpose. We must determine the Legislature's meaning from the statutory language alone, therefore. While it may be conceded that the language is not literally inconsistent with the construction put upon it by appellant, that is not the only construction consistent with its terms, nor is it the construction we believe most consistent with the permissible objectives sought to be achieved by the one-man grand jury law.

We construe the above quoted statutory language to mean that no judicial officer designated to serve as a one-man grand juror to investigate specified allegations of crime may do so for more than two consecutive six-month periods. By this provision we believe the Legislature manifested its intent to limit the time within which a particular judge could exercise the extraordinary powers of a grand juror. That a grand juror's powers are extraordinary, for a judicial officer, will be considered subsequently in this opinion. That the Legislature was aware of the possible political consequences of such power is manifest in that part of C.L.1948, s 767.3, as amended, P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943) quoted in the margin.[2] We perceive no rational legislative ***79** purpose in foreclosing one-man grand jury inquiry into any particular criminal activity beyond the period of one year, but we do perceive a rational purpose, manifested by the above-quoted provision from P.A.1951, No. 276, and that portion of C.L.1948, s 767.3, as amended, quoted in the margin, to limit to one year the exercise by any particular judge of the extraordinary powers of inquiry authorized by our one-man grand jury law. Thus construed, the time limitation of C.L.S.1961, s 767.4 is a time limitation upon the judicial officer performing duties as a one-man grand juror, and not a time limitation upon grand juror inquiry into a specific subject of criminal activity. So construed, the statute would not preclude a grand juror's investigation of the subject matter investigated by a prior grand juror, provided, of course, that the subject of inquiry is within the proper scope of inquiry of the second grand juror.

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Because we construe the time limitation as affecting the grand juror, rather than the inquiry, another issue is presented: may one grand juror utilize the evidence produced by a predecessor grand juror? ****6** Pertinent to this issue are the so-called secrecy provisions of C.L.1948, s 767.3, as amended (Stat.Ann.1965 Cum.Supp. s 28.943), C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944), and C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946), the pertinent provisions of which are italicized in the margin.[3] ***80** We construe the statutory provisions ****7** italicized in the margin to permit access by one grand juror to ***81** the records of a prior grand juror upon order of this Court, but subject to the secrecy provisions of C.L.S.1961, s 767.4 which attach to all information or evidence coming to the attention of a grand juror's inquiry. We perceive no reason for requiring a grand juror to retrace the path of a predecessor grand juror, considering the availability of the desired evidence and the convenience of the witnesses.

On the foregoing basis, this Court entered its order of January 6, 1967.[4] On the basis of tangible evidence obtained initially by the Piggins grand jury, Grand Juror Bowles asked certain questions appellant refused to answer notwithstanding the immunity granted to him. We conclude that appellant's conviction for contempt for refusal to answer is not vulnerable to attack because predicated upon evidence obtained in the first instance by another grand juror.

II.

A.

Appellant's principal argument on this appeal is that the immunity granted him, to induce his answering the questions put to him, is not coextensive with the Fifth Amendment to the United States Constitution, ***82** and therefore, that he could not be convicted legally of contempt for invoking the Fifth Amendment's privilege against self-incrimination. He insists that the immunity granted was not coextensive with his Fifth Amendment privilege because it failed to specify that this immunity extended to a prosecution presently pending in the recorder's court of the city of Detroit; to a possible prosecution on a charge which was theretofore dismissed as to appellant on preliminary examination, and as to which he was not in jeopardy; and to possible forfeiture proceedings aimed at revoking his restaurant and alcoholic beverage licenses. The prosecutions in recorder's court are for conspiracy to bribe and bribery of Detroit city police officers.

The order of immunity granted by Grand Juror Bowles reads, in pertinent part, as follows:

> 'IT IS THEREFORE ORDERED that said GUS COLACASIDES be and he hereby is directed to forthwith responsively answer said questions and all related questions which may hereafter be put to said witness, and, in accordance with said statute, this Court

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> does hereby grant immunity to said GUS COLACASIDES from all subsequent prosecution for any offense concerning which any responsive answer to such questions may have tended to incriminate him.'

Appellant argues that the phrase 'subsequent prosecution' is too narrow in view of the scope of the self-incrimination rights granted by the State[5] and Federal constitutions. The People counter by arguing that In re Watson (1940), 293 Mich. 263, 291 N.W. 652, a case with facts paralleling this Colacasides case, ***83** settles the issue in favor of the validity of the grant of immunity.

Looking to the language of the order, one notes that immunity is granted 'in accordance ****8** with said statute.' The statute earlier in the order was described as 'the statute in such case made and provided', which means C.L.S.1961, s 767.6 (Stat.Ann.1954, Rev. s 28.946), set forth in the margin, supra, at p. 6

Appellant does not challenge the validity of section 767.6; rather, his attack is upon the immunity order that was issued pursuant to the statutory provision. That order, however, must be read in the light of the statute as it, in turn, was interpreted by this Court in Watson, supra.

In Watson, the Court used broad language in finding the one-man grand jury immunity provision constitutional. Said the Court:

'The grant of immunity from crime is a large responsibility. The legislature, acting in the public interest for the detection and suppression of crime, has lodged this extraordinary power in the discretion of the magistrate, and the immunity granted extends to any prosecution by the State for any offenses that may be disclosed by the answers of the witness or for any offenses to which such testimony may lead.' (p. 277, 291 N.W. p. 658).

Earlier the Court had said:

'The witness shall not 'thereafter be prosecuted for Any offense concerning which such answers may have Tended to incriminate him'; and we construe the statute to afford a protection against prosecution by the State As broad as the Constitutional provision securing the privilege against self-incrimination.' (p. 276, 291 N.W. p. 658, emphasis added).

***84** Although the present immunity statute differs from the one quoted in Watson, the present statute contains parallel language:

> '* * * No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him * * *.'

Watson, then, gives C.L.S.1961, s 767.6 as broad a scope as the Federal privilege against self-incrimination. See Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653. We conclude that the following statement, from Malloy, is a principle of law binding upon us:

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'The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement-the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining (Twining v. New Jersey (1908), 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97), for such silence.' 378 U.S. 1, at p. 8, 84 S.Ct. at p. 1493.

and that Watson gives Michigan's immunity statute a scope as broad as the Malloy decision requires.

Thus we conclude that Watson, instead of being a 'judicial relic', as appellant contends, construes section 767.6 to be consistent with our Federal and State constitutional requirements. The immunity order explicitly says the immunity grant is in accordance with the statute, and the statute, as interpreted by Watson, gives immunity coextensive with the privilege. The statute, and the order issued thereunder, thus are constitutionally valid. We need determine only whether the privilege and, thus, the granted immunity apply to preclude use of the evidence sought from appellant in criminal proceedings now pending and in any subsequent license forfeiture proceedings.

***85** The Watson case has specific application to the pending prosecution, for the defendant in that case was already a defendant in a criminal case when the grand juror called upon him for testimony. In Watson the Court referred to ****9** In re Kittle, 180 F. 946 (1910) as a case which 'properly announces the rule.' The following language from Judge Learned Hand's opinion in Kittle supports our conclusion that testimony taken from appellant by the grand juror may not be used in the pending prosecution:

'* * * I shall assume that the inquiry is of the subject matter of some crime, and, indeed, of the crime laid in the existing indictment. When so questioned, the witness must answer * * *. And, when given, his answer will thereafter protect him from further prosecution. It will be a good bar to this very pending prosecution, if it be pertinent to the subject-matter.' (p. 947, emphasis added.)

The Watson decision adopted the foregoing language as its own, and its application to the present situation means that matter obtained by the grand juror would not be useable-either by itself or as a lead-in the pending prosecution. Appellant's fears concerning the pending case against him thus are unfounded-at least insofar as they are based on information the grand juror has requested.

The Watson case, by its express terms, applied to the pending prosecution against the defendant Watson. We do not believe we are obligated to anticipate that the judge in the pending prosecution will incorrectly apply the law of that case, and we decline to do so. The grand juror, in granting immunity, is not required to list every proceeding covered by the immunity for the rather obvious reason that the statute and the Watson case, by their terms, apply to prosecution for Any offense, directly or indirectly ***86** growing out of any testimony given by him. The prosecution which appellant complains is not covered by the grant of immunity is 'pending.' Since it is 'pending' it has not taken place. Since it has not taken place it can be nothing but 'subsequent' to the proceedings before the grand juror. The grant of immunity extended to it.

The next question is that of the use of the compelled answers in any possible future license forfeiture proceedings. The following language of the revised judicature act, presumably based upon the Federal

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and State privileges against self-incrimination, is in point:
'Any competent witness in a cause shall not be excused from answering a question relevant to the matter in issue, on the ground merely that the answer to such question may establish, or tend to establish, that such witness owes a debt, or is otherwise subject to a civil suit; but this provision shall not be construed to require a witness to give any answer which will have a tendency to accuse himself of any crime or misdemeanor, or to expose him to any penalty or forfeiture, nor in any respect to vary or alter any other rule respecting the examination of witnesses.' C.L.S.1961, s 600.2154 (Stat.Ann.1962 Rev. s 27A.2154).

This statute states the Legislature's understanding of the scope of the privilege against self-incrimination. Although the statute may not be all-inclusive, according to constitutional standards, it expressly prohibits a witness from being exposed to a forfeiture if he is required to give testimony. We draw two conclusions from the provision: first, that a license forfeiture may not be imposed because of testimony or leads from such testimony if appellant is required to testify despite his assertion of the privilege against self-incrimination; and, second, that the immunity granted under section 767.6 must ***87** be at least as broad as the judicature act provision, thus precluding a forfeiture of license after immunity has been granted, that is, a forfeiture ordered solely on the basis of information or leads gained by the grand juror after such grant of immunity.

B.

Another aspect of appellant's immunity argument merits our attention. He ****10** claims that before a witness who has been granted immunity can be convicted of contempt for refusal to answer questions put to him, he must be apprised of 'the nature and extent of said immunity.' For this proposition appellant relies upon Raley v. State of Ohio (1959), 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344, and Stevens v. Marks (1966), 383 U.S. 234, 86 S.Ct. 788, 15 L.Ed.2d 724. He concludes that because he was not advised by the grand juror whether the grant of immunity extended to the currently pending criminal prosecution against him and to alcoholic beverage license forfeiture proceedings, his contempt conviction was invalid.

Neither Raley nor Stevens stands for the proposition for which appellant cites them. In Raley, the witnesses were not advised at a legislative hearing that a state statute granted them immunity. In Stevens, investigators tried to hold the witness to a waiver of immunity. In both cases the Supreme Court reversed contempt convictions, not because, as appellant asserts, the witnesses were not advised of 'the nature and extent' of the immunity granted them but, rather, because the witnesses were left in doubt as to whether they had any immunity whatsoever. In this case of Colacasides, on the other hand, appellant was not only advised orally that he was granted immunity but, as well, and pursuant to ***88** statutory requirement,[6] a copy of the order granting immunity was given to appellant who, at all times, was represented by counsel. Nor does appellant deny that he was advised of the grant of immunity. His attack on this point is that the grand juror failed to specify exactly what lies within the scope of the immunity granted. Furthermore, he claims that Federal requirements are not met by our determination

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now of the scope of the immunity granted but, instead, that its scope should have been 'demonstrated' to him by the grand juror at the time of the grant of immunity.

As authority for this proposition he relies on the following language in footnote 11 in Stevens:

> 'The suggestion that we should remand the case to the New York courts for a finding of whether or not petitioner was misled is, we think, wide of the mark. A State must affirmatively demonstrate to the witness that a valid immunity from prosecution is his before it may hold him in contempt for refusing to answer questions that would otherwise be incriminating. Whether the State has met its burden must be measured at the time of the alleged contempt. A declaration that there was a valid immunity uttered for the first time on appeal would come too late.'

We think appellant misreads Stevens. Of course the 'burden' must be measured at the time of the alleged contempt. But the 'burden' the United States Supreme Court alluded to in Stevens was whether any grant of immunity was in fact made, not the legal construction of its scope, nor the specific proceedings to which it applied. These were and remain, and of necessity by the nature of things have to be, matters of judicial construction. We do ***89** not interpret Stevens to mean that a grand jury witness can vitiate the express terms of the immunity provision of the statute by a subjective declaration that the grand juror did not 'demonstrate' to his satisfaction that the immunity offered extended to a specific proceeding then in being or to some possible proceeding in the future. The argument, while ingenious, is not supported by the language relied upon. Neither Raley nor Stevens requires more than was done here-merely that the grand juror advise the witness of the existence of immunity if immunity be, in fact, granted.

III.

Finally, we come to appellant's contentions that this State's one-man grand jury law violates the separation of powers ****11** doctrine, as set forth in Article III, s 2, Constitution of 1963, and the due process clause of the Fourteenth Amendment.

A.

In this country it is not normally the function of a judge to investigate the occurrence of crime. That function normally is performed by the executive branch of government as part of its duty to enforce the laws. Experience has demonstrated, however, that regularly constituted law enforcement agencies sometimes are unable effectively and lawfully to enforce the laws, particularly with respect to corrupt

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conduct by officers of government and conspiratorial criminal activity on an organized and continuing basis. Our experience also has demonstrated that the common law 23-man grand jury is unwieldy and ineffective for the investigation of such crimes in a modern, industrialized and mobile society.[7] It has ***90** demonstrated also that corruption in government and organized crime are susceptible to discovery and prosecution if the investigative body has the power to compel some participants therein to testify by enforcing attendance of witnesses by subpoena and granting immunity from prosecution, but police agencies in this country do not possess such extraordinary power. The ineffectiveness of the common law grand jury considered, and absent the power lawfully to compel testimony, police agencies are thwarted too frequently, for society's safety, in their efforts to investigate such criminal activity. Traditionally in this country, such extraordinary power has been intrusted only to judicial officers. Absent constitutional authority therefor, such essentially judicial power cannot be granted validly to police agencies without violating the separation of powers provision of our Constitution. Art. III, s 2, Const. of 1963.

This dilemma has been resolved in this State by its unique one-man grand jury, comprised of a judicial officer who can properly exercise the subpoena power and the power to grant immunity in order to compel testimony. Appellant, however, contends that a judicial officer cannot also perform investigative duties without violating the separation of powers mandate of Art. III, s 2 of our Constitution of 1963.[8] That constitutional provision, however, contains a significant exception, 'except as expressly provided in this constitution.' In Art. VI, s 29,[9] we find ***91** that circuit judges are among those judicial officers granted the powers of conservators of the peace. If conservators of the peace possessed the powers now exercised by circuit judges as one-man grand jurors, Whether executive or judicial in nature, the exercise of such powers would not violate Art. III, s 2, either because they are judicial in nature or because, if executive, they are expressly authorized by Art. VI, s 29 and, thus, within the exception stated in Art. III, s 2. We find, for reasons to be stated, that conservators of the peace at common law possessed the power to investigate crime for the purpose of apprehending offenders. We hold, therefore, that circuit judges now possess such investigative power, as conservators of the ****12** peace, and their exercise of such power in the performance of duties as one-man grand jurors does not violate Art. III, s 2 of our Constitution of 1963.

The nature of the conservator's power was considered by this Court in In re Slattery (1945), 310 Mich. 458, 17 N.W.2d 251, in another unsuccessful challenge to the constitutionality of our one-man grand jury law. A few years earlier, in In re Sanderson (1939), 289 Mich. 165, 286 N.W. 198, the Court traced the historical development of the office of conservator of the peace from its origin in England to its ultimate merger in the office of justice of the peace. Little more need be added to what was written in Slattery and Sanderson in support of the conclusions we have reached, conclusions which are consistent with those to be found in those two cases.

Taswell-Langmead's English Constitutional History, 11th ed. by Theodore F. T. Plucknett, summarizes this historical development:

***92** 'Conservators of the peace. In the appointment of knights to receive the oaths may probably be discerned the germ of the office of conservator, later justice, of the peace. Custodes pacis were assigned in 1252, 1253 and 1264 and from 1285 were closely associated with the enforcement of the Statute of Winchester. They afterwards appear to have been occasionally chosen by the landholders of the county, but were finally appointed to their office by the royal writ or commission. Their constant function was to

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take indictments of felonies and misdemeanors, and to hold the accused until trial by royal judges. In 1329, 1332, 1338, and from 1350 to 1364 they were given powers to try their prisoners, and this became permanent in 1368. Their early functions of supervising the militia were soon transferred to separate commissions of array, but after the Black Death they frequently dealt with the new labour and price-control legislation. The local courts paled before them, the sheriff became their servant, and parliament (where many J.P.s sat in the House of Commons) constantly confided new and important tasks to them.' (p. 126).

'* * * The principal organ (of county government) in fact had come to be the justices of the peace. Their early history has already been mentioned; as time went on their duties were immensely increased by statute, not only in the sphere of criminal administration but also in that of poor law and general local government. A vast and confused mass of legislation which defies analysis conferred wide and very miscellaneous powers.' (Pp. 685, 686).

Another historian, discussing Criminal Jurisdiction in England, reports these conclusions about the office of justice of the peace:
'The remedy was found in the office of justice of the peace. This office has late twelfth-century origins, but the important steps were taken in the fourteenth century. A statute provided that 'worthy' men were to be appointed to keep the peace ***93** and hear and determine felonies. Further statutes enacted that they were to hold their sessions four times a year. Before these statutes these worthy men were more conservators of the peace than justices; the duty of hearing and determining felonies made them 'justices of the peace', or more simply 'justices'.

'* * * The powers of justices were extended somewhat in the fifteenth century, and increased greatly in the sixteenth century. * * * Thirdly, the justices were instructed to hold preliminary inquiries into allegations of crime that might lead to trial at Assizes or Quarter Sessions. This was in the nature of police powers in 'getting up' a case, not really a judicial activity and suitable only for a society that lacked an adequate police force. No substantial change took place until the middle of the ****13** nineteenth century.' The Machinery of Justice in England, R. M. Jackson, LLD, 4th Ed.1964; at pp. 92-93.

History adds weight to the reasoning of Justice Butzel's opinion in Slattery. Conservators of the peace, historically, were empowered to make investigations and 'get up' a case. Circuit judges, possessing the conservator's powers by virtue of Art. VI, s 29, therefore, do no violence to our separation of powers doctrine, Art. III, s 2, by exercising such powers of investigation as one-man grand jurors.

While we recognize that in Slattery this Court said that a judge conducting a one-man grand jury proceeding acts in a judicial capacity, 310 Mich. at 467, 17 N.W.2d 251, we do not believe it necessary to re-examine that question in this case. We mention the matter only because appellant asserts, without citing any supporting authority, that if grand jury proceedings are not judicial, appellant cannot be held in contempt. Whether a circuit judge acts in a judicial capacity or in an executive capacity as grand juror, there is no constitutional bar to the Legislature's ***94** providing by law, as ours has, that a witness who fails to appear or to answer questions asked of him may be punished for contempt, The contempt proceedings to be conducted in public by another judge and not by the grand juror. Such procedure customarily is followed in enforcing by contempt process refusals to obey lawful orders of disclosure

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made by agencies of the executive branch of government. See Penfield Company of California v. Securities and Exchange Commission (1947), 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117. See, also, Interstate Commerce Commission v. Brimson (1894), 154 U.S. 447, 485-486, 14 S.Ct. 1125, 38 L.Ed. 1047.

The debates of the recent constitutional convention which produced our Constitution of 1963 disclose that the delegates considered omitting from the new Constitution all reference to the conservators of the peace. Indeed, the convention's judiciary committee so recommended, but when it was brought to the delegates' attention in debate that omission of the grant to judges of conservator's powers might affect adversely the validity of our one-man grand jury law, the delegates voted to include in their final proposal the language which now appears as Art. VI, s 29 of the Constitution of 1963. The official record of the convention's proceedings reports the following introductory comment on the 'conservator' proposal by the chairman of the convention's judiciary committee:

'MR. DANHOF: Mr. President, members of the convention, some time back, we had an exclusion report to strike the provision in the 1908 constitution which made the supreme court judges, the circuit judges and the justices of the peace conservators of the peace within their respective jurisdiction. I might state at the time we considered this matter, none of the attorneys nor the circuit judges serving on my committee could see any particular ***95** advantage to the section, nor did research indicate that there was any reason that it be retained. The governor's advisory committee likewise recommended its removal. But we received a letter from Detroit from Circuit Judge Joseph Sullivan in which he brought to our attention a case involving the validity of the one man grand jury system in the state of Michigan.* In this particular case, the question was on the validity of the one man grand jury and Justice Butzel, writing the majority opinion of the court, pointed out the difference between Michigan and New York, and the reason why Michigan could sustain a one man grand jury system and why New York could not. And one of the items which Justice Butzel referred to constantly in about 3 pages of his opinion was the fact that circuit judges by the Constitution of 1908 were authorized to be conservators of the peace and that their duties and functions sitting ****14** as a grand jury would be within this particular section. Now, the odd part of it is that he went on to state that even in spite of this provision, he did not feel that sitting as a one man grand jury was a non judicial function. But in going over it with Mr. Joiner and other members of the staff, and in talking with Mr. Ford, we came to this conclusion: that we should not endanger the one man grand jury system; that if it is to be abolished, it should be abolished by the agency and the body which created the one man grand jury system, namely, the legislature, and that we would not be worried if Justice Butzel had not spent approximately 3 pages of the opinion pointing out that Michigan could have a one man grand jury system while New York could not because we had this provision making the judges conservators of the peace.

'Now, we have amended it slightly to read supreme court, court of appeals and circuit judges and other judges as provided by law, so that the ***96** legislature, if it deems, in its wisdom, to have the judges of courts of limited jurisdiction be conservators of the peace, it can so do. The committee considered this at the time that it was brought before the committee. We had about 14 people. We got 10 votes in favor. Eleven are needed on a committee proposal. I did not get the 11. However, Mr. Ford was absent. He joined with me in this particular amendment. We would urge the adoption thereof.' 2 Constitutional Convention 1961 Record, p. 2703.

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In addition to the chairman of the convention's judiciary committee, others expressed the view that if the State's one-man grand jury system were to be changed, it should be accomplished by the Legislature. The convention then approved the 'conservator' clause by a 58-55 margin. Shortly afterward, a delegate specially proposed a clause to be added to the article on the judiciary, to provide as follows:

> 'One man grand juries are hereby abolished.'

The proposal was defeated, 73-32. 2 Constitutional Convention 1961 Record, pp. 2709-2710.

The significance we place upon the foregoing actions of the constitutional convention is that the delegates correctly regarded the 'conservator' clause important to the constitutional validity of our one-man grand jury law. When the convention and, thereafter, the people of this State approved the document that was to become the Constitution of 1963, including both the 'separation of powers' clause (Art. III, s 2) and the 'conservator' clause (Art. VI, s 29), they declared in legal effect that a judge exercising the powers of a conservator of the peace was not thereby violating the separation of powers clause.

***97** B.

Relying generally upon Mr. Justice Rutledge's concurring opinion in Re Oliver (1949), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed 682, appellant invites our reconsideration of the constitutionality of Michigan's one-man grand jury law. It is his claim that our law is incompatible with current concepts of due process, citing recent United States Supreme Court decisions[10] applying guarantees of the Fourth, Fifth and Sixth Amendments of the United States Constitution to the States by incorporation into the due process clause of the Fourteenth Amendment. In Oliver a contempt conviction under the then Mighigan grand jury statute was reversed, but not on the ground contended for by Mr. Justice Rutledge. In ****15** short, the Rutledge opinion suggests the unconstitutionality of the statute and postulates that the majority opinion in that case demonstrated how far the Federal Supreme Court (p. 280, 68 S.Ct. p. 511)
'* * * departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights. In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, 'in spite of the absolutism of continental governments,' their 'ideas and processes of civil justice' in place of the time-tried 'principles and institutions of the common law' perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in this case. * * *'

***98** After paying tribute to Mr. Justice Rutledge's foresight, appellant then urges that the quoted language is (or at least should be) considered the present view (though not yet expressed) of the present United States Supreme Court. This conclusion, it is urged, can be reached by a process of judicial

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osmosis. While acknowledging that the law as originally enacted, in 1917, has been amended from time to time to correct potential evils disclosed by court decisions, appellant contends that the law still reposes in the one-man grand jury such 'awful authority' that we should strike it down as violative of our current concepts of due process.

Judicial declarations of statutory unconstitutionality we think should be made of sterner stuff. We cannot, by the suggested process, strike down a presumptively constitutional legislative act. The fact is that the one-man grand jury law, as it appears on our statute books today, is very much different from that which heretofore has been reviewed for constitutional validity by this Court and by the United States Supreme Court in Re Oliver, supra.

Today, a witness called before the grand juror is entitled to the presence and assistance of counsel in the room where he is being examined. C.L.1948, s 767.3, as amended by P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943). The grand juror no longer may act as the examining magistrate at a hearing on a complaint or indictment resulting from the inquiry,[11] nor may he hear any motions to dismiss or quash any such complaint or indictment; he may not hear any charge of contempt arising out of the inquiry,[12] except for neglect or refusal ***99** to appear in response to a summons or subpoena issued by him; and he may not preside at a trial resulting from the inquiry. C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944). No longer does the statute permit a grand juror to search out criminal conduct generally[13] but, instead, it requires the order authorizing the inquiry, and the complaint upon which such order is based, to 'be specific to common intent of the scope of the inquiry.' C.L.1948, s 767.3, as amended by P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943). Moreover, to forestall abuse of witnesses by grand jury staff personnel, the statute now prohibits the taking of any testimony in the absence of the grand juror and it requires that, upon arrival of a witness in response to a subpoena, the grand juror be ****16** notified thereof forthwith and that he forthwith take the witness' testimony. C.L.1948, s 767.3, as amended by P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943). The statute, despite an early interpretation,[14] has permitted the grant of immunity to a witness who invokes his privilege against self-incrimination and the scope of the immunity granted, as we have noted above, is as broad as the privilege itself. C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946). Finally, to reduce the risk of unwarranted damages to the reputations of witnesses appearing before the grand juror, as well as to enhance the likelihood of the inquiry's success, proceedings before the grand juror are prohibited from disclosure by any person participating therein as an official or as a witness or counsel for a witness, except when necessary in judicial proceedings or in disciplinary proceedings against an attorney, and violation of such requirement ***100** of secrecy constitutes a misdemeanor punishable by fine and imprisonment. C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944).[15] The statute specifically provides that the transcript and record as to any witness be made available to him when relevant ***101** to any appeal or other judicial proceeding. C.L.S.1961, s 767.6a (Stat.Ann.1954 Rev. s 28.946(1)).

However deficient this State's one-man grand jury statute once may have been, when measured against now recognized standards of due process, appellant has failed to persuade us that, as now written, it denies due process.

****17** We find the present statute meets all of the requirements of the Michigan Constitution of 1963 and the Constitution of the United States. No rights of appellant guaranteed thereby have been denied him. The judgment of contempt entered by the Wayne circuit court and the sentence imposed pursuant thereto are affirmed. No costs, constitutional issues being involved.

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DETHMERS, C.J., and BLACK and BRENNAN, JJ., concurred with SOURIS and O'HARA, JJ.

ADAMS, Justice.

I join in the opinion of Justices Souris and O'Hara except for Section III-A of said opinion. As to the question of separation of powers, I believe that the decision of this Court in In re Slattery (1945), 310 Mich. 458, 17 N.W.2d 251, that a judge conducting a one-man grand jury proceeding acts in a judicial capacity is controlling and disposes of this question.

KELLY, J., concurred with ADAMS, J.

KAVANAGH, Justice.

I concur in the result reached in the opinion of Justices Souris and O'Hara, except that I limit such concurrence with reference to the separation of powers question to the decision of this Court in In re Slattery, 310 Mich. 458, 17 N.W.2d 251, which held that a judge conducting a one-man grand jury proceeding acts in a judicial capacity.

All Citations

379 Mich. 69, 150 N.W.2d 1

Footnotes

* See In re Colacasides (On Application for Bail), 6 Mich.App. 298, 148 N.W.2d 898.

1 'In the Matter of the Petition of George E. Bowles, Grand Juror
'The petition of George E. Bowles, Grand Juror, for an order of this Court authorizing Petitioner or any member of his staff to take custody of boxes 1 through 13 of the Judge Edward S. Piggins Grand Jury records from the Clerk of this Court having been duly considered,
'IT IS ORDERED BY THE COURT, That the Clerk of this Court is hereby directed to deliver to Grand Juror George E. Bowles, or a member of his staff designated therefor by Grand Juror George E. Bowles in writing, boxes 1 through 13 of the records of the Edward S. Piggins Grand Jury and to take a receipt for such records;
'IT IS FURTHER ORDERED, That Grand Juror George E. Bowles shall obtain all synopses of testimony, dockets, journals, reporters' notes, transcripts, exhibits, and all other records, originals or duplicates, not heretofore filed by the Edward S. Piggins Grand Jury with this Court, whether in the hands of the Michigan State Police or the Detroit Police Department or any other person or persons, and shall deliver an inventory of the same and a receipt therefor to the Clerk of the Supreme Court;
'IT IS FURTHER ORDERED, That said records be kept in the possession of Grand Juror Bowles

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until the further order of this Court in the same manner and subject to the same conditions of secrecy as are provided by statute for all other records acquired during the course of the Grand Jury inquiry and that, pursuant to statute, they be made available to the State of Michigan for its lawful use thereof in prosecutions and

2 'Any judge, prosecuting attorney or special prosecuting attorney, or the attorney general participating in any inquiry under this section which continues more than 30 calendar days shall thereafter be disqualified from appointment or election to any office other than one held at the time of the inquiry. The disqualification shall not extend more than 1 year from date of termination of the inquiry, as determined by final order of the judge entered prior to such date.'

3 '* * * Any person called before the grand jury shall at all times be entitled to legal counsel not involving delay and he may discuss fully with his counsel all matters relative to his part in the inquiry without being subject to a citation for contempt. The witness shall have the right to have counsel present in the room where the inquiry is held. All matters revealed to the attorney shall be subject to the requirements of secrecy in section 4, and any revelation thereof by the attorney shall make him subject to punishment as provided in section 4. No testimony shall be taken or given by any witness except in the presence of the judge.' (C.L.1948, s 767.3, as amended in P.A.1965, No. 251 (Stat.Ann.1965 Cum.Supp. s 28.943)).

'* * * Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of such judge or after his services with such judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00, or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. Upon the termination of such inquiry if the judge shall make no presentment of crime or wrongdoing as to any person or persons whose apprehension or removal from office he has not so caused, he may, in his discretion, with the consent of the person who may be named, file with the clerk of the county in which such inquiry has been conducted, a report of no finding of criminal guilt as to any person or persons involved in such inquiry, either as witness or otherwise, whose involvement in such inquiry has become public.' (C.L.S.1961, s 767.4 (Stat.Ann.1954 Rev. s 28.944)).

'No witness shall upon such inquiry be required to answer any questions, or shall be convicted for contempt upon refusal to do so, when the answers might granted by the State[FN5] and Federal

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constitutions. granting to such witness immunity from such incrimination may be entered by said judge pursuant to a written motion by the prosecuting attorney or other duly authorized representative of the state in such proceeding, which order shall set forth verbatim the questions which such witness refused to answer. A true copy of such motion and order shall be delivered to such witness before he shall answer such questions. The order granting immunity so made shall thereafter extend to all related questions which may thereafter be put to such witness until such judge advises the witness that said immunity no longer applies. All such questions and the answers thereto shall be reduced to writing under the direction of such judge and a true copy of such transcript, duly certified by such judge, shall be delivered to such witness as soon as practicable thereafter. The provisions for secrecy provided for in section 3 hereof shall apply to all copies of such motion, order and transcript so delivered to such witness except that the witness may be privileged to disclose the same to his attorney if such witness should thereafter be prosecuted for any offense directly or indirectly growing out of any testimony given by him in such inquiry. No person required to answer such questions shall thereafter be prosecuted for any offense concerning which such answers may have tended to incriminate him. No such order granting immunity shall extend beyond the scope of such inquiry, nor shall it extend beyond the particular questions set forth in any such motion, order or transcript.' (C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946)).

4 See footnote 1, supra.

5 'No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.' Art. 1, s 17, Const. of 1963.

6 C.L.S.1961, s 767.6 (Stat.Ann.1954 Rev. s 28.946), see footnote 3, supra.

7 Even in 1850 the common law grand jury was subjected to devastating criticism. See Constitutional Convention Debates, 1850, remarks by Delegates Sullivan (pp. 54-55), Pierce (pp. 55-56) and McLeod (pp. 197-201). The constitutional language concerning the common law grand jury was deleted in 1850, although the Legislature has perpetuated the institution. (C.L.1948, ss 767.7-767.25; Stat.Ann.1954 Rev. ss 28.947-28.965).

8 'The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.'

9 'Justices of the supreme court, judges of the court of appeals, circuit judges and other judges as provided by law shall be conservators of the peace within their respective jurisdictions.'

* In re Slattery (1945), 310 Mich. 458, 17 N.W.2d 251.

10 Mapp v. People of State of Ohio (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; Gideon v. Wainwright (1963), 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; Douglas v. People

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of State of California (1963), 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811; and Malloy v. Hogan (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653.

11 A practice the statute allowed formerly and upheld in People v. McCrea (1942), 303 Mich. 213, 247, 248, 6 N.W.2d 489. See, also, September 1948 Michigan State Bar Journal, p. 66 (vol. xxvii, No. 9).

12 See In re Oliver (1947), 318 Mich. 7, 27 N.W.2d 323, rev'd, (1949), 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, and In re Murchison (1954), 340 Mich. 151, 65 N.W.2d 301, rev'd, (1955), 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942.

13 Another practice the statute allowed formerly and upheld by an equally divided court in People v. St. John (1938), 284 Mich. 24, 27, 28, 278 N.W. 754.

14 People v. Willson (1919), 205 Mich. 28, 43, 44, 171 N.W. 474.

15 On December 9, 1966, this Court issued the following order directed, by its terms, to all judges of courts of record 'now conducting or hereafter authorized to conduct' proceedings under our one-man grand jury law, to assure full compliance with the secrecy provisions of the statute:

'STATE OF MICHIGAN IN THE SUPREME COURT

'In the Matter of One Man Grand Jury Proceedings

'To All Judges of Courts of Record:

'On this Court's own motion, all judges now conducting or hereafter authorized to conduct one-man grand jury proceedings hereby are directed to order all members of their grand jury staffs and other persons admitted to such inquiries to comply fully with the following provisions of C.L.S.1956, s 767.4:

"* * * Except in cases of prosecutions for contempt or perjury against witnesses who may have been summoned before the judge conducting such inquiry, or for the purpose of determining whether the testimony of a witness examined before such judge is consistent with or different from the testimony given by such witness before a court in any subsequent proceeding, or in cases of disciplinary action against attorneys and counselors in this state, any judge conducting such inquiry, any prosecuting attorney and other persons who may at the discretion of such judge be admitted to such inquiry, who shall while conducting such inquiry or while in the services of such judge or after his services with such judge shall have been discontinued, utter or publish any statement pertaining to any information or evidence involved in any such inquiry, or who shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, or who shall disclose that any person has been questioned or summoned in connection with any such inquiry, or who shall disclose or publish or cause to be published any of the proceedings of such inquiry otherwise than by issuing or executing processes prior to such indictment, or shall disclose, publish or cause to be published any comment, opinion or conclusions related thereto, shall be guilty of a misdemeanor punishable by imprisonment in the county jail not more than 1 year or by a fine of not less than $100.00 nor more than $1,000.00 or both such fine and imprisonment in the discretion of the court, and such offense when committed by a public official shall also constitute malfeasance in office. * * *'

'The foregoing direction of full compliance with section 767.4 shall apply equally to the judges

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performing duties as grand jurors. Any violations hereof shall be deemed to be contempt of this Court.
'/sgd. Thomas M. Kavanagh/
Chief Justice
'Dated: December 9, 1966'

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75 S.Ct. 623
Supreme Court of the United States

In the Matters of Lee Roy MURCHISON and John White, Petitioners.

No. 405.
|
Argued April 20, 1955.
|
Decided May 16, 1955.

Synopsis

Contempt proceedings arising out of witnesses' conduct before a Michigan grand jury. The Reporter's Court of Detroit entered judgments of conviction and defendants appealed. The Supreme Court of Michigan, 340 Mich. 140, 65 N.W.2d 296 and 340 Mich. 151, 65 N.W.2d 301, affirmed the convictions, and certiorari was granted. The Supreme Court, Mr. Justice Black, held that fact that same judge who had sat as the Michigan 'judge-grand jury' before which witnesses had testified presided at contempt hearing wherein witnesses were adjudged in contempt for their conduct before the 'one-man grand jury' constituted a violation of due process.

Reversed and remanded with directions.

Mr. Justice Reed, Mr. Justice Minton and Mr. Justice Burton dissented.

Attorneys and Law Firms

****624 *133** Mr. William L. Colden, Detroit, Mich., for petitioner.

Mr. Edmund E. Shepherd, Lansing, Mich., for respondent.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

Michigan law authorizes any judge of its courts of record to act as a so-called 'one-man grand jury.'[1] He can compel witnesses to appear before him in secret to testify about suspected crimes. We have previously held that such a Michigan 'judge-grand jury' cannot consistently with the Due Process Clause of the Fourteenth Amendment summarily convict a witness of contempt for ***134** conduct in the secret hearings. In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. We held that before such a conviction could stand, due process requires as a minimum that an accused be given a public trial after reasonable notice of the charges, have a right to examine witnesses against him, call witnesses on his

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own behalf, and be represented by counsel. The question now before us is whether a contempt proceeding conducted in accordance with these standards complies with the due process requirement of an impartial tribunal where the same judge presiding at the contempt hearing had also served as the 'one-man grand jury' out of which the contempt charges arose. This does not involve, of course, the longexercised power of courts summarily to punish certain conduct occurring in open court.[2]

The petitioners, Murchison and White, were called as witnesses before a 'one-man judge-grand jury.' Murchison, a Detroit policeman, was interrogated at length in the judge's secret hearings where questions were asked him about suspected gambling in Detroit and bribery of policemen. His answers left the judge persuaded that he had committed perjury, particularly in view of other evidence before the 'judge-grand jury.' The judge then charged Murchison with perjury and ordered him to appear and show cause why he should not be punished for criminal contempt.[3] White, the other petitioner, was ***135** also summoned to appear as a witness in the same 'one-man grand jury' hearing. Asked numerous questions about gambling and bribery, he refused to answer on the ground that he ****625** was entitled under Michigan law to have counsel present with him. The 'judge-grand jury' charged White with contempt and ordered him to appear and show cause. The judge who had been the 'grand jury' then tried both petitioners in open court, convicted and sentenced them for contempt. Petitioners objected to being tried for contempt by this particular judge for a number of reasons including: (1) Michigan law expressly provides that a judge conducting a 'one-man grand jury' inquiry will be disqualified from hearing or trying any case arising from his inquiry or from hearing any motion to dismiss or quash any complaint or indictment growing out of it, or from hearing any charge of contempt 'except alleged contempt for neglect or refusal to appear in response to a summons or subpoena'; (2) trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of the fair and impartial trial required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. The trial judge answered the first challenge by holding that the state statute barring him from trying the contempt cases violated the Michigan Constitution on the ground that it would deprive a judge of inherent power to punish contempt. This interpretation of the Michigan Constitution is binding here. As to the second challenge ***136** the trial judge held that due process did not forbid him to try the contempt charges. He also rejected other constitutional contentions made by petitioners. The State Supreme Court sustained all the trial judge's holdings and affirmed.[4] Importance of the federal constitutional questions raised caused us to grant certiorari.[5] The view we take makes it unnecessary for us to consider or decide any of those questions except the due process challenge to trial by the judge who had conducted the secret 'one-man grand jury' proceedings.[6]

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. State of Ohio, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13.

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***137** It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations. Perhaps no State has ever forced a defendant to accept grand jurors as proper trial jurors to pass on charges growing out of their hearings.[7] A single 'judge-grand jury' is even more a part of the accusatory process than an ordinary lay grand juror. Having been ****626** a part of that process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would have none of that zeal.[8] Fair trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer.[9] It is true that contempt committed in a trial courtroom can under some circumstances be punished summarily by the trial judge. See Cooke v. United States, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 396, 69 L.Ed. 767. But adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here. For we held in the Oliver case (333 U.S. 257, 68 S.Ct. 501) that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.

***138** As a practical matter it is difficult if not impossible for a judge to free himself from the influence of what took place in his 'grand-jury' secret session. His recollection of that is likely to weigh far more heavily with him than any testimony given in the open hearings. That it sometimes does is illustrated by an incident which occurred in White's case. In finding White guilty of contempt the trial judge said, 'there is one thing the record does not show, and that was Mr. White's attitude, and I must say that his attitude was almost insolent in the manner in which he answered questions and his attitude upon the witness stand. * * * Not only was the personal attitude insolent, but it was defiant, and I want to put that on the record.' In answer to defense counsel's motion to strike these statements because they were not part of the original record the judge said, 'That is something * * * that wouldn't appear on the record, but it would be very evident to the court.' Thus the judge whom due process requires to be impartial in weighing the evidence presented before him, called on his own personal knowledge and impression of what had occurred in the grand jury room and his judgment was based in part on this impression, the accuracy of which could not be tested by adequate cross-examination.

This incident also shows that the judge was doubtless more familiar with the facts and circumstances in which the charges were rooted than was any other witness. There were no public witnesses upon whom petitioners could call to give disinterested testimony concerning what took place in the secret chambers of the judge. If there had been they might have been able to refute the judge's statement about White's insolence. Moreover, as shown by the judge's statement here a 'judge-grand jury' might himself many times be a very material witness in a later trial for contempt. If the Charge should be heard before ***139** that judge, the result would be either that the defendant must be deprived of examining or cross-examining him or else there would be the spectacle of the trial judge presenting testimony upon which ****627** he must finally pass in determining the guilt or innocence of the defendant.[10] In either event the State would have the benefit of the judge's personal knowledge while the accused would be denied an effective opportunity to cross-examine. The right of a defendant to examine and cross-examine witnesses is too essential to a fair trial to have that right jeopardized in such way.

We hold that it was a violation of due process for the 'judge-grand jury' to try these petitioners, and it was therefore error for the Supreme Court of Michigan to uphold the convictions. The judgments are reversed and the causes are remanded for proceedings not inconsistent with this opinion.

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Reversed.

Mr. Justice REED and Mr. Justice MINTON, dissenting, with whom Mr. Justice BURTON joins.

The Court holds that it is unconstitutional for a state judge to punish a contempt, previously committed before him while acting as a so-called one-man grand jury, after a full hearing in open court. It holds that White, in being so punished for his blanket refusal to answer any questions before the grand jury, and Murchison, in being so punished for perjury before the same body, were deprived of their liberty without due process of law.

This conclusion is not rested on any irregularity in the proceedings before either the grand jury or the court. Under Michigan procedure a single state judge makes the ***140** grand jury investigation, not in secret, but with other public officials to aid him, and a transcript is made of the testimony. There is certainly nothing unconstitutional about this. A State may reduce the customary number of grand jurors to one, and impart the investigatory duty to a member of its judiciary if it so desires. Further, the accused is afforded a full hearing in open court, with a statement of charges, benefit of counsel, and a full opportunity to explain his conduct before the grand jury, before being held in contempt. Thus all the requirements set down in In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, are met.

The Court's determination is rested on the sole fact that the same judge first cited petitioners for contempt committed in his presence, and then presided over the proceedings leading to the final adjudication. It is neither shown nor alleged that the state judge was in any way biased. Nor is this required by the Court, for it holds, as a matter of law, that the judge's 'interest' in a conviction makes the proceedings inherently prejudicial and thus constitutionally invalid. The fact that the 'interest' of the state judge in this procedure is no different from that of other judges who have traditionally punished for contempt leads us to dissent.

In Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 454, 96 L.Ed. 71, we upheld the power of a federal district judge to summarily punish a contempt previously committed in his presence. In that case, after a trial which had extended for some nine months, the trial judge issued a certificate summarily holding defense counsel in contempt for their actions during the trial. There were no formalities, no hearings, no taking of evidence, no arguments and no briefs. We held that such a procedure was permitted by Rule 42 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., which codified the "prevailing usages at law." The Court specifically rejected the contention that the judge who heard the contempt was disqualified from punishing it and should be required ***141** to assume the role ****628** of accuser or complaining witness before another judge. In Offutt v. United States, 348 U.S. 11, 75 S.Ct. 11, the Court simply stated an exception: when the trial judge becomes personally embroiled with the contemnor, he must step aside in favor of another judge. That decision was rested upon our supervisory authority over the administration of criminal justice in the federal courts. The Court now holds, even though there is no showing or contention that the state judge became enbroiled or personally exercised, or was in any way biased, that as a matter of constitutional law—of procedural due process—a state

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judge may not punish a contempt previously committed in his presence. This seems inconsistent with all that has gone before.

The Court, presumably referring to the situation in the federal courts, states that the 'adjudication by a trial judge of a contempt committed in his immediate presence in open court cannot be likened to the proceedings here.' The reason that it cannot, we are told, is because 'we held in the Oliver case that a person charged with contempt before a 'one-man grand jury' could not be summarily tried.' This is hardly explanatory, for the question of whether the hearing is to be summary or plenary has no bearing on the attitude or 'interest' of the judges in the two situations, which is indistinguishable. The simple fact is that in the federal courts we allow the same judge who hears the contempt and issues the certificate to punish it subsequently and summarily, but in this case we do not allow such punishment even after a full court trial. The only factual difference between Sacher and this case is that the contempt in Sacher was committed at a public trial. When the contempt is not committed in open court, we require that the criminal conviction be in public and that he individual be given a full hearing, with an opportunity to defend himself against the charges proffered and to make a record from which to appeal. ***142** In re Oliver, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682. Petitioners had all this. They are not entitled to more.

We do not see how it can be held that it violates fundamental concepts of fair play and justice for a state judge after a full court trial to punish a contempt previously observed when acting as a grand jury, when it has been held that it is perfectly proper for a federal judge to summarily punish a contempt previously observed in open court. It seems to us that the Court has imposed a more stringent requirement on state judges as a matter of due process than we have imposed on federal judges over whom we exercise supervisory power.

The Court relies heavily on Tumey v. State of Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749. There we held that it deprives a defendant of due process to 'subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.' Id., 273 U.S. at page 523, 47 S.Ct. at page 441. It is one thing to hold that a judge has too great an interest in a case to permit the rendition of a fair verdict when his compensation is determined by the result he reaches. It is quite another thing to disqualify a state judge as having too great an interest to render a due process judgment when his sole interest, as shown by this record, is the maintenance of order and decorum in the investigation of crime—an interest which he shares in common with all judges who punish for contempt.

The State of Michigan has decided that in the administration of its criminal law it is wise to have the investigating power in the hands of a judge. It has also decided that the judge who observes the contempt is to preside at the trial of the contemnor. It does not seem that there is here such a violation of accepted judicial standards as to justify this Court's determination of unconstitutionality.

We would affirm.

All Citations

349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942

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Footnotes

1 Mich.Stat.Ann.1954, ss 28.943, 28.944, Comp.Laws 1948, ss 767.3, 767.4.

2 Sacher v. United States, 343 U.S. 1, 72 S.Ct. 451, 96 L.Ed. 717; Cooke v. United States, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 396, 69 L.Ed. 767; Ex parte Savin, 131 U.S. 267, 277, 9 S.Ct. 699, 701, 702, 33 L.Ed. 150. See also In re Oliver, 333 U.S. 257, 273—278, 68 S.Ct. 499, 507—510, 92 L.Ed. 682.

3 The contempt charge signed by the judge reads in part as follows:
'It therefore appearing * * * that the said Patrolman Lee Roy Murchinson (sic) has been guilty of wilfull and corrupt perjury, which perjury has an obstructive effect upon the judicial inquiry being conducted by this court and the said Patrolman Lee Roy Murchinson (sic) obstructed the judicial function of the court by wilfully giving false answers as aforesaid, and did also tend to impair the respect for the authority of the court, all of which perjury and false answers given by the said witness aforesaid was committed during the sitting of, in the presence and view of this court and constitutes criminal contempt;
'It is therefore ordered that the said Patrolman Lee Roy Murchinson (sic) appear before this court on the tenth day of May, 1954, at 10:00 o'clock in the forenoon and show cause why he should not be punished for criminal contempt of this court because of his aforesaid acts.'

4 In re White, 340 Mich. 140, 65 N.W.2d 296; In re Murchison, 340 Mich. 151, 65 N.W.2d 301.

5 348 U.S. 894, 75 S.Ct. 216.

6 That we lay aside certain other federal constitutional challenges by petitioners is not to be taken as any intimation that we have passed on them one way or another.

7 See, e.g., Note, 50 L.R.A.,N.S., 933, 953-954, 970-971.

8 Apparently the trial judge here did consider himself a part of the prosecution. In passing on a request by Murchison's counsel for a two-day postponement of the contempt trial the judge said, 'There are two points that suggest themselves to me.
'One is that if the respondent is going to claim that he was in Shrewsberry, Ontario, Canada, on March 9, 1954, that we ought to be furnished with information so that we could between now and two days from now, which I am going to give you, we could do some checking and investigating ourselves.' (Emphasis supplied.)
Because of the judge's dual position the view he took of his function is not at all surprising.

9 See, e.g., Queen v. London County Council, (1892) 1 Q.B. 190; State ex rel. Getchel v. Bradish, 95 Wis. 205, 70 N.W. 172, 37 L.R.A. 289.

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[10] See Hale v. Wyatt, 78 N.H. 214, 98 A. 379. See also, Witnesses—Competency—Competency of a Presiding Judge as Witness, 28 Harv.L.Rev. 115.

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68 S.Ct. 499
Supreme Court of the United States

In re OLIVER.

No. 215.
|
Argued Dec. 11, 1947.
|
Decided March 8, 1948.

Synopsis

Habeas corpus proceeding by William Oliver. To review a judgment of the Supreme Court of Michigan, 318 Mich. 7, 27 N.W.2d 323, dismissing that petition, the petitioner brings certiorari.

Reversed and remanded with directions.

Mr. Justice FRANKFURTER and Mr. Justice JACKSON, dissenting.

On Writ of Certiorari to the Supreme Court of Michigan.

Attorneys and Law Firms

****500 *258** Messrs. William Henry Gallagher, of Detroit, Mich., and Osmond K. Fraenkel, for petitioner.

Mr. Edumund E. Shepherd, of Detroit, Mich., for respondent.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

A Michigan circuit judge summarily sent the petitioner to jail for contempt of court. We must determine whether he was denied the procedural due process guaranteed by the Fourteenth Amendment.

In obedience to a subpoena the petitioner appeared as a witness before a Michigan circuit judge who was then conducting, in accordance with Michigan law, a 'one-man grand jury' investigation into alleged gambling and official corruption. The investigation presumably took place in the judge's chambers, though that is not certain. ***259** Two other circuit judges were present in an advisory capacity.[1] A prosecutor may have been present. A stenographer was most likely there. The record does not show what other members, if any, of the judge's investigatorial staff participated in the proceedings. It is certain, however, that the public was excluded—the questioning was secret in accordance with the traditional grand jury method.

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****501** After petitioner had given certain testimony, the judge-grand jury, still in secret session, told petitioner that neither he nor his advisors believed petitioner's story—that it did not 'jell.' This belief of the judge-grand jury was not based entirely on what the petitioner had testified. As will later be seen, it rested in part on beliefs or suspicions of the judge-jury derived from the testimony of at least one other witness who had previously given evidence in secret. Petitioner had not been present when that witness testified and so far as appears was not even aware that he had testified. Based on its beliefs thus formed—that petitioner's story did not 'jell'—the judge-grand jury immediately charged him with contempt, immediately convicted him, and immediately sentenced him to sixty days in jail. Under these circumstances of haste and secrecy, petitioner, of course, had no chance to enjoy the benefits of counsel, no chance to prepare his defense, and no opportunity either to cross examine the other grand jury witness or to summon witnesses to refute the charge against him.

Three days later a lawyer filed on petitioner's behalf in the Michigan Supreme Court the petition for habeas corpus now under consideration. It alleged among other ***260** things that the petitioner's attorney had not been allowed to confer with him and that, to the best of the attorney's knowledge, the petitioner was not held in jail under any judgment, decree or execution, and was 'not confined by virtue of any legal commitment directed to the sheriff as required by law.' An order was then entered signed by the circuit judge that he had while 'sitting as a One-Man Grand Jury' convicted the petitioner of contempt of court because petitioner had testified 'evasively' and had given 'contradictory answers' to questions. The order directed that petitioner 'be confined in the county jail * * * for a period of sixty days * * * or until such time as he * * * shall appear and answer the questions heretofore propounded to him by this Court * * *.'

The Supreme Court of Michigan, on grounds detailed in the companion case of Petition of Dohany (In re Hartley), 317 Mich. 441, 27 N.W.2d 48,[2] rejected petitioner's contention that the summary manner in which he had been sentenced to jail in the secrecy of the grand jury chamber had deprived him of his liberty without affording him the kind of notice, opportunity to defend himself, and trial which the due process clause of the Fourteenth Amendment ***261** requires.[3] Petition of Dohany (Ex Parte Oliver), 318 Mich. 7, 27 N.W.2d 323. We granted certiorari, 332 U.S. 755, 68 S.Ct. 76, to consider these procedural due process questions.

The case requires a brief explanation of Michigan's unique one-man grand jury system.[4] That state's first constitution ****502** (1835), like the Fifth Amendment to the Federal Constitution, required that most criminal prosecutions be begun by presentment or indictment of a grand jury. Art. I, s 11. This compulsory provision was left out of the 1850 constitution and from the present constitution (1908). However, Michigan judges may still in their discretion summon grand juries, but we are told by the attorney general that this discretion is rarely exercised and that the 'One-Man Grand Jury' has taken the place of the old Michigan 16 to 23-member grand jury, particularly in probes of alleged misconduct of public officials.

The one-man grand jury law was passed in 1917 following a recommendation of the State Bar Association that, in ***262** the interest of more rigorous law enforcement, greater emphasis should be put upon the 'investigative procedure' for 'probing' and for 'detecting' crime.[5] With this need uppermost in its thinking the Bar Association recommended a bill which provided that justices of the peace be vested with the inquisitorial powers traditionally conferred only on coroners and grand juries. The bill as passed imposed the recommended investigatory powers not only on justices of the peace, but on police judges

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and judges of courts of record as well. Mich.Laws 1917, Act 196.

Whenever this judge-grand jury may summon a witness to appear, it is his duty to go and to answer all material questions that do not incriminate him. Should he fail to appear, fail to answer material questions, or should the judge-grand jury believe his evidence false and evasive, or deliberately contradictory, he may be found guilty of contempt. This offense may be punishable by a fine of not more than $100, or imprisonment in the county jail not exceeding sixty days, or both, at the discretion of the judge-grand jury. If after having been so sentenced he appears and satisfactorily answers the questions propounded by the judge-jury, his sentence may, within the judge-jury's discretion, be commuted or suspended. At the end of his first sentence he can be resummoned and subjected to the same inquiries. Should the judge-jury again believe his answers false and evasive, or contradictory, he can be sentenced to serve sixty days more unless he reappears before the judge-jury during the second 60-day period and satisfactorily answers the questions, and the judge-jury within ***263** its discretion then decides to commute or suspend his sentence.[6]

In carrying out this authority a judge grand jury is authorized to appoint its own prosecutors, detectives and aides at public expense,[7] all or any of whom may, at the discretion of the justice of the peace or judge, be admitted to the inquiry. Mich.Stat.Ann. s 28.944 (Henderson 1938). Comp.Laws 1929, s 17218. A witness may be asked questions on all subjects and need not be advised of his privilege against self-incrimination, even though the questioning is in secret.[8] And these secret interrogations can be carried on day or night, in a public place or a 'hideout,' a courthouse, an office building, a hotel room, a home, or a place of business; so well is this ambulatory power understood in Michigan that the one-man grand jury is also popularly referred to as the 'portable grand jury.'[9]

It was a circuit court judge-grand jury before which petitioner testified. That ****503** judge-jury filed in the State Supreme Court an answer to this petition for habeas corpus. The answer contained fragments of what was apparently a stenographic transcript of petitioner's testimony given before the grand jury. It was these fragments of testimony, so the answer stated, that the 'Grand ***264** Jury' had concluded to be 'false and evasive.' The petitioner then filed a verified motion with the State Supreme Court seeking to have the complete transcript of his testimony before the judge-jury produced for the habeas corpus hearing. He alleged that a full report of his testimony would disclose that he had freely, promptly, and to the best of his ability, answered all questions asked, and that the full transcript would refute the charge that he had testified evasively or falsely. In his answer to the motion the circuit judge did not deny these allegations. However, he asserted that the fragments contained in the original answer showed 'all of the Grand Jury testimony necessary to the present proceeding' and that 'the full disclosure of petitioner's testimony would seriously retard Grand Jury activities.' The State Supreme Court then denied the petitioner's motion. Thus when that Court later dismissed the petition for habeas corpus it had seen only a copy of a portion of the record of the testimony given by the petitioner.

The petitioner does not here challenge the constitutional power of Michigan to grant traditional inquisitorial grand jury power to a single judge, and therefore we do not concern ourselves with that question. It has long been recognized in this country however that the traditional 12 to 23-member grand juries may examine witnesses in secret sessions. Oaths of secrecy are ordinarily taken both by the members of such grand juries and by witnesses before them. Many reasons have been advanced to support grand jury secrecy. See, e.g., Hale v. Henkel, 201 U.S. 43, 58—66, 26 S.Ct. 370, 372-375, 50

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L.Ed. 652; State v. Branch, 68 N.C. 186, 12 Am.Rep. 633. But those reasons have never been thought to justify secrecy in the trial of an accused charged with violation of law for which he may be fined or sent to jail. Grand juries investigate, and the usual end of their investigation is either a report, a 'no-bill' or an indictment. ***265** They do not try and they do not convict. They render no judgment. When their work is finished by the return of an indictment, it cannot be used as evidence against the person indicted. Nor may he be fined or sentenced to jail until he has been tried and convicted after having been afforded the procedural safeguards required by due process of law. Even when witnesses before grand juries refuse to answer proper questions, the grand juries do not adjudge the witnesses guilty of contempt of court in secret or in public or at all.[10] Witnesses who refuse to testify before grand juries are tried on contempt charges before judges sitting in open court. And though the powers of a judge even when acting as a one-man grand jury may be, as Michigan holds, judicial in their nature,[11] the due process clause may apply with one effect on the judge's grand jury investigation, but with quite a different effect when the judge-grand jury suddenly makes a witness before it a defendant in a contempt case.

Here we are concerned, not with petitioner's rights as a witness in a secret grand jury session, but with his rights as a defendant in a contempt proceeding. The powers of the judge-grand jury who tried and convicted him in secret and sentenced him to jail on a charge of false and evasive swearing must likewise be measured, not by the limitations applicable to grand jury proceedings, but by the constitutional ****504** standards applicable to court proceedings in which an accused may be sentenced to fine or imprisonment or both. Thus our first question is this: ***266** Can an accused be tried and convicted for contempt of court in grand jury secrecy?

First. Counsel have not cited and we have been unable to find a single instance of a criminal trial conducted in camera in any federal,[12] state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. Summary trials for alleged misconduct called contempt of court[13] have not been regarded as an exception to this universal rule against secret trials, unless some other Michigan one-man grand jury case may represent such an exception.

This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial.[14] In this country the guarantee to an accused of ***267** the right to a public trial first appeared in a state constitution in 1776.[15] Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, which commands that 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial * * *' most of the original states and those subsequently admitted to the Union adopted similar constitutional provisions.[16] Today almost without exception[17] every state by constitution[18] ****505 *268** statute,[19] or judicial decision,[20] requires that all criminal trials be open to the public.

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition,[21] to the excesses of ***269** the English Court of Star Chamber,[22] and to the French monarchy's abuse of the lettre de cachet.[23] All of these institutions obviously symbolized a ****506** menace to liberty. In ***270** the hands of despotic groups each of them had become an instrument for the suppression of political and religious heresies in ruthless disregard of the

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right of an accused to a fair trial. Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society,[24] the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.[25] One need not wholly agree with a statement made on the subject by ***271** Jeremy Bentham over 120 years ago to appreciate the fear of secret trials felt by him, his predecessors and contemporaries. Bentham said: '* * * suppose the proceedings to be completely secret, and the court, on the occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary: how corrupt soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.'[26]

In giving content to the constitutional and statutory commands that an accused be given a public trial, the state and federal courts have differed over what groups of spectators, if any, could properly be excluded from a criminal trial.[27] But, unless ****507** in Michigan and in one-man grand jury contempt cases, no court in this country has ever before held, so far as we can find, that an accused can be tried, convicted, and sent to jail, when everybody else is denied entrance to the court, except the judge and his attaches.[28] And without exception all courts have held ***272** that an accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged.[29] In Gaines v. Washington, 277 U.S. 81, 85, 86, 48 S.Ct. 468—470, 72 L.Ed. 793, this Court assumed that a criminal trial conducted in secret would violate the procedural requirements of the Fourteenth Amendment's due process clause, although its actual holding there was that no violation had in fact occurred, since the trial court's order barring the general public had not been enforced. Certain proceedings in a judge's chambers, including convictions for contempt of court, have occasionally been countenanced by state courts,[30] but there has never been any intimation that all of the public, including the accused's relatives, friends, and counsel, were barred from the trial chamber.

In the case before us, the petitioner was called as a witness to testify in secret before a one-man grand jury conducting a grand jury investigation. In the midst of petitioner's testimony the proceedings abruptly changed. The investigation became a 'trial,' the grand jury became a judge, and the witness became an accused charged with contempt of court—all in secret. Following a charge, conviction and sentence, the petitioner was led away to ***273** prison—still without any break in the secrecy. Even in jail, according to undenied allegations, his lawyer was denied an opportunity to see and confer with him. And that was not the end of secrecy. His lawyer filed in the State Supreme Court this habeas corpus proceeding. Even there, the mantle of secrecy enveloped the transaction and the State Supreme Court ordered him sent back to jail without ever having seen a record of his testimony, and without knowing all that took place in the secrecy of the judge's chambers. In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison.

Second. We further hold that failure to afford the petitioner a reasonable opportunity to defend himself

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against the charge of false and evasive swearing was a denial of due process of law. A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, ****508** to offer testimony, and to be represented by counsel.[31] Michigan, not denying the existence of these rights in criminal cases generally, apparently concedes that the summary conviction here would have been a denial of procedural due process but for the nature of the charge, ***274** namely, a contempt of court, committed, the State urges, in the court's actual presence.

It is true that courts have long exercised a power summarily to punish certain conduct committed in open court without notice, testimony or hearing. Ex parte Terry, 128 U.S. 289, 9 S.Ct. 77, 32 L.Ed. 405, was such a case. There Terry committed assault on the marshal who was at the moment removing a heckler from the courtroom. The 'violence and misconduct' of both the heckler and the marshal's assailant occurred within the 'personal view' of the judge, 'under his own eye,' and actually interrupted the trial of a cause then under way. This Court held that under such circumstances a judge has power to punish an offender at once, without notice and without hearing, although his conduct may also be punishable as a criminal offense. This Court reached its conclusion because it believed that a court's business could not be conducted unless it could suppress disturbances within the courtroom by immediate punishment. However, this Court recognized that such departure from the accepted standards of due process was capable of grave abuses, and for that reason gave no encouragement to its expansion beyond the suppression and punishment of the court-disrupting misconduct which alone justified its exercise. Indeed in the Terry case the Court cited with approval its decision in Anderson v. Dunn, 6 Wheat. 204, 5 L.Ed. 242, which had marked the limits of contempt authority in general as being 'the least possible power adequate to the end proposed.' Id., at page 231 of 6 Wheat. And see In re Michael, 326 U.S. 224, 227, 66 S.Ct. 78, 79, 90 L.Ed. 30.

That the holding in the Terry case is not to be considered as an unlimited abandonment of the basic due process procedural safeguards, even in contempt cases, was spelled out with emphatic language in Cooke v. United States, 267 U.S. 517, 45 S.Ct. 390, 69 L.Ed. 767, a contempt case arising in a federal district court. There it was pointed out that for a ***275** court to exercise the extraordinary but narrowly limited power to punish for contempt without adequate notice and opportunity to be heard, the court-disturbing misconduct must not only occur in the court's immediate presence, but that the judge must have personal knowledge of it acquired by his own observation of the contemptuous conduct. This Court said that knowledge acquired from the testimony of others, or even from the confession of the accused, would not justify conviction without a trial in which there was an opportunity for defense. Furthermore, the Court explained the Terry rule as reaching only such conduct as created 'an open threat to the orderly procedure of the court and such a flagrant defiance of the person and presence of the judge before the public' that, if 'not instantly suppressed and punished, demoralization of the court's authority will follow.' Id., at page 536 of 267 U.S., at pages 394, 395 of 45 S.Ct.

Except for a narrowly limited category of contempts, due process of law as explained in the Cooke case requires that one charged with contempt of court be advised of the charges against him, have a reasonable opportunity to meet them by way of defense or explanation, have the right to be represented by counsel, and have a chance to testify and call other witnesses ****509** in his behalf, either by way of defense or explanation. The narrow exception to these due process requirements includes only charges

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of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority * * * before the public.' If some essential elements of the offense are not personally observed by the judge, so that the must depend upon statements made by others for his knowledge about these essential elements, due process requires, according to the ***276** Cooke case, that the accused be accorded notice and a fair hearing as above set out.

The facts shown by this record put this case outside the narrow category of cases that can be punished as contempt without notice, hearing and counsel. Since the petitioner's alleged misconduct all occurred in secret, there could be no possibility of a demoralization of the court's authority before the public. Furthermore, the answer of the judge-grand jury to the petition for habeas corpus showed that his conclusion that the petitioner had testified falsely was based, at least in part, upon the testimony given before him by one or more witnesses other than petitioner. Petitioner and one Hartley both testified the same day; both were pin-ball machine operators; both had bought or had in their possession certain so-called bonds purchased from one Mitchell; both were sent to jail for contempt the same day. Petition of Dohany (In re Hartley), 317 Mich. 441, 27 N.W.2d 48. The judge-grand jury pressed both petitioner and Hartley to state why they bought bonds which were patently worthless. The petitioner was also repeatedly asked what he had done with the worthless bonds. He answered every question asked him, according to the fragmentary portions of his testimony reported to the Michigan Supreme Court, most of which is included in that court's opinion. He steadfastly denied that he knew precisely what he had done with the worthless bonds, but made several different statements as to how he might have disposed of them, such as that he might have thrown them into the wastebasket, or trash can, or might have burned them.

In upholding the judge-grand jury's conclusion that petitioner had testified falsely and evasively, the majority of the Michigan Supreme Court gave as one reason a statement in the judge-grand jury's answer 'That the Grand Jury, after investigation, is satisfied that the bonds ***277** sold by the said Carman A. Mitchell to the said William D. Oliver are the same as those sold by the said Carman A. Mitchell to Leo Thomas Hartley.' Nothing in the petitioner's testimony as reported could have remotely justified the judge-jury in drawing such a conclusion. The judge-jury was obviously appraising the truth of Oliver's testimony in light of testimony given the same day in petitioner's absence by Hartley and possibly by other witnesses. The Terry case and others like it provide no support for sustaining petitioner's conviction of contempt of court upon testimony given in petitioner's absence. This case would be like the Terry case only if the judge there has not personally witnessed Terry's assault upon the marshal but had nevertheless sent him to jail for contempt of court after hearing the testimony of witnesses against Terry in Terry's absence. It may be conceivable, as is here urged, that a judge can under some circumstances correctly detect falsity and evasiveness from simply listening to a witness testify. But this is plainly not a case in which the finding of falsity rested on an exercise of this alleged power. For this reason we need not pass on the question argued in the briefs whether a judge can, consistently with procedural due process, convict a witness of testifying falsely and evasively solely on the judge's ability to detect it from merely observing a witness and hearing him testify.

Nor is there any reason suggested why 'demoralization of the court's authority' would have resulted from giving the ****510** petitioner a reasonable opportunity to appear and offer a defense in open court to

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a charge of perjury or to the charge of contempt. The traditional grand juries have never punished contempts.[32] The practice that has always been followed with recalcitrant grand jury witnesses ***278** is to take them into open court, and that practice, consistent with due process, has not demoralized the authority of courts. Reported cases reveal no instances in which witnesses believed by grand juries on the basis of other testimony to be perjurers, have been convicted for contempt, or for perjury, without notice of the specific charges against them, and opportunity to prepare a defense, to obtain counsel, to cross-examine the witnesses against them and to offer evidence in their own defense. The right to be heard in open court before one is condemned is too valuable to be whittled away under the guise of 'demoralization of the court's authority.'

It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal. See Chambers v Florida, 309 U.S. 227, 236, 237, 60 S.Ct. 472, 477, 84 L.Ed. 716. The petitioner was convicted without that kind of trial.

The judgment of the Supreme Court of Michigan is reversed and the cause is remanded to it for disposition not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice RUTLEDGE, concurring.

I join in the Court's opinion and decision. But there is more which needs to be said.

Michigan's one-man grand jury, as exemplified by this record, combines in a single official the historically separate powers of grand jury, committing magistrate, prosecutor, trial judge and petit jury. This aggregated authority denies to the accused not only the right to a public trial, but also those other basic protections secured by the Sixth Amendment, namely, the rights 'to be informed ***279** of the nature and cause of the accusation;[1] to be confronted with the witnesses against him;[2] to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.' It takes away the security against being twice put in jeopardy for the same offense[3] and denies the equal protection of the laws by leaving to the committing functionary's sole discretion the scope and contents of the record on appeal.[4] U.S.Const.Amends. V. and XIV.

This aggregation of powers and inherently concomitant denial of historic freedoms were unknown to the common law at the time our institutions crystallized in the Constitution. They are altogether at variance with our tradition and system of government. They cannot stand the test of constitutionality for purposes of depriving any person of life, liberty or property. There is no semblance of due process of law in the scheme when it is used for those ends.[5]

****511 *280** The case demonstrates how far this Court departed from our constitutional plan when, after the Fourteenth Amendment's adoption, it permitted selective departure by the states from the scheme of ordered personal liberty established by the Bill of Rights.[6] In the guise of permitting the states to experiment with improving the administration of justice, the Court left them free to substitute, 'in spite of the absolutism of continental governments,' their 'ideas and processes of civil justice' in place of the time-tried 'principles and institutions of the common law'[7] perpetuated for us in the Bill of Rights. Only by an exercise of this freedom has Michigan been enabled to adopt and apply her scheme as was done in

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this case. It is the immediate offspring of Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232, and later like cases.[8]

So long as they stand, so long as the Bill of Rights is regarded here as a strait jacket of Eighteenth Century procedures rather than a basic charter of personal liberty, like experimentations may be expected from the states. And the only check against their effectiveness will be the agreement of a majority of this Court that the experiment violates fundamental notions of justice in civilized society.

I do not conceive that the Bill of Rights, apart from the due process clause of the Fifth Amendment, incorporates all such ideas. But as far as its provisions go, I know of no better substitutes. A few may be inconvenient. But restrictions upon authority for securing personal liberty, as well as fairness in trial to deprive ***281** one of it, are always inconvenient—to the authority so restricted. And in times like these I do not think substitutions imported from other systems, including continental ones, offer promise on the whole of more improvement than harm, either for the cause of perfecting the administration of justice or for that of securing and perpetuating individual freedom, which is the main end of our society as it is of our Constitution.

One cannot attribute the collapse of liberty in Europe and elsewhere during recent years solely to the 'ideas and processes of civil justice' prevailing in the nations which have suffered that loss. Neither can one deny the significance of the contrast between their success in maintaining systems of ordered liberty and that of other nations which in the main have adhered more closely to the scheme of personal freedoms the Bill of Rights secures. This experience demonstrates, I think, that it is both wiser and safer to put up with whatever inconveniences that charter creates than to run the risk of losing its hard-won guaranties by dubious, if also more convenient substitutions imported from alien traditions.[9]

****512 *282** The states have survived with the nation through great vicissitudes, for the greater part of our history, without wide departures or numerous ones from the plan of the Bill of Rights. They accepted that plan for the nation when they ratified those amendments. They accepted it for themselves, in my opinion, when they ratified the Fourteenth Amendment. Adamson v. California, 332 U.S. 46, dissenting opinions, at pages 68, 123, 67 S.Ct. 1672, 1683, 1684, 171 A.L.R. 1223. It was good enough for our fathers. I think it should be good enough for this Court and for the states.

Room enough there is beyond the specific limitations of the Bill of Rights for the states to experiment toward improving the administration of justice. Within those limitations there should be no laboratory excursions, unless or until the people have authorized them by the constitutionally provided method. This is no time to experiment with established liberties. That process carries the dangers of dilution and denial with the chances of enforcing and strengthening.

It remains only to say that, in the face of so broad a departure from so many specific constitutional guaranties or, if the other view is to control, from their aggregate summarized in the concept of due process as representing fundamental ideas of fair play and justice in civilized society, such as the record in this case presents, this Court's eyes need not remain closed nor its hand idle until the case is returned to the state supreme court for reaffirmation of its position or confirmation of our views expressed in the Court's opinion. Neither Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, nor Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397, presented a situation like the one tendered here, whether ***283** in relation to the disentanglement of constitutional issues from questions of state law or, consequently, in

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respect to the breadth and clarity of the state's departure from federal constitutional commands. Neither case therefore requires or justifies the disposition of this cause according to the procedure there followed. This case is neither unripe for decision nor wanting of sufficient basis in the record for exercise of that function.

Mr. Justice FRANKFURTER:

Under the Fourteenth Amendment, a State may surely adopt as its own a procedure which was the established method for prosecuting crime in nearly half the States which ratified that amendment. And so, it may abolish the grand jury,[1] or it may reduce the size of the grand ***284** jury, and even to a single member. A State has great leeway in devising its judicial instruments for probing into conduct as a basis for charging the commission of crime. It may, at the same time, surround such preliminary inquiry with safeguards, not only that crime may be detected and criminals ****513** punished, but also that charges may be sifted in secret so as not to injure or embarrass the innocent.

Flouting of such a judicial investigatory system may be prevented by the hitherto constitutionally valid power to punish for contempt. There must, however, be such recalcitrance, where the basis of punishment is testimony given or withheld, that the administration of justice is actively blocked. See Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656, 11 A.L.R. 333. And the procedural safeguards of 'due process' must be observed. Due notice of the charge and a fair opportunity to meet it, are indispensable. This involves an opportunity to canvass the charge in the open and not behind closed doors. So long as a man has ample opportunity to demonstrate his innocence before he is hustled off to jail, he cannot complain that a State has seen fit to devise a new procedure for satisfying that opportunity. Just as it is not violative of due process for a State to take private property for public use and leave to a later stage the constitutional vindication of the right to compensation, it does not seem to me that it would be violative of due process to allow the judge-grand juror of Michigan to find criminal contempt for conduct in his proceedings without the familiar elements of an open trial, provided that the State furnishes the accused a public tribunal before which he has full opportunity to be quit of the finding.

But an opportunity to meet a charge of criminal contempt must be a fair opportunity. It would not be fair, if in the court in which the accused can contest for the first time the validity of the charge against him, he comes ***285** handicapped with a finding against him which he did not have an adequate opportunity of resisting.

We are here dealing with the attempt of a State having the seventh largest population in the Union to curb or mitigate the commission of crimes by effective prosecution. This procedure has been in operation for over thirty years. It was not heedlessly entered into nor has it been sporadically pursued. In a series of cases it has had the sanction of the highest court of Michigan. While there are indications in the opinion of the Supreme Court of Michigan from which we could infer the constitutional inadequacy of the procedure pursued in this case, we should not decide constitutional issues and conclude that the Michigan system offends the Constitution of the United States, without a clearer formulation of what it is that actually happens under this system, or did happen here, than the case before us reveals.

It is to me significant that the precise issues on which this Court decides this case have never been explicitly challenged before, or passed on, by the Supreme Court of Michigan in the series of cases in which that court had adjudicated controversies arising under the Michigan grand jury system. If a State

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has denied the due process required by the Fourteenth Amendment, it is more consonant with the delicate relations between the United States and the courts of the United States, and the States and the courts of the States, that the courts of the States be given the fullest opportunity, by proper presentation of the issues, to make such a finding of unconstitutionality.

I do not think that we have had that in this case. For instance, while I could regard it inadmissible under the Fourteenth Amendment to have only a partial and mutilated record of the proceedings before the grand juror-judge when the contemnor for the first time has the opportunity to meet the accusation against him publicly, the petitioner himself in this case seems to repel the ***286** suggestion that that is his complaint.[2] Certainly, as Mr. Justice JACKSON points out, the first ground of the Court's opinion was not made the basis ****514** for inviting our review here. I agree with him in concluding that in the light of our decision the other day in Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397, in conjunction with Rescue Army v. Municipal Court, 331 U.S. 549, 67 S.Ct. 1409, the cause should be returned to the Supreme Court of Michigan to enable that court to pass upon these issues.

Mr. Justice JACKSON, with whom Mr. Justice FRANKFURTER agrees, dissenting.

The principal ground assigned for reversal of the judgment of conviction is the alleged secrecy of the contempt procedure. That ground was not assigned for review in the petition for certiorari to this Court. Nor was it raised in the petition for writ of habeas corpus in the state courts. Therefore, it has not been litigated and the record has not been made with reference to it. On the other hand, the principal question raised by the petition to this Court and argued by the State is not decided by the Court's opinion.

When a case here from a state court involves a question not litigated below, not raised by petitioner here and which the state court has had no opportunity to pass upon, we should remand the case for its further consideration, as was just done in Musser v. Utah, 333 U.S. 95, 68 S.Ct. 397.

All Citations

333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682

Footnotes

1 Under certain circumstances Michigan law permits circuit judges to sit with other circuit judges in an advisory capacity. Mich.Stat.Ann. s 27.188 (Henderson 1938), Mich.Comp.Laws 1929, s 13666.

2 In giving reasons in its Hartley opinion for rejecting this petitioner's constitutional contentions, the State Supreme Court said it would have been an 'idle gesture to require such adjournment of the grand jury and its reconvening as a circuit court. The circuit judge, while acting as a one man grand jury may, in appropriate cases, summarily adjudge a witness testifying before him guilty of contempt and impose sentence forthwith.
'Plaintiff's contempt, if any, was committed in the face of the court and required no extraneous proofs as to its occurrence. It was direct and there was, therefore, no necessity for filing of charges, notice to accused and hearing as provided in 3 Comp.Laws of 1929, s 13912, Stat.Ann. s

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27.513. It was properly dealt with summarily. 3 Comp.Laws 1929, ss 13910, 13911, Stat.Ann. ss 27.511, 27.512.' 317 Mich. at pages 444, 445, 27 N.W.2d at page 50.

[3] By a four to four vote the court also held that there was 'evidence to support the finding' of the judge-grand jury that petitioner had testified falsely. Petitioner has argued here that there was not a shred of evidence which under any circumstances could have conceivably supported this finding and thus that he was deprived of his liberty without due process of law. In the view that we take of this case we find it unnecessary to consider this constitutional contention.

[4] The laws authorizing the system are found in Michigan Comp.Laws 1929, s 17217 et seq., Mich.Stat.Ann. s 28.943 et seq. (Henderson 1938). A summary of the ten states' statutes which have some similarities to Michigan's appears in Winters, The Michigan One-Man Grand Jury, 28 J.Am.Jud.Soc. 137. See, e.g., Conn.Gen.Stat. s 889f (Supp.1941); McCarthy v. Clancy, 110 Conn. 482, 148 A. 551; Okla.Stat.Ann. tit. 37, s 83; tit. 21 s 951; Ex parte Ballew, 20 Okl.Cr. 105, 201 P. 525.

[5] Proceedings of the Twenty-sixth Annual Meeting of the Michigan State Bar Association 101—105 (1916).

[6] In re Ward, 295 Mich. 742, 747, 295 N.W. 483, 485. (First 60-day conviction May 31, 1940, followed by second 60-day conviction July 29, 1940. A $100 fine was also imposed in each instance.)

[7] In re Petition for Investigation of Recount, 270 Mich. 328, 331, 258 N.W. 776, 777; In re Slattery, 310 Mich. 458, 479, 17 N.W.2d 251, 259.

[8] People v. Wolfson, 264 Mich. 409, 413, 250 N.W. 260, 262; In re Watson, 293 Mich. 263, 269, 291 N.W. 652, 655; People v. Butler, 221 Mich. 626, 631, 632, 192 N.W. 685, 687.

[9] Winters, The Michigan One-Man Grand Jury, 28 J.Am.Jud.Soc. 137, 143; Unprecedented Success in Criminal Courts, 26 J.Am.Jud.Soc. 42—43.

[10] See cases collected in 8 A.L.R. 1579—1580; Orfield, Criminal Procedure from Arrest to Appeal 161 (1947).

[11] In re Slattery, 310 Mich. 458, 466—468, 17 N.W.2d 251, 254—255; Kloka v. Brake State Treasurer, 318 Mich. 87, 90, 27 N.W.2d 507, 508; cf. Todd v. United States, 158 U.S. 278, 284, 15 S.Ct. 889, 891, 39 L.Ed. 982; Interstate Commerce Commission v. Brimson, 154 U.S. 447, 481, 489, 14 S.Ct. 1125, 1134, 1137, 38 L.Ed. 1047; United States v. Ferreira, 13 How. 40, 44—48, 14 L.Ed. 42.

[12] Cases within the jurisdiction of courts martial may be regarded as an exception. Ex parte Quirin, 317 U.S. 1, 43, 63 S.Ct. 2, 18, 87 L.Ed. 3; King v. Governor of Lewes Prison, 61 Sol.J. 294, 30 Harv.L.Rev. 771. Whatever may be the classification of juvenile court proceedings, they are often conducted without admitting all the public. But it has never been the practice wholly to

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exclude parents, relatives, and friends, or to refuse juveniles the benefit of counsel.

13 Under Michigan law contempt proceedings against a witness before a one-man grand jury are criminal in nature. In re Wilkowski, 270 Mich. 687, 259 N.W. 658. But this characterization is not material in resolving this due process question. Cf. Gompers v. United States, 233 U.S. 604, 610, 611, 34 S.Ct. 693, 695, 58 L.Ed. 1115.

14 Radin, The Right to a Public Trial, 6 Temp.L.Q. 381—384. Early commentators mention that public trials were commonly held without attempting to trace their origin. Sir Thomas Smith in 1565Smith in 1565 in his De Republica Anglorum bk. 2, pp. 79, 101 (Alston ed.1906); Sir Matthew Hale about 1670 in his History of The Common Law of England 343—345 (Runnington Ed.1820). In 1649, a few years after the Long Parliament abolished the Court of Star Chamber, an accused charged with high treason before a Special Commission of Oyer and Terminer claimed the right to public trial and apparently was given such a trial. Trial of John Lilburne, 4 How.St.Tr. 1270, 1274. 'By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.' 2 Bishop, New Criminal Procedure s 957 (2d Ed.1913).

15 Penn.Const., Declaration of Rights IX (1776); N.C.Const. Declaration of Rights IX (1776) (criminal convictions only by jury verdict in 'open court').

16 See, e.g., Vt.Const., ch. I, art. 11 (1787); Dela.Const. art. 1, s 7 (1792); Ky.Const. art. XII, cl. 10 (1792); Tenn.Const. art. XI, s 9 (1796); Miss.Const. art. I, s 10 (1817); Mich.Const. art. I, s 10 (1835); Tex.Const. art. I, s 8 (1845).

17 Four states, Massachusetts, New Hampshire, Virginia and Wyoming, appear to have neither statutory nor constitutional provisions specifically requiring that criminal trials be held in public, although all have constitutions guaranteeing an accused the right to a jury trial. Mass.Const. Pt. I, art. XII; N.H.Const. Pt. I, arts. XVN.H.Const. Pt. I, arts. XV, XVIXVI: Va.Const. art. I, s 8; Wyo.Const. art. I, s 10. Massachusetts by implication has recognized that an accused has a right to a public trial as well. A statute of that state permits the exclusion of spectators in only a limited category of cases. Mass.Gen.Laws c. 278, s 16A (1932). In New Hampshire and Wyoming no statute or decision has been found in which the right of an accused to a public trial is mentioned. In Virginia, although no decision has been discovered, a statute provides: 'In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any or all persons whose presence is not deemed necessary.' Va.Code Ann. s 4906 (1942).

18 Forty-one states: Ala.Const. s 6; Ariz.Const. art. II, s 24; Ark.Const. art. II, s 10; Cal.Const. art. I, s 13; Colo.Const. art. II, s 16; Conn.Const. art. I, s 9; Del.Const. art. I, s 7; Fla.Const. Declaration of Rights, s 11, F.S.A.; Ga.Const. art. I, s 1, par. 5, Code, s 2-105; Idaho Const. art. I, s 13; Ill.Const. art. 2, s 9, Smith-Hurd States.; Ind.Const. art. I, s 13; Iowa Const. art. I, s 10; Kan.Const. Bill of Rights, s 10; Ky.Const. s 11; La.Const. art. I, s 9; Me.Const. art. I, s 6; Mich.Const. art. 2, s 19; Minn.Const. art. I, s 6, M.S.A.; Miss.Const. s 26; Mo.Const. art. I, s 18 Mo.R.S.A.; Mont.Const. art. I, s 16; Neb.Const. art. I, s 11; N.J.Const. art. I, par. 8, N.J.S.A.; N.M.Const. art. II, s 14; N.C.Const. art. I, s 13 (no convictions for crime except by jury verdict in 'open court');

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N.D.Const. art. I s 13; Ohio Const. art. I, s 10; Okl.Const. art. 2, s 20, Okl.St.Ann.; Or.Const. art. I, s 11; Pa.Const. art. I, s 9, P.S.; R.I.Const. art. I, s 10; S.C.Const. art. I, s 18; S.D.Const. art. 6, s 7; Tenn.Const. art. I, s 9; Tex.Const. art. I, s 10, Vernon's Ann.St.; Utah Const. art. I, s 12; Vt.Const. ch. I, art. 10; Wash.Const. art. I, s 22; W.Va.Const. art. III, s 14; Wis.Const. art. I, s 7.

19 Two states: Nev.Comp.Laws Ann. s 10654 (1929); N.Y. Civil Rights Law, Consol.Laws, c. 6, s 12.

20 The Maryland Court of Appeals has apparently interpreted the state constitution as prohibiting secret trials. Dutton v. State, 123 Md. 373, 386—388, 91 A. 417, 422, 423, Ann.Cas.1916C, 89.

21 Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 389. The criminal procedure of the civil law countries long resembled that of the Inquisition in that the preliminary examination of the accused, the questioning of witnesses, and the trial of the accused were conducted in secret. Esmein, A History of Continental Criminal Procedure 183—382 (1913); Ploscowe, Development of Inquisitorial and Accusatorial Elements in French Procedure, 23 J.Crim.L. & Criminology 372—386. The ecclesiastical courts of Great Britain, which intermittently exercised a limited civil and criminal jurisdiction, adopted a procedure described as 'in name as well as in fact an Inquisition, differing from the Spanish Inquisition in the circumstances that it did not at any time as far as we are aware employ torture, and that the bulk of the business of the courts was of a comparatively unimportant kind * * *.' 2 Stephen, History of the Criminal Law of England 402 (1883). The secrecy of the ecclesiastical courts and the civil law courts was often pointed out by commentators who praised the publicity of the common law courts. See e.g., 3 Blackstone, Commentaries *373; 1 Bentham Rationale of Judicial Evidence, 594—595, 603 (1827). The English common law courts which succeeded to the jurisdiction of the ecclesiastical courts have renounced all claim to hold secret sessions in cases formerly within the ecclesiastical jurisdiction, even in civil suits. See, e.g., Scott v. Scott, (1913) A.C. 417.

22 Davis v. United States, 8 Cir., 247 F. 394, 395, L.R.A.1918C, 1164; Keddington v. State, 19 Ariz. 457, 459, 172 P. 273, L.R.A.1918D, 1093; Williamson v. Lacy, 86 Me. 80, 82, 83, 29 A. 943, 944, 25 L.R.A. 506; Dutton v. State, 123 Md. 373, 387, 91 A. 417, 422, Ann.Cas.1916C, 89; Jenks, The Book of English Law 91 (3d Ed.1932). Some authorities have said that trials in the Star Chamber were public, but that witnesses against the accused were examined privately with no opportunity for him to discredit them. Apparently all authorities agreed that the accused himself was grilled in secret, often tortured, in an effort to obtain a confession and that the most objectionable of the Star Chamber's practices was its asserted prerogative to disregard the common law rules of criminal procedure when the occasion demanded. 5 Holdsworth, A History of English Law, 163, 165, 180—197 (2d Ed.1937); Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 386—388; Washburn, The Court of Star Chamber, 12 Am.L.Rev. 21, 25—31.

23 Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 388. The lettre de cachet was an order of the king that one of his subjects be forthwith imprisoned or exiled without a trial or an opportunity to defend himself. In the eighteenth century they were often issued in blank to local police. Louis XV is supposed to have issued more than 150,000 lettres de cachet during his reign. This device

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was the principal means employed to prosecute crimes of opinion, although it was also used by the royalty as a convenient method of preventing the public airing of intra-family scandals. Voltaire, Mirabeau and Montesquieu, among others denounced the use of the lettre de cachet, and it was abolished after the French Revolution, though later temporarily revived by Napoleon. 13 Encyc. Brit. 971; 3 Encyc. Soc. Sci, 137.

[24] Other benefits attributed to publicity have been: (1) Public trials come to the attention of key witnesses unknown to the parties. These witnesses may then voluntarily come forward and give important testimony. 6 Wigmore, Evidence s 1834 (3d Ed.,1940); Tanksley v. United States, 9 Cir., 145 F.2d 58, 59, 156 A.L.R. 257.
(2) The spectators learn about their government and acquire confidence in their judicial remedies. 6 Wigmore, Evidence s 1834 (3d Ed. 1940); 1 Bentham, Rationale of Judicial Evidence 525 (1827); State v. Keeler, 52 Mont. 205, 156 P. 1080, L.R.A.1916E, 472, Ann.Cas.1917E, 619; 20 Harv.L.Rev. 489.

[25] Jenks, The Book of English Law 91 (1932); Auld, Comparative Jurisprudence of Criminal Process, 1 U. of Toronto L.J. 82, 99; Radin, The Right to a Public Trial, 6 Temp.L.Q. 381; Criminal Procedure in Scotland and England, 108 Edinburgh Rev. 174, 181—182; Holmes, J. in Cowley v. Pulsifer, 137 Mass. 392, 394, 50 Am.Rep. 318; State v. Osborne, 54 Or. 289, 295—297, 103 P. 62, 64—66, 20 Ann.Cas. 627. People v. Murray, 89 Mich. 276, 286, 50 N.W. 995, 998, 14 L.R.A. 809, 28 Am.St.Rep. 294: 'It is for the protection of all persons accused of crime—the innocently accused that they may not become the victim of an unjust prosecution, as well as the guilty, that they may be awarded a fair trial—that one rule (as to public trials) must be observed and applied to all.' Frequently quoted is the statement in 1 Cooley, Constitutional Limitations (8th Ed.1927) at 647: 'The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions * * *'

[26] 1 Bentham, Rationale of Judicial Evidence 524 (1827).

[27] Compare People v. Murray, 89 Mich. 276, 50 N.W. 995, 14 L.R.A. 809, 28 Am.St.Rep. 294, and People v. Yeager, 113 Mich. 228, 71 N.W. 491, with Reagan v. United States, 9 Cir., 202 F. 488, 44 L.R.A., N.S., 583. For collection and analysis of the cases, see 6 Wigmore, Evidence s 1834 (3d Ed.1940); Orfield, Criminal Procedure from Arrest to Appeal 385—387 (1947); Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 389—391; Note, 35 Mich.L.Rev. 474; 8 U. of Det.L.J. 129; Tanksley v. United States, 9 Cir., 145 F.2d 58, 156 A.L.R. 265.

[28] 'For the purposes contemplated by the provision of the constitution, the presence of the officers of the court—men whom, it is safe to say, were under the influence of the court—made the trial no more public than if they too had been excluded.' People v. Hartman, 103 Cal. 242, 244, 37 P. 153, 154, 42 Am.St.Rep. 108.

[29] See, e.g., State v. Beckstead, 96 Utah 528, 88 P.2d 461 (error to exclude friends and relatives of accused); Benedict v. People, 23 Colo. 126, 46 P. 637 (exclusion of all except witnesses,

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members of bar and law students upheld); People v. Hall, 51 App.Div. 57, 64 N.Y.S. 433 (exclusion of general public upheld where accused permitted to designate friends who remained). 'No court has gone so far as affirmatively to exclude the press.' Note, 35 Mich.L.Rev. 474, 476. Even those who deplore the sensationalism of criminal trials and advocate the exclusion of the general public from the courtroom would preserve the rights of the accused by requiring the admission of the press, friends of the accused, and selected members of the community. Radin, The Right to a Public Trial, 6 Temp.L.Q. 381, 394—395; 20 J.Am.Jud.Soc. 139.

30 Cases are collected in 27 Ann.Cas. 35.

31 The following decisions of this Court involving various kinds of proceedings are among the multitude that support the above statement: Snyder v. Massachusetts, 291 U.S. 97, 116, 54 S.Ct. 330, 336, 78 L.Ed. 674, 90 A.L.R. 575; Powell v. Alabama, 287 U.S. 45, 68—70, 53 S.Ct. 55, 63, 64, 77 L.Ed. 158, 84 A.L.R. 527; Hovey v. Elliot, 167 U.S. 409, 418, 17 S.Ct. 841, 844, 42 L.Ed. 215; Holden v. Hardy, 169 U.S. 366, 390, 391, 18 S.Ct. 383, 387, 42 L.Ed. 780; Morgan v. United States, 304 U.S. 1, 14, 15, 58 S.Ct. 773, 774, 775, 82 L.Ed. 1129, and cases there cited.

32 See note 10 supra.

1 The requirement, of course, contemplates that the accused be so informed sufficiently in advance of trial or sentence to enable him to determine the nature of the plea to be entered and to prepare his defense if one is to be made. Cf. White v. Ragen, 324 U.S. 760, 764, 65 S.Ct. 978, 980, 89 L.Ed. 1348; Powell v. Alabama, 287 U.S. 435, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527.

2 The only 'witness' in this case was the grand jury-judge who, so far as the record discloses, did not submit to cross-examination.

3 As the Court's opinion notes, the state supreme court has held that the witness may be reexamined and recommitted for a further 60-day period after serving the first sentence of that length, unless he reappears and answers the same questions to the satisfaction of the one-man grand jury. In re Ward, 295 Mich. 742, 747, 295 N.W. 483.

4 Cf. Cochran v. Kansas, 316 U.S. 255, 62 S.Ct. 1068, 86 L.Ed. 1453. So far as appears, only persons committed or fined by a one-man grand jury are subjected in Michigan to this attenuated appellate procedure. Others convicted of crime, including criminal contempt, apparently are afforded rights to complete and non-discretionary records on appeal.

5 The immediate shift of the proceeding from inquisitorial to punitive function converts it from a grand jury investigation to a proceeding in criminal contempt.

6 Cf. Adamson v. California, 332 U.S. 46, at page 68, 67 S.Ct. 1672, 1684, 171 A.L.R. 1223, dissenting opinion of Mr. Justice Black.

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7 See Hurtado v. California, 110 U.S. 516, 531, 4 S.Ct. 111, 118, 28 L.Ed. 232.

8 E.g., Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed. 97; Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 171 A.L.R. 1223.

9 I do not think it can be demonstrated that state systems, free of the Bill of Rights' 'inconveniences,' have been more fair, just, or efficient than the federal system of administering criminal justice, which has never been clear of their restraints.
Notwithstanding Betts v. Brady, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, and its progeny, I cannot imagine that state denial of the right to counsel beyond that permissible in the federal courts or indeed of any other guaranty of the Sixth Amendment could bring an improvement in the administration of justice.
The guaranties seemingly considered most obstructive to that process are those of the Fifth Amendment requiring presentment or indictment of a grand jury and securing the privilege against self-incrimination; the rights to jury trial and to the assistance of counsel secured by the Sixth Amendment; and the requirements relating to suits at common law of the Seventh Amendment. Whatever inconveniences these or any of them may be thought to involve are far outweighed by the aggregate of security to the individual afforded by the Bill of Rights. That aggregate cannot be secured, indeed it may be largely defeated, so long as the states are left free to make broadly selective application of its protections.

1 In sustaining this power of the States, the Court enunciated a principle the force of which has not lessened with time: 'The constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of the English law and history; but it was made for an undefined and expanding future, and for a people gathered, and to be gathered, from many nations and of many tongues; and while we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems of jurisprudence prevail, the ideas and processes of civil justice are also not unknown. Due process of law, in spite of the absolutism of continental governments, is not alien to that Code which survived the Roman empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice, suum cuique tribuere. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and various experiences of our own situation and system will mold and shape it into new and not less useful forms.' Hurtado v. California, 110 U.S. 516, 530, 531, 4 S.Ct. 111, 118, 28 L.Ed. 232.

2 'Neither in our brief nor in our argument before the court have we urged this court to reverse this conviction merely because the partial return of the witness's testimony to the Supreme Court constituted a denial of due process. * * * The questions we present are much more basic,—the denial of due process in the original commitment. * * * (To) us it is much more shocking that an accused charged with contempt not committed in open court be denied any trial in the lower court than that he be given a trial only upon an incomplete record in the appellate court.' Petitioner's 'Brief in Answer to Brief of State Bar of Michigan,' pp. 13, 14.

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310 Mich. 458
Supreme Court of Michigan.

In re SLATTERY.

No. 397.
|
Jan. 4, 1945.

Synopsis

Certiorari to Circuit Court, Ingham County; Leland W. Carr, Judge.

In the matter of Francis P. Slattery, petitioner, who was examined by the circuit judge under the one man grand jury statutes. Having refused to give satisfactory answers to certain questions, petitioner was adjudged in contempt and sentenced to jail, and he petitions for habeas corpus and ancillary writ of certiorari.

Petitions dismissed and petitioner remanded to custody.

Attorneys and Law Firms

****252** Before the Entire Bench.

***461** Wm. Henry Gallagher, of Detroit, and Harry D. Hubbard, of Lansing, for petitioner.

Kim Sigler, Special Prosecutor and Asst. Pros. Atty., Ingham County, Victor Anderson, Pros. Atty., Ingham County, and H. H. Warner, Special Counsel, all of Lansing, for respondent

Fred R. Walker, of Detroit, amicus curiae.

Pierce, Planck & Ramsey, of Lansing, amicus curiae.

Opinion

BUTZEL, Justice.

In accordance with section 3 et seq. of chapter 7 of the Code of Criminal Procedure of the State of Michigan, the same being section 17217 et seq., 3 Comp.Laws 1929, Stat.Ann. § 28.943 et seq., the Honorable Leland W. Carr, a circuit judge of the county of Ingham, required the attendance of Francis P. Slattery, referred to herein as petitioner, as a witness to testify in regard to certain crimes that were alleged in a formal complaint to have been committed within the jurisdiction of the Ingham county circuit court. Petitioner makes no objection to the sufficiency of the complaint or the proceedings that led up to his examination. An examination by the circuit judge, under the statutes above cited, is similar to that of a grand jury. It is popularly known as a ‘one man grand jury’ proceeding. Even though this term may be a misnomer, it nevertheless is descriptive and we refer to the examination as that of a ‘one

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man grand jury.' These statutes provide for the summoning of witnesses and their examination, and that any witness neglecting or refusing to answer questions shall be guilty of contempt punishable by a fine not to exceed $100 or imprisonment in the county jail not to exceed 60 days, or both, in the discretion of the court. They further provide that no witness shall be required to answer questions which might ***462** tend to incriminate himself unless he is granted immunity, et cetera. According to the brief filed by petitioner he was a vice president of the Michigan National Bank. He spent some months in Lansing lobbying against a bank bill, the purpose of which, if enacted, was to restrict chain banking generally in the State of Michigan. It is not claimed that petitioner was a professional lobbyist, or that he ever lobbied for any other measure. While thus engaged in lobbying as to this particular bill, he repeatedly contacted various members of the legislature in Lansing. In the course of his examination, to which later we shall refer with more particularity, petitioner testified that he could not remember or recall a conversation with a certain legislator who, in order to retain the secrecy of the proceedings except as it becomes necessary to divulge them, is described as 'A' ****253** in the return of the judge. The gist of the conversation was to the effect that 'A' made an offer to petitioner that he would change his vote for a consideration. The approximate time when, and the definite place where, the conversation took place and the real name of 'A' were set forth in the questions to petitioner. He refused to affirm or deny that the conversation took place and repeatedly asserted words to the effect that he had no memory of such a conversation and finally in his memory 'it didn't happen.' After futile efforts to obtain a more satisfactory answer, and an answer of Yes or No to the particular question, the judge adjourned the one man grand jury proceedings and, in open court, adjudged petitioner guilty of contempt and sentenced him to serve 60 days in the county jail in accordance with 3 Comp. Laws, 1929, § 17219 (Stat. Ann. § 28.945). Petitioner thereupon filed a petition for habeas corpus and ancillary writ of ***463** certiorari. The judge, as part of his return, filed a transcript of such portion of the testimony as he deemed sufficient to show the grounds for the contempt order. Obviously because of the secrecy of the proceedings, as provided by law, the transcript of the entire proceedings was not included in the return.

Petitioner assails the constitutionality of the 'one man grand jury statutes,' claiming that they impose non-judicial duties on a judge, and that one cannot be held in contempt if he testifies before a non-judicial body. Petitioner's counsel, as well as those who appear as amici curiae, base their claims largely on the case of In the Matter of Richardson, 247 N.Y. 401, 160 N.E. 655, 658, the opinion of which was written by the late Justice Cardozo in his characteristically learned and lucid style. We are much impressed but not bound by the opinion. Some of the statements therein, if wrested from the context, might be applicable to the instant case, were the issues the same. The sole issue in the Richardson case was whether a New York statute which provided that the governor of New York, in a proceeding before him for the removal of a public officer, might as governor take the evidence, or at his option direct that the taking of proofs be delegated to a judicial officer or commissioner for the purpose of taking testimony and reporting his findings to the governor. The law was held to be unconstitutional on the ground that it was a delegation of the administrative powers to the judiciary. It is axiomatic that under our Constitution and the American system of jurisprudence, the executive, legislative and judicial departments of the government must be kept separate and one department cannot delegate its duties to the other. In discussing the cases where duties in addition to ***464** holding court were imposed upon the judge, he stated: 'Superficial analogies are suggested, but superficial only. A magistrate before whom there is laid an information of the commission of a crime may take the depositions of the informant and prosecutor and of any witnesses produced. Code Crim. Pro. § 148. His inquiry is judicial. If he finds that a crime has been committed and that there is reasonable cause to believe that the defendant has committed it, he issues a warrant of arrest. Code Crim. Pro. § 150, subd. 2. He does not keep to himself the knowledge thus acquired, but embodies it in depositions which are exhibited to the defendant like

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any other public record.' He stated, so that the decision would not be misapprehended, its tenor was to deny the power of the legislature to charge a justice of the Supreme Court with the duties of a prosecutor in aid of the executive. We might add that under the laws of this State, hereinbefore referred to, the testimony is kept secret, but if the judge finds that a crime has been committed, he orders a warrant to be issued, and an examination held in open court before a magistrate and, if probable cause is shown, the accused is bound over for trial in the proper court. It will be noted that under the Constitution of the State of New York, a grand jury investigation precedes a criminal complaint. This is likewise true in the Federal courts, in accordance with Article 5 of the Amendments to the Constitution of the United States. The Constitution of the State of New York contains no similar provision to that of the State of Michigan which makes the circuit judge a conservator of the peace.

***465** In Cobbledick . United States, 309 U.S. 323, 60 S.Ct. 540, 542, 84 L.Ed. 783: 'The Constitution itself makes the grand jury a part of the judicial process. It must initiate prosecution for the most important federal crimes. It does so under general instructions from the court to which it it attached and to which, from time to time, ****254** it reports its findings. The proceeding before a grand jury constitutes 'a judicial inquiry', Hale v. Henkel, 201 U.S. 43, 50 S.Ct. 370, 375, 50 L.Ed. 652, of the most ancient lineage. See Wilson v. United States, 221 U.S. 361, 31 S.Ct. 538, 55 L.Ed. 771, Ann.Cas.1912D, 558. The deration of its life, frequently short, is limited by statute. It is no less important to safeguard against undue interruption the inquiry instituted by a grand jury than to protect from delay the progress of the trial after an indictment has been found. Opportunity for obstructing the 'orderly progress' of investigation should no more be encouraged in one case than in the other.'

The statutes of this State, invoked in the instant case, serve the same purpose as the constitutional provisions in regard to grand juries in other jurisdictions. They do not impose non-judicial duties upon the judiciary and are in strict conformity with the Constitution of this State which in Article 7, under the heading of 'Judicial Department,' makes due provision in regard to judicial power. In section 18 of Article 7, under the heading 'Conservators of the peace,' it is stated that justices of the Supreme Court, circuit judges and justices of the peace shall be conservators of the peace within their respective jurisdictions. Certain statements in the case of Allor v. Wayne County Auditors, 43 Mich. 76, 4 N.W. 492, were in a measure overruled and must be restricted ***466** by the holding in the subsequent case of Averill v. Perrott, 74 Mich. 296, 41 N.W. 929, in which, speaking of conservators of the peace, we said: 'As such conservators, they had, when the constitution took effect, the authority to apprehend offenders against the criminal laws of the state, and to hold examinations, and commit, bind over, or hold to bail, as well as other authority exercised by conservators of the peace.'

Petitioner claims that the office of a conservator of the peace is a different position from that of a judicial officer. Under section 9 of Article 7 of our Constitution, a circuit judge would be ineligible for any other office than a judicial office for the term for which he is elected and for one year thereafter. Under section 18 he is a conservator of the peace by virtue of the fact that he is a circuit judge. Averill v. Perrot, supra. The one man grand jury proceedings, in accordance with law, were instituted in the circuit court for the county of Ingham. When a complaint had been filed by the attorney general, it became incumbent upon the judge as a circuit judge to make an investigation. He was neither a prosecuting attorney, policeman or detective. He had judicial duties to perform and he proceeded in a judicial capacity. In order to dispel any doubt as to the finding of petitioner guilty of contempt, he proceeded to

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act as a circuit judge in regard to proceedings which he himself had conducted while acting as a one man grand jury.

Because of the importance of the question, we have re-examined it with extreme care although the questions raised have been heretofore decided by this court a number of times. In Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877, 20 A.L.R. 398, the case of Johnson v. Morton, 94 Mich. 1, 53 N.W. 816, was referred to, and we held that the defendant, a circuit judge, acted ***467** in a judicial capacity in conducting an examination in proceedings for the discovery of crime, similar to the circumstances in the instant case. In the case of People v. Doe, 226 Mich. 5, 196 N.W. 757, while the decision of the trial court was upheld by an equally divided court, the question upon which there was a disagreement was not as to the constitutionality of the act but whether defendant, an attorney, was obliged to disclose information which he claimed was confidential. Mr. Justice Fellows, in writing the opinion upholding the trial court, stated that he found no merit in appellant's objection to the constitutionality of the act on the ground that it conferred non-judicial duties upon circuit judges. In People v. Wolfson, 264 Mich. 409, 250 N.W. 260, a like objection was raised by defendant who had been adjudged guilty of contempt by a circuit judge, sitting as a one man grand jury, and we again upheld the act in a unanimous opinion of the court. Also see, Johnson v. Morton, 94 Mich. 1, 53 N.W. 816. In People v. St. John, 284 Mich. 24, 278 N.W. 754, wherein defendant's conviction for perjury before a one man grand jury was affirmed by an evenly divided court, the only point on which the court disagreed was the form of the complaint. See, also, People v. O'Hara, 278 Mich. 281, 270 N.W. 298; In re Watson, 293 Mich. 263, 291 N.W. 652. There are many other cases wherein we have affirmed convictions for contempt in one man grand ****255** jury proceedings similar to the one in the instant case. See People v. Bommarito, 270 Mich. 455, 259 N.W. 310; In re Wilkowski, 270 Mich. 687, 259 N.W. 658; In re Schnitzer, 295 Mich. 736, 295 N.W. 478; In re Ward, 295 Mich. 742, 295 N.W. 483; In re Cohen, 295 Mich. 748, 295 N.W. 481. So that there may be no further question, we hold that the judge conducting a one man grand jury proceeding is acting in a judicial capacity.

Petitioner was not entitled to a full inspection of the records of his examination by the grand jury, under 3 Comp.Laws 1929, § 17218 (Stat.Ann. ***468** § 28.944); People v. Prevost, 219 Mich. 233, 189 N.W. 92; People v. McCrea, 303 Mich. 213, at page 244, 6 N.W.2d 489, 501, and cases therein cited.

Judge Carr in his return to the writ of certiorari certified that the petitioner was summoned to testify as a witness in the one man grand jury proceeding, the judge adjudged petitioner guilty of contempt of court and imposed a sentence upon him of 60 days in the county jail. The clerk inadvertently inserted in the sentence the words ‘at hard labor,’ but these words were stricken out immediately and an amended order was made, when the judge's attention was called to the error. Petitioner was denied bail. He was refused a copy of his lengthy testimony before the grand jury because it involved many subjects which could under no circumstances be divulged or disclosed without seriously interfering with and jeopardizing the work of the grand jury, and it involved a number of individuals about whom petitioner had been questioned. The circuit judge further stated that petitioner made untruthful answers to the questions put to him; that, without giving any good and sufficient reason for such failure, he avoided disclosing information within his knowledge sought to be elicited from him; that his attitude was contemptuous and his answers were evasive; that he refused to answer proper questions propounded to him; that his typewritten testimony covers 139 pages; that he was examined particularly regarding his activities in connection with the passage of a certain bill in the legislature and was interrogated with regard to his conversation and relations with certain senators and representatives, certain ones having appeared in the

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proceedings and given full confessions concerning conversations with petitioner in regard to bribery; that one of the legislators confessed to a conversation with petitioner concerning ***469** a bribe requested from petitioner, and for reasons hereinbefore indicated this legislator is referred to in the transcript as 'A'. The return of the judge gives a transcript of portions of petitioner's testimony. He testified that he probably talked with 'A' but did not recall the time or the place of the conversation or that he talked with him in the lobby of the Olds Hotel, when 'A' stated: 'Mr. Slattery, I have decided to change my mind about the (blank) bill, if I get some money.' Petitioner testified: 'I don't recall any such thing,' and when he was asked if it did not happen, he stated: 'I don't recall it happening.' When further asked whether a thing of that sort court take place and he would not remember it, he stated: 'I don't remember it.'

We give a further excerpt from his testimony as follows:

'Q. Do you say that it didn't happen? A. Not to my knowledge.

'Q. Will you say now that it didn't happen? A. I don't recall it happening.

'Q. Do you mean to sit here and tell me, Mr. Slattery, that a thing of that sort could occur and you not recall it? A. I don't know. I can't recall the incident happening at all.

'Q. The facts are now Mr. 'A' voted Yes on the 15th of May. He heard about the fact that money was floating around, just the same as some of the rest of them heard about money that your boy friends who were working with you on this bill had money to spend, and were spending it, and so he stepped up to you, because he had seen you over there in the House time and time again, and in the lobby of the Olds Hotel he said to you, 'I have decided to change my vote,' or words to that effect, 'for a consideration,' or 'for some money.' ***470** A. I don't recall him ever saying that to me, or ever hearing him say it.

'Q. I am asking you again now, and I want an answer, Yes or No. A. I don't know.

The judge further certified that to many of the questions put to Slattery concerning the incident referred to, as well as others, he repeatedly replied: 'I said I don't remember.' Another excerpt from his testimony is as follows:

****256** 'Q. Your Honor, I insist that I have an answer to that question.

'The Court: Mr. Slattery, if anything like that happened, you would know it, wouldn't you? * * *

'A. If I was listening, I would.

'The Court: If you were listening. Don't you think that you would listen, if any member of the legislature stepped up to you and talked to you? A. Oh, I could be interrupted, lots of times, your Honor, and I——

'The Court: Well, that is utter nonsense. You know whether this incident happened or did not. A. Well, I can't recall any such thing happening.

'The Court: Do you want to tell us now, then, that nothing of the kind happened? A. I can't remember any such thing happening. You want me to tell the truth, don't you?

'The Court: You are now willing to say that it didn't happen, are you? A. I don't say that it did or didn't happen. I don't say that it didn't happen; I don't say that it did.

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'The Court: You want to leave your testimony just like that, that you are unwilling to say now here under oath, on the stand, that that did not happen? A. I am willing to say that I don't remember any such thing happening, your Honor.

'The Court: Well, that is sheer nonsense. Do ***471** you expect us to believe for a moment that you can't remember a thing of that kind—— A. I don't know. * * *

'The Court: So I say we come back to the proposition you will not say here and now under oath that this did not happen? A. I will say that——

'The Court: I want an answer to that question, Yes or No. A.—in my memory, it never happened, your Honor.'

Then after some testimony that was omitted, the following colloquy took place:

'The Court: You can answer the question, Yes or No. I am entitled to an answer to it in that form. Do you say now that that didn't happen? A. Do I have to answer any question that might incriminate me?

'The Court: Do you wish to decline to answer the question on the ground that the answer might incriminate you? A. I don't know. I don't even know my rights, your Honor. I am trying to be honest, and to tell you that I don't remember any such incident happening.

'The Court: Well, we are entitled to know now what your claim is with reference to this occurrence. * * *

'The Court: I want to know right here and now, Mr. Slattery, and this is the last time I am going to ask you that question. Is it your claim now,—do you say now, here under oath, that that did not happen? A. Your Honor, I don't—I won't swear to anything that I don't know to be a fact, and you don't want me to, do you?

'The Court: But I want you to answer these questions here, that you should be prepared to answer, ***472** and are prepared to answer. You know whether that happened or not. A. I don't remember any such thing happening, your Honor, and you want me to tell the truth, and that is my memory of it, so help me God, I wouldn't lie to you for anything.

'The Court: Then you mean to say that it didn't happen do you? A. Not in my momory, it didn't happen.'

Later, when pressed for an answer:

'Mr. Sigler: I ask the court right now to commit him for contempt of court in the presence of the court. A. I have answered every question I could as hohestly as I can.

'Q. You haven't answered this, and Judge Carr has been very particular to give you a chance to answer. I am going to give you one more chance. (Again testimony is omitted.)

'Do you say that it did or did not happen? A. I won't say that it did happen; I won't say that it didn't happen, because I can't remember. * * *

'Q. Upon receipt of this subpoena today, with whom did you talk? A. I talked with my attorney.'

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The judge further certified that the answers thus given, as well as the answers to other questions, indicated beyond question the intention upon his part to refrain from testifying to facts obviously within his knowledge. The judge stated that Slattery was interested in a certain bill pending before the legislature and devoted the major portion of his time over a period of several months to lobbying in regard to the bill and that, as a lobbyist on behalf of certain parties interested in the bill, he was in close touch with members ****257** of the legislature. The contempt consists in the giving false or evasive answers and evading replies to questions propounded ***473** by the subterfuge of the answers, 'I don't remember,' or 'recall,' or 'it did not happen in my memory.' Such answers might be truthful in regard to trivial events and particularly so if they happened some time in the past, but it does not seem reasonable that a man of petitioner's position, who devoted several months of his time to lobbying in regard to a certain bill and thus trying to win over legislators to his point of view, could not possibly remember whether or not 'A' had approached him and stated he would change his vote for a consideration. An additional return by the judge discloses that the question propounded by him immediately before the subject of self-incrimination arose was similar to the previous one to which petitioner had replied that he did not remember or that it did not happen within his memory. When the judge insisted that petitioner give an answer of Yes or No to the question of whether Mr. 'A' had made an offer to petitioner to change his vote for a consideration, or words to that effect, notwithstanding petitioner's previous statement that he could not remember, he raised the question of self-incrimination. This indicates that he did remember but he feared that the answer might incriminate him. The judge asked him whether he declined to answer on that ground, and petitioner replied that he did not know what his rights were. We realize he was without counsel, although he had consulted counsel both in Detroit and in Lansing before taking the witness stand. Preliminary questions put to him as to what some one else said ordinarily would not involve self-incrimination. The witness himself is not the sole arbiter of the incriminating nature of the testimony he is asked to give. Where it is perfectly clear that an answer cannot incriminate, silence is contumacious. ***474** In re Schnitzer, 295 Mich. 736, 295 N.W. 478. Also see, United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037, 51 A.L.R. 1020. Remote denger of incrimination as a rule is not sufficient to excuse a witness from testifying. We need not pass upon the question of whether an answer, 'Yes, it did happen,' or 'No, it did not happen,' would have been incriminating, as the judge did not have an opportunity to rule on it. The question of self-incrimination is not involved. We only mention that the inquiry made by witness as to self-incrimination does indicate that his previous answers as to lack of memory were untrue, and in that respect he was wilfully evasive in his previous answers.

Petitioner stresses the case of Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 339, 63 L.Ed. 656, 11 A.L.R. 333, wherein the petitioner was adjudged guilty of contempt for falsely swearing, stating that he could not recollect ever seeing a certain party write or sign his name, although he believed from having seen his writing that the writing shown him was of the same party. The witness persisted in saying that he could not recall seeing a certain party write, that he would not say that he had or had not. In the above case, the lower court had found that from other testimony in the case the witness was wilfully refusing to testify truthfully, that he was committing perjury. There was no reference in the case to show any circumstances or conditions showing that such perjury had an obstructive effect. The court, however, stated: 'Whether, then, power to punish for contempt exists in every case where a court is of the opinion that a witness is committing perjury, is the test we must here apply. Because perjury is a crime defined by law and one committing it may be tried and punished does not necessarily establish that when

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committed ***475** in the presence of a court it may not, when exceptional conditions so justify, be the subject-matter of a punishment for contempt.'

The court cited with approval In re Rosenberg, 90 Wis. 581, 63 N.W. 1065, 64 N.W. 299, and a number of other cases including United States v. Appel, D.C., 211 F. 495, in which Judge Learned Hand stated: 'The rule, I think, ought to be this: If the witness' conduct shows beyond any doubt whatever that he is refusing to tell what he knows, he is in contempt of court. That conduct is, of course, beyond question when he flatly refuses to answer, but it may appear in other ways. A court, like any one else who is in earnest, ought not to be put off by transparent sham, and the mere fact that the witness gives some answer cannot be an absolute test. For instance, it could not be enough for a witness to say that he did not remember where he had slept the night before, if he was sane and sober, or that he could not tell whether he had been married more than a week. If a court is to have any power at ****258** all to compel an answer, it must surely have power to compel an answer which is not given to fob off inquiry.'

We quote from O'Connell v. United States, 2 Cir., 40 F.2d 201, 204: 'His contumacy was further established by the character of his responses to question to which he did make formal answer. Since Ex parte Hudgings, 249 U.S. 378, 39 S.Ct. 337, 63 L.Ed. 656, 11 A.L.R. 333, we have held that, though a witness make formal answer, it may be apparent that he is withholding the truth, and that such obstruction of justice may be punished as contempt even if it be also perjury. Loubriel v. United States, 2 Cir., 9 F.2d 807. See, also, ***476** In re Schulman, 2 Cir., 177 F. 191; In re Kaplan Bros., 3 Cir., 213 F. 753; Haimsohn v. United States, 6 Cir., 2 F.2d 441; United State v. Karns, D.C., 27 F.2d 453. * * * His parrying with the examiner and his constant reiteration of 'I don't remember' in respect to matters of which he must have had some recollection indicate to our minds, as they did to grand jury and the District Court, a determination not to give his best recollection of facts about which he was being interrogated. Such conduct, coupled with his refusal to answer some questions at all, under a claim of privilege which the court had previously instructed him to be inapplicable, furnishes a typical example of recalcitrancy. His attitude was clearly obstructive and contemptuous of judicial authority.'

The refusal to answer or the giving of an evasive reply obstructs the work of a judge or jury which in an orderly manner is seeking to ascertain whether a complaint is true and certain crimes have been committed. If the witness could hide behind the answer 'I don't remember,' or words to that effect, when such statement was manifestly untrue, it would emasculate the one man grand jury proceedings and make them of little or no value.

In Finkel v. McCook, 247 App.Div. 57, 286 N.Y.S. 755, 760, Finkel was adjudged guilty of contempt of court because as a witness before the grand jury he gave testimony which was plainly inconsistent, manifestly contradictory and conspicuously unbelieveable so as to make it apparent that he had deliberately concealed the truth and given answers which were replies in form only and substantially as useless as a complete refusal to answer. The court held that on his own admission he was chargeable with perjury and subject to punishment for that crime, ***477** but there was nothing to prevent the court from treating it as a contempt. The court said: 'The distinction is very clearly illustrated in Edwards v. Edwards, 87 N.J.Eq. 546, 548, 100 A. 608, where it was said: 'It is a contempt and may be punished as such. It may also be punished as a crime. The one act constitutes two offences, one against the court, the other against the state, just as an assault committed in court may be both a contempt and a crime.''

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The return of the judge shows that there was evidence indicating that Slattery was obstructing the work of the court by wilfully giving evasive answers. The judge had the advantage of seeing the witness and the manner in which he testified.

The case is presented to us also on certiorari. The court in its return stated that the attitude of the witness upon the stand was contemptuous, that his answers to questions propounded were evasive and that he refused to give proper answers to the questions put to him. The law is stated by Mr. Justice Fellows, speaking for the court in People v. Doe, 226 Mich. 5, 196 N.W. 757, 759: 'The return must be taken as true. In this certiorari proceeding we are not the triers of the facts. We do not weigh the testimony. We may, and it is our duty to, examine the testimony, to see if there is any evidence to support the finding. If there is, we cannot measure it. The finding must be accepted as true. This is settled law.'

He also quoted from In re Rosenberg, supra, as follows: 'Whether the petitioner's answers were untruthful, evasive, or prevaricating, so as in effect to amount to a refusal to answer and to give the discovery called ***478** for, or whether it was fairly within his ability to make the discovery required of him; whether his conduct was innocent or contumacious—were questions which the exigency of the case required the circuit court to determine. The power to determine is jurisdiction. The correctness or justice of the determination of these questions by the circuit court is not open for consideration here. That determination is conclusive in this proceeding.'

We have examined the record as submitted to us and we find there is evidence to support the judge's finding.

Other questions raised have been considered. We do not believe they are of merit or that it is necessary to discuss ****259** them in detail. It was proper for Judge Carr to make the order finding petitioner guilty of contempt, not as a one man grand jury but as a circuit judge. It would have been a idle gesture for him to have the record of a case in which he had sat, first written up and then submitted to himself. The sentence of 60 days was in accordance with the statute.

In a brief of an amicus curiae, distinction is sought to be made between a court and a judge. When a judge sits in court, the words 'court' and 'judge' are used interchangeably. It was pointed out that there are two judges in Ingham county. Judge Carr took jurisdiction. Two men are not a one man grand jury. It is claimed that imposing that extra work upon a judge prevents him from performing his other judicial duties. We know of no more important duty than to sit as a one man grand jury called to uncover criminal malfeasance in office. Under the judicial system of this State, judges from other judicial districts can be assigned to sit in judicial circuits that need assistance. It is further claimed that a proceeding of this nature may cause a very ***479** large financial burden upon the taxpayer of the county. We shall consider such question, when and if it arises. In the instant case, the State has made provision for the expense of the one man grand jury. It is further claimed that the special prosecutor, assistant prosecuting attorney of Ingham county and special counsel have no standing in court. A similar question arose in regard to an investigation of a one man grand jury in In re Investigation of Recount, 270 Mich. 328, 258 N.W. 776, and it was held that the judge in making this investigation might call assistance from the bar or otherwise as he might desire.

Petitions for habeas corpus and certiorari are dismissed and petitioner is remanded to the custody of the sheriff to complete his sentence for contempt unless he purges himself of such contempt to the satisfaction of the circuit judge, as provided by law.

STARR, C. J., and NORTH, BUSHNELL, SHARPE, and BOYLES, JJ., concurred with BUTZEL, J.

WIEST, Justice.

I concur in the result on the ground that petitioner was contumacious.

REID, J., concurred with WIEST, J.

All Citations

310 Mich. 458, 17 N.W.2d 251

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Michigan Supreme Court
Lansing, Michigan

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Syllabus

Chief Justice:
Bridget M. McCormack

Justices:
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Reporter of Decisions:
Kathryn L. Loomis

PEOPLE v DAVIS

Docket No. 161396. Argued on application for leave to appeal November 10, 2021. Decided March 14, 2022.

Donald W. Davis, Jr., was convicted following a jury trial in the Genesee Circuit Court of multiple felonies in connection with the shooting death of Devante Hanson. During a recess on the second day of the trial, the mother of the victim's child made contact with a juror in the hallway. When the trial resumed, the court, Geoffrey L. Neithercut, J., ordered the woman and all other spectators, with the exception of the victim's mother, removed from the courtroom and directed them not to return for the remainder of the trial. After his conviction, defendant appealed and moved to remand for an evidentiary hearing, arguing that he had been denied his constitutional right to a public trial and that his trial counsel had been ineffective for failing to object to the closure of the courtroom. The Court of Appeals granted the motion. On remand, following the evidentiary hearing, the trial court denied defendant's motion for a new trial, stating that it had not actually closed the courtroom to the public and that the doors were never locked. In addition, the court concluded that while it had poorly worded its directive to the spectators not to return during the trial, defendant was not prejudiced by the removal because no one supporting defendant had been affected by the removal order. The Court of Appeals, MARKEY, P.J., and REDFORD, J. (SWARTZLE, J., concurring in part and dissenting in part), affirmed, stating that the courtroom had been "cleared" rather than closed, that defendant had waived his right to a public trial when defense counsel failed to object to the clearing of the courtroom, and that even if the courtroom had been closed and the error had been forfeited rather than waived, defendant would not have been entitled to relief because any error in this regard would not have warranted reversal. 331 Mich App 699 (2020). Defendant applied for leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 507 Mich 853 (2021).

In an opinion by Justice CLEMENT, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, CAVANAGH, and WELCH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The trial court's closure of the courtroom for nearly the entirety of defendant's trial after a single, benign interaction between an observer and a juror constituted plain error. Because the deprivation of a defendant's public-trial right is a structural error, the error necessarily affected defendant's substantial rights. This structural error presumptively satisfied the plain-error

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standard's requirements for reversal, and neither the prosecution's arguments nor the record evidence rebutted that presumption. The Court of Appeals judgment was reversed, and the case was remanded to the trial court for a new trial.

1. Appellate review was not precluded on the ground that defendant had waived the argument regarding the closure of the courtroom by failing to object. In order to waive a known right, a party must clearly express satisfaction with a trial court's decision, which defense counsel did not do in this case. The Court of Appeals erred by considering defense counsel's posttrial statements at the evidentiary hearing to supplement defense counsel's silence at trial to conclude that the issue had been waived rather than forfeited. A failure to object—even when purposeful or strategic—does not constitute the clear, outward expression of satisfaction with a trial court's decision that is necessary to find waiver, and defense counsel's testimony detailing his motivation behind the lack of objection, elicited months after trial when defense counsel was no longer representing defendant, did not retroactively transform defense counsel's silence into an affirmative approval. Further, after the trial, a defense counsel's interests are no longer necessarily aligned with those of the defendant and defense counsel may no longer make decisions on the defendant's behalf. Accordingly, an attorney's posttrial testimony about the reason for a lack of objection cannot retroactively transform the forfeiture of a client's right at trial into a waiver of the same.

2. The United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a public trial. This right allows the public to see that a defendant is fairly dealt with and not unjustly condemned, reminds defendant's triers of their responsibility and the importance of their functions, helps ensure that judges and prosecutors fulfill their duties ethically, encourages witnesses to come forward, and discourages perjury. However, a courtroom may be closed during any stage of a criminal proceeding if there is an overriding interest that is likely to be prejudiced, if the closure is no broader than necessary to protect that interest, and if the trial court has considered reasonable alternatives to closing the proceeding and made findings adequate to support the closure.

3. The trial court and the Court of Appeals clearly erred by finding that the courtroom was not closed to the public. The trial court ordered everyone in the gallery to leave the courthouse and not come back, told the observers that they were not allowed to return for the remainder of the trial, and stated that the only person allowed to watch the trial was the victim's mother. The trial court's posttrial interpretation of this oral order as a temporary "clearing" of the courtroom ignored its own explicit instruction that the observers were not allowed to return for the remainder of trial, not just the remainder of that particular day. Even accepting as true the trial court's posttrial assertions that it did not lock the courtroom or eject any observers during the remainder of trial, the trial court's failure to enforce or otherwise effectuate the order did not undo it. The observers who were removed from the courtroom on the day of the order were directed not to return for the remainder of the trial, and they did not. It was not necessary for the trial court to have ejected potential observers or taken actions to bar entry of potential observers to find that a closure order was in place.

4. When preserved, the erroneous denial of a defendant's public-trial right is considered a structural error that defies analysis by harmless-error standards and results in automatic relief to

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the defendant. When such an error is forfeited, a defendant must prove that error occurred, that the error was plain, and that the plain error affected substantial rights. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence.

5. The trial court's decision to close the courtroom was plain error. The observer's prohibited interaction with the juror implicated the impartiality of the jury, and given defendant's constitutional right to be tried by an impartial jury, preventing interference with the jury was an overriding interest that the trial court was justified in attempting to safeguard. However, the closure was broader than necessary to protect the impartiality of the jury, the trial court failed to consider reasonable alternatives to closing the proceeding, and the trial court failed to make adequate factual findings to support the closure. The trial court's failure to comply with these requirements constituted plain error, given that these requirements are well established and the trial court's failure to comply with them was readily apparent from the record.

6. The trial court's plain error in closing the courtroom affected defendant's substantial rights. Because structural errors such as this affect the framework within which the trial proceeds rather than a single piece of evidence or aspect of the trial, the harm they cause is substantial but often difficult to quantify, and they are thus particularly ill-suited to an analysis of whether the error affected the outcome of the trial court proceedings. The United States Supreme Court has held that structural errors involve constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error and that the proper remedy for a preserved structural error is automatic reversal. The Michigan Supreme Court has previously suggested that structural errors satisfy the third prong of the plain-error standard. The harmless-error and plain-error standards require the same kind of inquiry because they both require appellate courts to assess the effect of the error on the outcome of the trial court proceedings. Just as preserved structural errors defy analysis by harmless-error standards, forfeited structural errors defy analysis under the third prong of the plain-error standard. Because structural errors often render a trial fundamentally unfair and an unreliable vehicle for determining guilt or innocence and also affect the framework within which the trial proceeds, they necessarily affect a defendant's substantial rights. Therefore, the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice. Because the deprivation of the public-trial right is a structural error, defendant satisfied the third prong of the plain-error standard.

7. The fourth prong of the plain-error standard requires consideration of whether the error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. A forfeited structural error creates a formal presumption that this prong of the plain-error standard has been satisfied. A trial that has been rendered fundamentally unfair or had its framework affected by structural error is generally one whose fairness, integrity, or public reputation has been damaged. Given this conceptual overlap between the third and fourth prongs of the plain-error standard and that a forfeited structural error automatically satisfies the third prong of the plain-error standard, a forfeited structural error is very likely to also satisfy the fourth prong of the plain-error test. Recognizing a formal rebuttable presumption creates a better framework for future courts applying the plain-error standard to forfeited structural errors. Just as

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defendants face difficulty in proving prejudice from structural errors, they also face difficulty in identifying specific facts on the record showing that the forfeited structural error seriously affected the fairness, integrity, or public reputation of the trial. The formal rebuttable presumption in cases of forfeited structural error will shift the burden of demonstrating that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding to the prosecution, which is better positioned to marshal record facts supporting the overall fairness of the trial proceedings.

8. The denial of defendant's public-trial right, as a structural error, presumptively establishes that the error had a serious effect on the fairness, integrity, or public reputation of the trial. The prosecution did not rebut this presumption with its argument that the closure reduced the perception that the gallery supported the victim while defendant had no supporters in attendance. The public-trial right does not serve only defendant's interest in the presence of community support; rather, the existence of public observers, no matter their affiliation, helps to ensure a fair trial, to ensure that attorneys and judges do their jobs responsibly, to encourage witnesses to come forward, and to discourage perjury. Further, the prosecution's focus on the supposed absence of harm to defendant himself failed to consider the harm rendered to the integrity and public reputation of the trial. Having satisfied the plain-error standard, defendant is entitled to relief.

Reversed and remanded for a new trial.

Justice ZAHRA, concurring in the result only, agreed that the closure of the courtroom for the majority of defendant's trial violated his constitutional right to a public trial and amounted to plain structural error warranting reversal. He disagreed, however, with the majority's decision to modify the existing plain-error standard for reviewing unpreserved structural errors on its own initiative and with no warning to the bench and the bar, notwithstanding the Court's prior precedent rejecting the rule that the majority adopted. He stated that the majority opinion's framework erodes the preservation standard by undermining the reasons for requiring errors to be preserved for appellate review, which are to allow trial courts the opportunity to correct the error, to prevent the administrative and social costs of further proceedings that could have been avoided with a timely objection, and to deter defendants and their counsel from harboring error as an appellate parachute. He further noted that the majority need not have adopted a new standard in order to provide relief in this case given that defendant could demonstrate that he was entitled to a reversal under all four prongs of the current plain-error standard.

Michigan Supreme Court
Lansing, Michigan

OPINION

Chief Justice:
Bridget M. McCormack

Justices:
Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch

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FILED March 14, 2022

STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 161396

DONALD WAYNE DAVIS, JR.,

Defendant-Appellant.

BEFORE THE ENTIRE BENCH

CLEMENT, J.

At issue in this case is whether defendant, Donald W. Davis, Jr., was deprived of his constitutional right to a public trial. After a benign interaction between a courtroom observer and a juror on the second day of trial, the trial court removed all but one observer from the courtroom, instructed the removed observers not to return, and stated that the courtroom would be closed for the remainder of trial. Although the trial court did not take

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any further action to effectuate this closure, we hold that the unjustified closure nonetheless violated defendant's public-trial right and constituted plain error requiring reversal.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the murder of Devante Hanson. In 2016, a security guard found Hanson's body in the driver's seat of a running car parked outside an apartment complex. Hanson had been shot to death. On the basis of surveillance-camera footage, defendant and Spencer Holiday were identified as the parties who might have been responsible for Hanson's death. As part of a plea deal, Holiday testified against defendant at trial. According to Holiday, defendant lured Hanson to the apartment complex by offering to purchase marijuana from Hanson, but actually intended to rob Hanson. When defendant and Holiday entered Hanson's vehicle, defendant brandished a gun at Hanson and demanded money and marijuana. Hanson reached for defendant's gun, and defendant fatally shot him. Defendant then demanded at gunpoint that Holiday shoot Hanson as well, and Holiday complied.

The prosecutor charged defendant with first-degree murder, based on alternate theories of premeditated murder and felony murder.[1] On the second day of trial, the trial court became aware that a courtroom observer had spoken to a juror during a break in the proceedings. The trial court identified the courtroom observer as Daundria Frye, who explained that she was attending the trial because Hanson was the father of her child. The following exchange then took place:

[1] The prosecutor also charged defendant with assault with intent to commit armed robbery, being a felon in possession of a firearm, being a felon in possession of ammunition, and four counts of carrying a firearm during the commission of a felony.

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> *The Court*: So you know, counselors, the jury has complained that that woman has tried to talk to them.
>
> *Ms. Frye*: No. I didn't try to talk, I just saw a lady and I asked—I'm like did you—do you work at Hurley's? I know I'm not supposed to talk to them.
>
> *The Court*: I've got two choices. One is to find you in contempt of court and lock you up.
>
> *Ms. Frye*: [Are] you serious?
>
> *The Court*: I'm serious. The other is to order everyone in the gallery to leave the courthouse and not come back. What we're going to do is this; in order to lock you up I'd have to get you a lawyer first and that wastes time because we have things to do here. So instead, I'm going to bar everyone from this courthouse except for the mother of Devante [Hanson]. The rest of you leave. Don't you come back.
>
> *Ms. Frye*: Okay.
>
> *The Court*: Shame on you trying to subvert the justice system.

Shortly thereafter, a person unidentified in the trial transcript sought clarification of the trial court's verbal order:

> *Unidentified Speaker*: Judge, you did mean for the remainder of the trial correct?
>
> *The Court*: For the remainder of the trial, all the way in to next week.
>
> *Unidentified Speaker*: All right.
>
> *The Court*: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

The prosecutor asked the trial court whether the "jurors who have a complaint" regarding the interaction with Frye should be questioned to determine whether they were prejudiced by the interaction. The trial court responded that this was not necessary, reasoning that

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Frye had merely asked one juror whether that juror worked at Hurley Hospital and that this interaction was merely "a short comment."

The trial continued, and, over the course of several days, the jury heard from 14 additional witnesses, including the key testimony from Holiday described above. Ultimately, the jury found defendant guilty as charged.

Defendant appealed by right in the Court of Appeals, and he included in his appeal a motion to remand for an evidentiary hearing and to allow him the opportunity to file a motion for a new trial based on a variety of issues. The Court of Appeals granted this motion in part, ordering a remand for the sole purpose of "expand[ing] the factual record regarding [the trial court's] decision to close the trial to all members of the public except for the victim's mother, and to allow defendant to file a motion for new trial based on his claim that trial counsel was ineffective for failing to object to the court's decision." *People v Davis*, unpublished order of the Court of Appeals, entered November 13, 2018 (Docket No. 343432).

On remand, testimony was elicited regarding the factual circumstances of the courtroom closure. Defense counsel testified that, before the courtroom closure, there were between 3 and 10 people observing the trial on the side of the prosecution, and no observers on defendant's side.[2] After the closure, only the decedent's mother and an employee from the prosecutor's office remained in the gallery. Defense counsel also testified that he did not know of any members of the public who tried to view the trial but were stopped, that

[2] Defense counsel acknowledged on redirect examination that it was never made clear to the jury that there was a defense side and a prosecution side of the courtroom.

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he did not recall there being a sign on the door telling people the trial was closed, and that he did not believe there was a deputy posted outside the courtroom to stop people from entering.[3]

Defendant's sister testified that she came to the courthouse during the trial and found the courtroom door locked, but she was unsure whether her attempted entry occurred during a break in the proceedings.[4] She returned the next day but left before entering the courtroom after feeling threatened by the decedent's family.

Finally, Bryan Wooten, who attempted to view the trial in support of defendant, also testified. He stated that there was no sign at the courtroom door indicating that he could not enter, and Wooten was able to enter the courtroom without interference from the courtroom deputy. However, after he entered, defendant gestured toward the door and indicated that Wooten should leave, and Wooten did so.[5]

---

[3] Defense counsel also testified regarding his decision not to object to the trial court's decision to close the courtroom. Defense counsel explained that when the trial court made its decision, none of the trial observers was there to support defendant. When asked whether "it was actually better to only have the victim's mother here as opposed to having a large group of people," defense counsel answered, "Absolutely."

[4] She testified that she arrived at 1:30 p.m., which was during the period in which the court was in recess.

[5] The record does not reflect the reason for defendant's gesture, and, on appeal, the parties have put forth competing arguments regarding the basis behind this gesture. Defendant argues that he asked Wooten to leave to comply with the courtroom closure order; the prosecutor argues that defendant's request was based instead on defendant's desire that Wooten not observe the trial.

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After evaluating this testimony, the trial court denied defendant's motion for a new trial. The court reasoned that it had not actually closed the courtroom, explaining as follows:

> But I did not lock the courtroom, I did not close it to the public, I just kicked out three to ten people. And I admit I poorly worded it because I said don't come back and I probably should have said don't come back today. That's my error.

The trial court also determined that defendant had not suffered prejudice from this clearing of the courtroom, reasoning that there was no evidence that defense supporters were cleared from the courtroom or later prevented from observing the trial.

Defendant appealed, and the Court of Appeals affirmed in a split, published decision. The majority succinctly agreed with the trial court that the courtroom had been "cleared," not closed. Further, the majority held that defendant had waived his right to a public trial when defense counsel intentionally—according to his hearing testimony—declined to object to the trial court's clearing of the courtroom. In the alternative, if the trial court's order was instead understood to be a closure and defendant was deemed to have forfeited, rather than intentionally waived, the argument, the Court held that defendant would still not have been entitled to relief because he could not have satisfied the plain-error standard. Specifically, defendant could not have demonstrated that the courtroom closure seriously affected the fairness, integrity, or public reputation of the judicial proceedings because the effect of the courtroom closure was merely to limit the presence of observers supporting the prosecution. Because no observers supporting defendant were removed or prevented from observing the trial, the courtroom closure was to defendant's

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benefit, and he was not entitled to relief. *People v Davis*, 331 Mich App 699; 954 NW2d 552 (2020).[6]

Defendant subsequently applied for leave to appeal in this Court, and we ordered oral argument on the application on the following issues:

> (1) whether [defendant] was denied his right to a public trial pursuant to US Const, Am VI, and Const 1963, art 1, § 20 where the Genesee Circuit Court stated that it was barring everyone, but the decedent's mother, from the courtroom for the remainder of the trial and told others in the courtroom to leave and not return; (2) whether, despite the court's statement, the courtroom remained open to the public because the courtroom door was unlocked, no sign was posted advising members of the public that the courtroom was closed, and court personnel did not prevent persons from entering the courtroom; (3) whether the appellant waived his right to a public trial; (4) whether trial counsel rendered ineffective assistance in failing to object; see *Weaver v Massachusetts*, 582 US ___; 137 S Ct 1899, 1913 (2017); and (5) whether the trial court committed plain error entitling the appellant to a new trial. [*People v Davis*, 507 Mich 853 (2021).]

II. ANALYSIS

A. WAIVER AND FORFEITURE

As a threshold issue, the prosecutor argues that defendant has waived this argument and that, accordingly, appellate review is precluded. We disagree. Waiver is " 'the intentional relinquishment or abandonment of a known right,' " and one who waives an

[6] Judge SWARTZLE, concurring in part and dissenting in part, would have held that defendant satisfied the plain-error standard and, accordingly, was entitled to a new trial. Regarding the fourth prong of the plain-error standard, Judge SWARTZLE determined that the closure seriously affected the fairness, integrity, and reputation of the judicial proceedings because a majority of defendant's trial—the testimony of 14 witnesses, closing arguments, and the rendering of the verdict—was not subject to public view. He reasoned that the public-trial right serves several interests beyond demonstrating community support for a defendant or a prosecution and that defendant was denied these benefits without sufficient justification.

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issue cannot later seek appellate review of that issue. *People v Carines*, 460 Mich 750, 752 n 7; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (some quotation marks omitted). In order to waive a known right, a party must "clearly express[] satisfaction with a trial court's decision . . . ." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). In contrast, a party merely forfeits rather than waives an issue when that party fails to timely assert a right. *Id*. at 504 n 27.

As applied to the public-trial right, this Court has held that mere silence in the face of a courtroom closure results in forfeiture, not waiver, of the public-trial right. *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012). Similarly, here, defense counsel did not object to the courtroom closure, but also did not "clearly express[] satisfaction" with the closure, so the alleged error was forfeited. *Kowalski*, 489 Mich at 503.

In so holding, we reject the Court of Appeals' use of defense counsel's posttrial statements at the evidentiary hearing to supplement defense counsel's silence at trial and its resultant conclusion that the issue was waived rather than forfeited. The failure to object—even when purposeful or strategic—does not constitute the clear, outward expression of satisfaction with a trial court's decision that is necessary to find waiver. See *Vaughn*, 491 Mich at 663-664. And defense counsel's testimony detailing his motivation behind the lack of objection, elicited months after trial when defense counsel was no longer representing defendant, does not retroactively transform defense counsel's silence into an affirmative approval. Eliciting testimony from defense counsel regarding his motivations for not objecting at trial is not the same as defense counsel's waiving an issue at trial on behalf of his client. Further, the majority's analysis ignores the reality that, posttrial,

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defense counsel's interests are no longer necessarily aligned with those of the defendant and that defense counsel may no longer make decisions on behalf of the defendant. It places defendants who seek posttrial evidentiary hearings in an unequal position with those defendants who do not, as the former risk having their arguments deemed waived and prohibited from appellate review by virtue of their defense counsel's testimony at the hearing, whereas the latter class of defendants is not exposed to such a risk. Accordingly, an attorney's posttrial testimony as to the reason for the attorney's lack of objection cannot retroactively transform the forfeiture of a client's right at trial into a waiver of the same.

B. THE PUBLIC-TRIAL RIGHT

Having determined that defendant has not waived this argument, we must now consider whether the alleged courtroom closure violated defendant's right to a public trial. Both the United States Constitution and the Michigan Constitution guarantee a criminal defendant the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20. "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of responsibility and to the importance of their functions . . . ." *Gannett Co v DePasquale*, 443 US 368, 380; 99 S Ct 2898; 61 L Ed 2d 608 (1979) (quotation marks and citations omitted). The public-trial right also helps ensure that judges and prosecutors fulfill their duties ethically, encourages witnesses to come forward, and discourages perjury. *Vaughn*, 491 Mich at 667.

Despite serving these important interests, the public-trial right is not unlimited, and circumstances may exist that warrant the closure of a courtroom during any stage of a

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criminal proceeding. *Id*. at 653. In order to justify a courtroom closure, there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id*. at 653, quoting *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984) (quotation marks omitted).

1. STANDARD OF REVIEW

When preserved, the erroneous denial of a defendant's public-trial right is considered a structural error. *Weaver v Massachusetts*, 582 US ___, ___; 137 S Ct 1899, 1908; 198 L Ed 2d 420 (2017). Structural errors "are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards." *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Because the harm rendered by these errors is extensive but intrinsic and difficult to quantify, preserved structural errors result in automatic relief to the defendant to "ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial." *Weaver*, 582 US at ___; 137 S Ct at 1907.

Although preserved structural errors are subject to automatic reversal, the alleged error here was forfeited.[7] In order to receive relief on a forfeited claim of constitutional error, a defendant must prove that (1) error occurred, (2) the error "was plain, i.e., clear or

[7] Although the term "structural error" was coined in the context of preserved claims of errors exempt from the harmless-error standard, for brevity's sake, and for the sake of the bench and bar moving forward, we will also use the term "structural error" to include the same type of errors, even when unpreserved.

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obvious," and (3) "the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks, brackets, and citation omitted). However, as discussed later in this opinion, there are special considerations relevant to this analysis when a forfeited structural error is at issue.

Finally, we review a trial court's factual findings for clear error. *Vaughn*, 491 Mich at 650. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993) (opinion of GRIFFIN, J.).

2. FACTUAL ISSUE OF CLOSURE

To begin, we disagree with the lower courts' finding that the courtroom was not closed to the public.

Here, the trial court ordered "everyone in the gallery to leave the courthouse and not come back."[8] And it further specified that the observers were not allowed to return "[f]or the remainder of the trial, all the way in to next week" and that "[t]he only person allowed to watch this trial is the mother of the young man who died." There is no ambiguity in this language: The trial court had ordered the courtroom closed to all observers except Hanson's

[8] The court made an exception for Hanson's mother, whose presence was expressly permitted by statute. MCL 780.761; MCL 780.752(1)(m)(*ii*)(C).

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mother for the remainder of the trial. We are "left with a definite and firm conviction" that the trial court was mistaken in concluding otherwise. *Kurylczyk*, 443 Mich at 303.

The trial court's posttrial interpretation of this oral order as a temporary "clearing" of the courtroom ignores its own explicit instruction that the observers were not allowed to return for the remainder of trial, not just the remainder of that particular day.[9] Moreover, even accepting as true the trial court's posttrial assertions that it did not lock the courtroom or eject any observers during the remainder of trial, the trial court's failure to enforce or otherwise effectuate the order does not undo it.[10] The observers who were removed from the courtroom on the day of the order were directed not to return for the remainder of the trial, and they did not. The parties understood that no observers would be allowed for the

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[9] Specifically, at the close of the evidentiary hearing, the trial court stated, "I admit I poorly worded [the order] because I said don't come back and I probably should have said don't come back today," but the trial court actually directed the observers not to return "[f]or the remainder of the trial."

[10] While the Court of Appeals found that the courtroom was not closed, it proceeded in the alternative with a plain-error analysis as follows:

> The trial court stated that it did not actually close the courtroom to the public and that the doors were never locked, and no one was ejected from the courtroom after Frye and the victim's other supporters were ejected. We decline to call into question the highly respected jurist's credibility, so we shall proceed with our analysis on the *assumption* that the courtroom was closed for the remainder of the trial. [*People v Davis*, 331 Mich App at 712 n 1.]

There are established standards for reviewing the trial court's findings of fact and conclusions of law, and none of these standards involves an assessment of the presiding judge's professional reputation. See *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The presence of legal error does not depend on a jurist's respectability, and to the extent that the Court of Appeals adopted the trial court's rulings and findings of fact on that basis, it erred.

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remainder of the trial, and the trial court did not later advise them otherwise. We do not require the trial court to have ejected potential observers or taken actions to bar entry of potential observers to find that a closure order was in place. Such requirements would expose potential observers to the risk of being held in contempt of court for violating the previously rendered closure order. It would also treat defendants inequitably on the basis of the level of community interest in their prosecution, as those whose cases lack potential interested observers would be unable to meet this standard.

In sum, pursuant to the plain language of the trial court's verbal order, we find that the trial court's order rendered the courtroom closed to the public for a majority of the trial.

3. APPLICATION OF THE PLAIN-ERROR STANDARD

Having found that the courtroom was factually closed, we hold that the decision to close the courtroom was plain error.

a. PLAIN ERROR OCCURRED

As discussed, to justify a courtroom closure, there must be "an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Vaughn*, 491 Mich at 653, quoting *Waller*, 467 US at 48 (quotation marks omitted). Here, Frye's prohibited interaction with the juror implicated the impartiality of the jury. Given defendant's constitutional right to be tried by an impartial jury, US Const, Am VI; Const 1963, art 1, § 20, preventing interference with the jury is undoubtedly an overriding interest. The trial court thus was justified in attempting to safeguard that interest.

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However, the trial court failed to comply with the remainder of the requirements set forth in *Vaughn* and *Waller*. First, the closure was broader than necessary to protect the impartiality of the jury. See *Waller*, 467 US at 48. The trial court could have banned only Frye from the courtroom, given that no other member of the public attempted to interact with the jury. It could have repeated its previous instructions to observers regarding the prohibition on juror interaction or given more detailed instructions. Or it could have had the deputy escort the jury to and from the courtroom to prevent any potential interaction with members of the public. Any of these alternatives on their own or in combination would have safeguarded the jury's impartiality while still maintaining a public trial under the circumstances of this case.

Second, the trial court failed to consider reasonable alternatives to closing the proceeding. See *id*. As discussed, there were several alternatives to closure available to the trial court. But the trial court considered only the option of holding Frye in contempt of court.

Third, the trial court also failed to make adequate factual findings to support the closure. See *id*. The trial court did not find that Frye's interaction with the juror was for the purpose of interfering with court proceedings or tampering with the jury. It did not find that the result of Frye's interaction with the juror was a biased juror. And it did not find that a closure was necessary to protect the impartiality of the jury. To the contrary, the trial court concluded that it was unnecessary to question the jurors to determine whether any were prejudiced by Frye's interaction with the juror because it was merely a "short comment." Without factual findings to support its conclusion, the trial court's decision to close the courtroom was unjustified.

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The trial court's failure to comply with the requirements set forth in *Vaughn* and *Waller* constituted error. We also conclude that the error was plain, as these requirements are well established and the trial court's failure to comply with them is readily apparent from the record. See *Carines*, 460 Mich at 763.

b. THE ERROR AFFECTED DEFENDANT'S SUBSTANTIAL RIGHTS

Having found that plain error occurred, we must now consider whether the plain error affected defendant's substantial rights. See *id*. This prong of the plain-error analysis is typically satisfied by demonstrating that the plain error likely affected the outcome of the trial court proceedings. See *Olano*, 507 US at 734; *Carines*, 460 Mich at 763. We readily apply that standard in the context of nonstructural error—for example, by concluding that wrongly admitted evidence likely caused the jury to reach a guilty verdict. See *Fulminante*, 499 US at 307-308. But this prong presents special difficulty when presented with a structural error. Because structural errors by definition "affect[] the framework within which the trial proceeds" rather than a single piece of evidence or aspect of the trial, the harm rendered by structural errors is substantial but often difficult to quantify. *Id*. at 310. Given these difficulties, structural errors are particularly ill-suited to an analysis of whether the error affected the outcome of the trial court proceedings.

The United States Supreme Court faced similar difficulty in the context of applying the harmless-error standard to preserved structural errors. Generally, preserved errors are subject to the harmless-error rule, under which a defendant is denied relief only if the complained-of error was harmless beyond a reasonable doubt. *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967); *Carines*, 460 Mich at 774. But when faced

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with applying this prejudice standard to preserved structural errors, the Court was met with the same difficulties we described earlier; specifically, that errors in the framework of the trial cause serious, but usually unquantifiable harm. *Fulminante*, 499 US at 289-290. The Court ultimately determined that these structural errors involved "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," *Chapman*, 386 US at 23, and held that the proper remedy for a preserved structural error is automatic reversal, *Fulminante*, 499 US at 309.

This Court has previously suggested that structural errors satisfy the third prong of the plain-error standard. See *Vaughn*, 491 Mich at 666; see also *Cain*, 498 Mich 108, 145; 869 NW2d 829 (2015) (VIVIANO, J., dissenting) (advocating for this Court to expressly recognize that structural errors satisfy the third prong). The harmless-error and plain-error standards require "the same kind of inquiry," because they both require appellate courts to assess the effect of the error on the outcome of the trial court proceedings. *Olano*, 507 US at 734. Accordingly, just as preserved structural errors "defy analysis by 'harmless-error' standards," *Fulminante*, 499 US at 309, we conclude that forfeited structural errors defy analysis under the third prong of the plain-error standard. Just as the United States Supreme Court jettisoned the prejudice analysis for preserved structural errors, we similarly jettison the prejudice analysis for forfeited structural errors. Instead, we hold that because structural errors often "render a trial fundamentally unfair" and an "unreliable vehicle for determining guilt or innocence," *Neder v United States*, 527 US 1, 8-9; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (quotation marks and citations omitted),[11] and affect the framework

[11] Although the United States Supreme Court in *Weaver* reasoned that "not every public-trial violation will in fact lead to a fundamentally unfair trial," the Court continued to

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within which the trial proceeds, *Fulminante*, 499 US at 310, they necessarily affect a defendant's substantial rights.[12] Accordingly, the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice.[13] As applied here, because the deprivation of the public-trial right is a structural error, defendant has satisfied the third prong of the plain-error standard. *Vaughn*, 491 Mich at 666; *Weaver*, 582 US at ___; 137 S Ct at 1908.

c. REVERSAL IS WARRANTED

We must now consider whether "the plain, forfeited error . . . seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the

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recognize that some structural errors do always result in fundamental unfairness, "either to the defendant in the specific case or by pervasive undermining of the systematic requirements of a fair and open judicial process." *Weaver*, 582 US at ___; 137 S Ct at 1911. In the specific context of the public-trial right, the Court further recognized that its violation *may* result in fundamental unfairness, that the harm rendered by such a violation is difficult to quantify, and that the public-trial right protects interests of people beyond the defendant. *Id*. at ___; 137 S Ct at 1910. Although the violation of the public-trial right may not always result in fundamental unfairness, it does affect the framework within which the trial proceeds, and the harm rendered is sufficiently significant to support our conclusion that violation of this right necessarily affects a defendant's substantial rights.

[12] This holding is consistent with the United States Supreme Court's decision in *Olano*, 507 US at 735, in which the Court suggested, but did not affirmatively hold, that forfeited structural errors may constitute "a special category of forfeited errors that can be corrected regardless of their effect on the outcome" of the trial court proceedings.

[13] In so doing, we join multiple federal circuits who have held similarly. See *United States v Adams*, 252 F3d 276, 285-286 (CA 3, 2001); *United States v Ramirez-Castillo*, 748 F3d 205, 215 (CA 4, 2014); *Robinson v Ignacio*, 360 F3d 1044, 1061 (CA 9, 2004).

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defendant's innocence." *Carines*, 460 Mich at 763 (quotation marks, citation, and brackets omitted).[14]

We take this opportunity to hold that a forfeited structural error creates a formal presumption that this prong of the plain-error standard has been satisfied.[15] "[T]here is substantial overlap between the characteristics of structural errors (i.e., they 'necessarily render a trial fundamentally unfair') and the standard under the fourth *Carines* prong ('serious effect on the fairness, integrity, or public reputation of the proceedings')." *Cain*, 498 Mich at 148 (VIVIANO, J., dissenting). A trial that has been rendered fundamentally unfair or had its framework affected by structural error is generally one whose fairness, integrity, or public reputation has been damaged. See *Vaughn*, 491 Mich at 667 (reasoning that "any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings") (quotation marks and citation omitted); *United States v Recio*, 371 F3d 1093, 1103 n 7 (CA 9, 2004) ("We note that structural error is particularly likely to satisfy [the] fourth prong [of the plain-error standard]."). Given this conceptual overlap between the third and fourth prongs of the plain-error standard and that a forfeited

[14] Defendant does not argue that the error resulted in the conviction of an actually innocent defendant.

[15] The concurrence asserts that this part of our holding is a sua sponte modification of the law. We disagree. Defendant prompted us to take this approach as a responsive suggestion to the part of our order that asked the parties whether a plain error occurred below. *Davis*, 507 Mich 853. Given that this modification of the prior plain-error standard was made at a party's prompting, we do not view this as a sua sponte change to the law. See, e.g., *Black's Law Dictionary* (11th ed) (defining "sua sponte" as "[w]ithout prompting or suggestion; on [the court's] own motion").

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structural error automatically satisfies the third prong of the plain-error standard, a forfeited structural error is very likely to also satisfy the fourth prong of the plain-error test.

Recognizing a formal rebuttable presumption creates a better framework for future courts applying the plain-error standard to forfeited structural errors. Just as defendants face difficulty in proving prejudice from structural errors, they also face difficulty in identifying specific facts on the record showing that the forfeited structural error seriously affected the fairness, integrity, or public reputation of the trial. The formal rebuttable presumption in cases of forfeited structural error will shift the burden to the prosecutor to demonstrate that the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceeding. The prosecutor is better positioned to marshal record facts supporting the overall fairness of the trial proceedings. For example, in the context of courtroom closures, a prosecutor may successfully rebut the presumption when the trial court failed to sufficiently articulate the basis for the closure under *Waller*, but sufficient justification for the specific closure was present elsewhere in the record. A prosecutor may also successfully rebut such a presumption when an unjustified closure was limited and the courtroom remained open during most of the critical stages of trial. In those hypothetical situations, specific facts could affirmatively demonstrate that, despite the error, the overall fairness, integrity, and reputation of the trial court proceedings were preserved.[16]

[16] The ability to rebut this presumption is consistent with our historical differentiation between preserved and unpreserved errors. "This Court disfavors consideration of unpreserved claims of error," and the mere occurrence of error is insufficient for relief if the defendant failed to object to the error in the trial court. *Carines*, 460 Mich at 761-762. Enforcing a higher standard to achieve relief for unpreserved error encourages defendants to identify error at trial, as the trial court is "ordinarily in the best position to determine the relevant facts and adjudicate the dispute," and resolution at the trial court level prohibits

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As applied in the present case, the denial of defendant's public-trial right—as a structural error—presumptively establishes that the error had a serious effect on the fairness, integrity, or public reputation of the trial, and the prosecutor has not rebutted this presumption. The prosecutor, with whom the Court of Appeals agreed, argues that this prong is not satisfied because the closure "reduced the perception that the gallery was pro-victim and against defendant, and it made less glaring the fact that no one was there who supported defendant." *Davis*, 331 Mich App at 716. But the public-trial right does not serve only defendant's interest in the presence of community support. The existence of public observers, no matter their affiliation, helps to ensure a fair trial, to ensure that attorneys and judges do their jobs responsibly, to encourage witnesses to come forward, and to discourage perjury. *Vaughn*, 491 Mich at 667. Further, this focus on the supposed absence of harm to defendant himself fails to consider the harm rendered to the integrity and public reputation of the trial. While we agree with the prosecutor that jurors are presumed to follow their instructions and that the jurors in this case were instructed to base their decisions on the evidence, that alone is not enough to rebut the presumption where

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the defendant from using the alleged error as an appellate parachute. *Puckett v United States*, 556 US 129, 134; 129 S Ct 1423; 173 L Ed 2d 266 (2009). Here, although the fundamental and unquantifiable harm rendered by forfeited structural errors is sufficient to satisfy the third prong of the plain-error standard and presumptively satisfy the fourth, the prosecutor's ability to rebut the latter presumption means that the defendant is not guaranteed relief for a forfeited structural error. Accordingly, defendants remain encouraged to object to structural errors at the trial court, where the trial court may contemporaneously cure the error, or, upon appeal, the defendant will receive automatic relief. Those defendants who forfeit their argument continue to face a higher threshold for relief on appeal than those who preserved their argument. Under these circumstances, we find unlikely the concurrence's concern that litigants will strategically choose not to object to potential structural error in order to harbor that error as an appellate parachute.

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the vast majority of the critical parts of this trial occurred behind closed doors.[17] Therefore, we hold that the prosecutor has failed to rebut the presumption that the deprivation of defendant's public-trial right had a serious effect on the fairness, integrity, or public reputation of the trial. Having satisfied the plain-error standard, defendant is entitled to relief.

III. CONCLUSION

The trial court's closure of the courtroom for nearly the entirety of trial after a single, benign interaction between an observer and a juror constituted plain error. Because the deprivation of a defendant's public-trial right is a structural error, it necessarily affected defendant's substantial rights. This structural error presumptively satisfies the plain-error standard's requirements for reversal, and here, neither the prosecutor's arguments nor the record evidence rebuts that presumption. Accordingly, we reverse the Court of Appeals judgment and remand to the trial court for a new trial.

Elizabeth T. Clement
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch

[17] While the courtroom was closed in this case, "the jury heard the testimony of 14 witnesses, 13 of whom testified for the prosecution. Counsel then presented their closing arguments, the trial court instructed the jury, and the jury returned its verdict—all in private." *Davis*, 331 Mich App at 724 (SWARTZLE, P.J., concurring in part and dissenting in part). "If a portion of the trial may be conducted behind barred doors, it may all be conducted behind barred doors. If one constitutional right may be violated with impunity, all may be and the bill of rights becomes but a scrap of paper. The defendant has not had the public trial guaranteed him by the Constitution." *People v Micalizzi*, 223 Mich 580, 585; 194 NW 540 (1925).

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STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v No. 161396

DONALD WAYNE DAVIS, JR.,

Defendant-Appellant.

ZAHRA, J. (*concurring in the result*).

I concur with the majority opinion that the closure of the courtroom for the majority of defendant's trial violated his constitutional right to a public trial and amounted to plain structural error warranting reversal. I disagree, however, with this Court's sua sponte decision to modify the existing plain-error standard of review adopted by this Court in *People v Carines*[1] for reviewing unpreserved structural errors. With no warning to the bench and the bar, the majority opinion opportunistically concludes that structural errors defy plain-error review and that the prosecution must bear the burden of proving that an unpreserved structural error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of a defendant's trial so as to warrant reversal—notwithstanding this Court's prior precedent rejecting such a rule. The majority opinion's newfound framework erodes the preservation standard in this state by undermining the very reasons for which we require errors to be preserved for

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[1] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

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appellate review—to allow trial courts the opportunity to correct the error, to prevent the administrative and social costs of further proceedings that could have been avoided with a timely objection, and to deter defendants and their counsel from harboring error as an appellate parachute. Further still, the majority opinion casts aside our jurisprudence without any apparent need to do so in this case. That is, because defendant can demonstrate that he is entitled to a reversal under all four prongs of the current plain-error standard, this Court fashions a rule it need not even apply to afford defendant relief. Accordingly, while I concur in the result reached by the majority opinion, I very much disagree with its reasoning.

I. THE PLAIN-ERROR STANDARD

Time and again, this Court has emphasized " ' "the importance of preserving issues for appellate review" ' " and expressed its disfavor of considering " ' "unpreserved claims of error," even unpreserved claims of constitutional error.' "[2] "As a general rule, appellate courts will not grant relief on belated claims of error unless *the proponent* establishes, among other things, that the unpreserved error seriously affected the fairness, integrity, or public reputation of the judicial proceedings."[3] This general rule exists for good reason: " ' "[A]nyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not much matter, and that a reflexive inclination by appellate

[2] *People v Cain*, 498 Mich 108, 115; 869 NW2d 829 (2015), quoting *People v Vaughn*, 491 Mich 642, 653-654; 821 NW2d 288 (2012). See also *Carines*, 460 Mich at 761-762, citing *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

[3] *Cain*, 498 Mich at 112 (emphasis added).

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courts to reverse because of unpreserved error would be fatal." ' "[4] "Preservation serves 'the important need to encourage all trial participants to seek a fair and accurate trial the first time around[.]' "[5]

It is with this basic understanding of appellate law that this Court in *Carines* adopted the plain-error standard set forth by the Supreme Court of the United States in *United States v Olano* for forfeited constitutional errors.[6] "[I]n order to receive relief on his forfeited claim of constitutional error, *defendant* must establish (1) that the error occurred, (2) that the error was plain, (3) that the error affected substantial rights, and (4) that the error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings."[7] Although the third prong generally requires a defendant to establish "prejudice," i.e., that the error affected the outcome of the proceedings, there exists a special "category of cases, yet to be clearly defined, where prejudice is presumed or reversal is automatic."[8] Errors in these cases are referred to as "structural errors" because "they 'affect the framework within which the trial

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[4] *Id*. at 115, quoting *Puckett v United States*, 556 US 129, 134; 129 S Ct 1423; 173 L Ed 2d 266 (2009).

[5] *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006), quoting *Grant*, 445 Mich at 551.

[6] *Carines*, 460 Mich at 763-764, citing *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[7] *Vaughn*, 491 Mich at 664-665 (quotation marks omitted; emphasis added), citing *Carines*, 460 Mich at 763.

[8] *Vaughn*, 491 Mich at 666 (quotation marks and citation omitted).

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proceeds' and are not 'simply an error in the trial process itself.' "[9] As we stated in *People v Vaughn*, another case involving an unpreserved claim of error regarding a defendant's right to a public trial:

> While the Supreme Court of the United States has specifically reserved judgment on whether an unpreserved structural error automatically affects a defendant's substantial rights, this Court's decision in *People v Duncan*[10] has explained that structural errors are intrinsically harmful, without regard to their effect on the outcome. Accordingly, our caselaw suggests that a plain structural error satisfies the third *Carines* prong.
>
> Nevertheless, even if defendant can show that the error satisfied the first three *Carines* requirements, we must exercise discretion and only grant defendant a new trial if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. Although denial of the right to a public trial is a structural error, it is still subject to this requirement. While any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors.[11]

In *People v Cain*, this Court reaffirmed *Vaughn*'s holding that even with respect to unpreserved structural errors, "a defendant is still not entitled to relief unless he or she can

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[9] *United States v Gonzalez-Lopez*, 548 US 140, 148; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (brackets omitted), quoting *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Structural errors are distinguishable from "trial error[s]," which are errors that "occur[] during presentation of the case to the jury" and "may be quantitatively assessed in the context of other evidence presented in order to determine whether [they are] harmless beyond a reasonable doubt." *Gonzalez-Lopez*, 548 US at 148 (quotation marks and citation omitted).

[10] *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000).

[11] *Vaughn*, 491 Mich at 666-667 (quotation marks, citations, and ellipses omitted).

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satisfy the four requirements set forth in *Carines*."[12] "While meeting all four prongs is difficult, as it should be, the plain-error test affords defendants sufficient protection because . . . [a]pplication of a plain-error analysis to unpreserved structural error does not deny that error close consideration . . . ."[13] Reviewing courts must " 'consider carefully whether any forfeited error either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.' "[14] "[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis."[15]

II. PROBLEMS WITH THE MAJORITY OPINION'S FRAMEWORK

Rather than follow the traditional plain-error framework outlined in *Carines* and applied in *Vaughn*, the majority opinion carves out an exception for unpreserved structural errors. The Court concludes that all structural errors defy the third prong of *Carines* because they render a trial fundamentally unfair, undermine the reliability of the guilt-determining process, and affect the framework within which the trial proceeds. As to the fourth *Carines* prong, the majority opinion shifts the burden to the prosecution to show why the forfeited structural error did not result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, and public reputation of defendant's trial. I discern a number of problems with the Court's newfound framework.

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[12] *Cain*, 498 Mich at 116.

[13] *Id*. (quotation marks, citations, and brackets omitted).

[14] *Id*. at 116-117, quoting *Vaughn*, 491 Mich at 655 n 42.

[15] *Id*. at 121.

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As an initial matter, I am troubled by this Court's sua sponte decision to modify the current plain-error standard with absolutely no notice to the bench and the bar. Nothing in this Court's order for supplemental briefing even hinted at the notion that this Court was considering altering our traditional framework, nor did our order invite traditional interest groups, such as the Prosecuting Attorneys Association of Michigan, to file briefs amicus curiae.[16] Also, defendant did not request such a change in the law in his application for leave to appeal. Instead, defendant's supplemental brief advocates for this new standard in the alternative; that is, only if this Court concludes that defendant cannot satisfy his burden under all four *Carines* prongs. By adopting a new standard of appellate review for unpreserved structural errors without notice to the bench and the bar, this Court deprives interested parties from weighing in on this jurisprudentially significant issue, which has far-reaching ramifications in our state's criminal law jurisprudence.

These prudential concerns are particularly heightened considering that the majority opinion goes further than the Supreme Court of the United States or this Court has previously been willing to go. "Despite its name, the term 'structural error' carries with it no talismanic significance as a doctrinal matter. It means *only* that the government is not entitled to deprive the defendant of a new trial by showing that the error was *harmless beyond a reasonable doubt*."[17] As we stated in *Vaughn*, the Supreme Court of the United States "has expressly distinguished plain-error analysis from harmless-error analysis" by

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[16] See *People v Davis*, 507 Mich 853 (2021).

[17] *Weaver v Massachusetts*, 582 US ___, ___; 137 S Ct 1899, 1910; 198 L Ed 2d 420 (2017) (quotation marks and citation omitted; emphasis added).

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"repeatedly with[holding] judgment on whether a structural error automatically satisfies the third prong of plain-error analysis, implying that structural errors do not entirely defy plain-error analysis, even if they do defy harmless-error analysis."[18] We also explained in *Vaughn* that the Supreme Court's decision in *Johnson v United States* "rejected the argument that *Olano* does not apply to a claimed structural error because it had 'no authority' to create 'out of whole cloth' an exception to the traditional forfeiture analysis simply because the claimed error was structural."[19] By concluding that all unpreserved structural errors defy the traditional plain-error framework, automatically satisfy the third *Carines* prong, and presumptively satisfy the fourth *Carines* prong, the majority opinion breaks new ground with little discussion of this Court's previous concerns about keeping harmless-error review and plain-error review conceptually separate.

Further, this Court in *Cain* specifically rejected the majority opinion's new burden-shifting framework, stating:

> The dissent's theory that the structural nature of the error presumptively establishes the fourth prong is inconsistent with this Court's recent holding in *Vaughn*, that even with regards to a structural error, a defendant is not entitled to relief unless he can establish that the error seriously affected the fairness, integrity, or public reputation of judicial proceedings and that while any error that is structural is likely to have *an* effect on the fairness, integrity or public reputation of judicial proceedings, the plain-error analysis requires us to consider whether an error *seriously* affected those factors.[20]

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[18] *Vaughn*, 491 Mich at 656 n 42 (emphasis omitted), citing *Puckett*, 556 US at 140.

[19] *Id*. at 655, quoting *Johnson v United States*, 520 US 461, 466; 117 S Ct 1544; 137 L Ed 2d 718 (1997).

[20] *Cain*, 498 Mich at 118 n 4 (quotation marks, citations, and ellipses omitted). Although the majority opinion recognizes that "not every public-trial violation will in fact lead to a fundamentally unfair trial," *Weaver*, 582 US at ___; 137 S Ct at 1911, it fails to give due

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This Court now adopts the dissent's theory in *Cain* and overrules *Vaughn*'s application of the plain-error standard for unpreserved structural errors without any mention of the doctrine of stare decisis.[21]

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weight to this principle in its articulation of its rebuttable presumption under the fourth *Carines* prong. The majority states that "[t]here is substantial overlap between the characteristics of structural errors (i.e., they *necessarily render a trial fundamentally unfair*) and the standard under the fourth *Carines* prong (serious effect on the fairness, integrity, or public reputation of the proceedings)." *Ante* at 18 (quotation marks and citation omitted; emphasis added). However, "[a]n error can count as structural even if the error does not lead to fundamental unfairness in every case." *Weaver*, 582 US at ___; 137 S Ct at 1908; see also *Gonzalez-Lopez*, 548 US at 149 n 4 (rejecting the notion that "fundamental unfairness" is the sole criterion of structural error and stating that structural errors do not "*always* or *necessarily* render a trial fundamentally unfair and unreliable"). Indeed, we recognized in *Vaughn* that "[t]he right to a public trial is of a different order because the violation of that right does not necessarily affect qualitatively the guilt-determining process or the defendant's ability to participate in the process." *Vaughn*, 491 Mich at 657 (quotation marks and citation omitted). Therefore, while there may be some overlap between the characteristics of structural error and the "fairness" principles encompassed in the fourth *Carines* prong, this will not always be the case, as there are other considerations unrelated to the fairness or reliability of the proceedings that can contribute to an error being labeled "structural" such that it defies harmless-error analysis. See *Weaver*, 582 US at ___; 137 S Ct at 1908-1910 (explaining that there are at least three broad, nonexclusive rationales for why an error may be deemed "structural"—(1) "if the right at issue is not designed to protect the defendant from erroneous conviction but instead protects some other interest"; (2) "if the effects of the error are simply too hard to measure"; or (3) "if the error always results in fundamental unfairness"—and that public-trial violations have characteristics of all three).

[21] *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010) ("Deciding to overrule precedent is not a decision that this Court takes lightly. Indeed, this Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so."). See *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000) (establishing a three-part test to determine whether to depart from stare decisis).

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The majority opinion's new framework also largely ignores the broader teachings of the United States Supreme Court's recent decision in *Weaver v Massachusetts*.[22] The issue in *Weaver* was whether the burden of proving prejudice for an unpreserved public-trial violation changed when the defendant raised that claim of structural error on collateral review via an ineffective-assistance-of-counsel claim rather than on direct review.[23] The Court ultimately concluded that the burden remained on the defendant to show prejudice under either the traditional ineffective-assistance-of-counsel standard articulated in *Strickland v Washington* (i.e., " 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different' "), or a less " 'mechanical' " framework that focused on " 'the fundamental fairness of the proceeding' " (i.e., that the attorney's error rendered the defendant's trial fundamentally unfair).[24] Particularly relevant is the Court's discussion as to why placing the burden on the defendant, who failed to preserve the claimed error on direct appeal, was appropriate:

> The reason for placing the burden on the [defendant] in this case . . . derives both from the nature of the error and the difference between a public-trial violation *preserved* and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim. . . .

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[22] *Weaver*, 582 US ___; 137 S Ct 1899.

[23] *Id*. at ___; 137 S Ct at 1905.

[24] *Id*. at ___; 137 S Ct at 1911, quoting *Strickland v Washington*, 466 US 668, 694, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The Court in *Weaver* accepted, "for analytical purposes," the defendant's argument "that under a proper interpretation of *Strickland*, even if there is no showing of a reasonable probability of a different outcome, relief still must be granted if the convicted person shows that attorney errors rendered the trial fundamentally unfair." *Weaver*, 582 US at ___; 137 S Ct at 1911. The Court ultimately deemed it unnecessary to decide whether the defendant's interpretation of *Strickland* was correct.

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> [W]hen a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed. When a defendant first raises the closure in an ineffective-assistance claim, however, the trial court is deprived of the chance to cure the violation either by opening the courtroom or by explaining the reasons for closure.
>
> Furthermore, when state or federal courts adjudicate errors *objected to during trial* and then raised on direct review, the systemic costs of remedying the error are diminished to some extent. That is because, if a new trial is ordered on direct review, there may be a reasonable chance that not too much time will have elapsed for witness memories still to be accurate and physical evidence not to be lost. . . .
>
> * * *
>
> In sum, "an ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial," thus undermining the finality of jury verdicts.[25]

In this way, the majority opinion's burden-shifting framework for unpreserved structural errors subverts the many reasons we require litigants to preserve their claims of error for appellate review. Requiring litigants to preserve their claims of error with a contemporaneous objection provides trial courts the opportunity to correct the error, thereby obviating the need for further proceedings and avoiding the costs of new trials that could have been rendered unnecessary by timely objections.[26] " 'And of course the

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[25] *Id*. at ___; 137 S Ct at 1912 (brackets omitted; emphasis added), quoting *Harrington v Richter*, 562 US 86, 105; 131 S Ct 770; 178 L Ed 2d 624 (2011).

[26] *Cain*, 498 Mich at 114; *Grant*, 445 Mich at 551 (" 'The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible. Thus, while reversal may, in theory, entitle the defendant only to retrial, in practice it may reward the accused with complete freedom from prosecution, and thereby cost the society the right to punish admitted offenders.' ") (quotation marks

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contemporaneous-objection rule prevents a litigant from "sandbagging" the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor.' "[27] Indeed, this case illustrates the precise problem with the Court's new rule. Not only did defendant not object to the closure, but defense counsel testified at the postconviction evidentiary hearing that his decision not to object was intentional and that he believed the courtroom closure inured to defendant's benefit by decreasing the number of supporters on the victim's side of the courtroom. Also, although not argued by the prosecution, defense counsel appeared to express some level of agreement with the trial court's decision to close the courtroom. At the time the trial court ordered the courtroom closed, the following exchange occurred:

> *The Court*: . . . Who is in the gallery that works at Hurley Hospital? . . .
>
> * * *
>
> *Member of the gallery*: I work there.
>
> * * *
>
> *The Court*: Where do you work at Hurley Hospital?
>
> *Member of the gallery*: Housekeeping. Environmental Services.
>
> *The Court*: And are you here watching this trial why?
>
> * * *
>
> *Member of the gallery*: Because [the victim] was my kid's father.

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and brackets omitted), quoting *United States v Mechanik*, 475 US 66, 72; 106 S Ct 938; 89 L Ed 2d 50 (1986).

[27] *Cain*, 498 Mich at 115, quoting *Puckett*, 556 US at 134 (quotation marks omitted).

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The Court: So you know, counselors, the jury has complained that that woman has tried to talk to them.

Member of the gallery: No. I didn't try to talk. I just saw a lady and I asked[,] . . . do you work at Hurley's? I know I'm not supposed to talk to them.

The Court: I've got two choices. One is to find you in contempt of court and lock you up.

* * *

. . . The other is to order everyone in the gallery to leave the courthouse and not come back. . . . I'm going to bar everyone from this courthouse except for the mother of [the victim]. The rest of you leave. Don't come back.

Member of the gallery: Okay.

The Court: Shame on you trying to subvert the justice system.

* * *

The Court: The only person allowed to watch this trial is the mother of the young man who died. What foolishness.

[*Defense Counsel*]: Your Honor, may we approach?

The Court: Yes. Do you want this on the record or off the record?

[*The Prosecutor*]: It probably should be on because I think it's for both of our benefit here.

The Court: Okay.

[*The Prosecutor*]: Do you want to have the jurors who have a complaint to come in to double check to make sure that there has been no comment that has been made that's go[ing to] prejudice the—anything?

The Court: No.

[*The Prosecutor*]: Okay. Fair enough.

The Court: No. It was a short comment. What she asked one juror was, do you work at Hurley Hospital[?]

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[*The Prosecutor*]: Okay. So, there's nothing about the case itself that was implicated?

The Court: Right.

[*Defense Counsel*]: Well it's still enough to . . . cause some concerns, but I guess you worked it out. I understand why the concern (inaudible).

The Court: Sure.

[*The Prosecutor*]: It's up to you. Do you want him—are you okay with it?

[*Defense Counsel*]: (inaudible) with the Judge's decision.

[*The Prosecutor*]: I don't have a need for a hearing if that's all that was said.

The Court: I don't think it's necessary.

[*The Prosecutor*]: Okay. Thank you.

The Court: I don't want to make the jury nervous. Now we'll bring the jury out.

Admittedly, the record is cryptic and difficult to discern. Nonetheless, defense counsel's statement that the trial court "worked it out" can arguably be interpreted as an express approval of the courtroom closure, particularly when coupled with counsel's later testimony that his decision not to object was intentional. These facts make it a close question as to whether defendant waived, rather than forfeited, his claim that his right to a public trial was violated.[28] Had the record been developed on this point, the result here could have been very different. In any event, accepting the notion that the underlying record is so unclear it cannot establish that defendant waived this claim of error, I seriously

[28] See *Olano*, 507 US at 733 ("Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.") (quotation marks and citation omitted).

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question the logic behind shifting the burden of proving the fourth *Carines* prong to the prosecution when, under these circumstances, the record is crystal clear that defense counsel *intentionally* did not object to the closure. This case presents a classic example in which silent acquiescence to an erroneous decision leads to the litigant "sandbagging" the court and harboring error—which is significant enough to be deemed "structural"—as an appellate parachute.[29]

Finally, this Court's sua sponte modification of the plain-error standard for unpreserved structural errors is completely unnecessary in this case because defendant can satisfy the current standard. As the majority opinion concludes, the trial court was certainly justified in taking some action in response to the prohibited interaction between the mother of the victim's child and the juror. But the court's closure of the courtroom to everyone except the victim's mother for the remainder of defendant's trial was overbroad, and the court failed to consider other reasonable alternatives in lieu of closing the courtroom.[30]

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[29] The majority opinion also contends that recognizing a rebuttable presumption that shifts the burden of proving the fourth *Carines* prong to the prosecution is appropriate because the prosecution "is better positioned to marshal record facts supporting the overall fairness of the trial proceedings." *Ante* at 19. Not only is this reasoning unfounded, it ignores the fact that the burden was on defendant to object in the first place.

[30] Although the majority opinion applies the test articulated in *Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984), for complete closures, I agree with the prosecution that the courtroom was only partially closed. "[A] total closure involves excluding all persons from the courtroom for some period while a partial closure involves excluding one or more, but not all, individuals for some period." *United States v Simmons*, 797 F3d 409, 413 (CA 6, 2015). See also *People v Kline*, 197 Mich App 165, 170 n 2; 494 NW2d 756 (1992) ("A partial closure occurs where the public is only partially excluded, such as when family members or the press are allowed to remain . . . ."). "Whether a closure is total or partial depends not on how long a trial is closed, but rather who is excluded during the period of time in question." *Simmons*, 797 F3d at 413 (quotation marks, citation, and ellipsis omitted). Here, the court's closure order did not preclude *all*

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Thus, the violation of defendant's right to a public trial amounted to plain structural error. And given this Court's decision in *Vaughn*, this type of structural error satisfies the third prong of *Carines*.[31] Further, defendant has shown that the closure here seriously affected the fairness, integrity, and public reputation of his trial. During the closure, 14 witnesses testified, including the prosecution's star witness, whose testimony implicated defendant in the murder; the parties gave closing arguments; the trial court instructed the jury; and the jury rendered its verdict. This stands in marked contrast to the closure that occurred in *Vaughn*, in which the courtroom was closed only during voir dire; no witnesses testified during the closure; no objections were made to either party's peremptory challenges; each party was satisfied with the jury chosen; and the venire represented the public.[32] Here, the

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members of the public from attending the trial, as the victim's mother was notably excluded. Further, Bryan Wooten, a friend of defendant, testified at the postconviction evidentiary hearing that he entered the courtroom unencumbered and only left because of an ambiguous gesture given by defendant, not because of any state action by a court officer.

Although this Court has not distinguished between total and partial courtroom closures, courts that have made that distinction "modify the *Waller* test so that the 'overriding interest' requirement is replaced by requiring a showing of a 'substantial reason' for a partial closure, but the other three factors remain the same." *Simmons*, 797 F3d at 414 ("[U]nder the modified *Waller* test . . . , (1) a party seeking a partial closure of the courtroom during proceedings must show a 'substantial reason' for doing so that is likely to be prejudiced if no closure occurs; (2) the closure must be no broader than necessary or must be 'narrowly tailored'; (3) the trial court must consider reasonable alternatives to closing the proceeding; and (4) the trial court must make findings adequate to support the closure."). See also *Kline*, 197 Mich App at 170-171. Even applying this slightly more lenient standard, however, I conclude that the partial closure violated defendant's right to a public trial for the reasons discussed earlier.

[31] *Vaughn*, 491 Mich at 666.

[32] *Id*. at 668-669.

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courtroom was closed for the majority of defendant's trial and at critical points when the constitutional protections of a public trial are at their zenith.[33] Therefore, because defendant can satisfy all four prongs of the current plain-error standard articulated in *Carines*, there is no need for this Court to shift the burden to the prosecution to show why reversal is not appropriate.

III. CONCLUSION

Until now, this Court has not wavered in its position that simply labeling an error as "structural" does not place it outside the strictures of the traditional plain-error standard. Unbothered by our precedent, this Court now casts that framework aside with respect to unpreserved structural errors in favor of a new burden-shifting framework that this Court has expressly rejected. For the reasons explained in this opinion, this change in the law is unwarranted. Accordingly, I concur in result only.

Brian K. Zahra

[33] *Id.* at 667 (The protections conferred by the Sixth Amendment right to a public trial "include (1) ensuring a fair trial, (2) reminding the prosecution and court of their responsibility to the accused and the importance of their functions, (3) encouraging witnesses to come forward, and (4) discouraging perjury.").

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415 Mich. 728
Supreme Court of Michigan.

SOAP AND DETERGENT ASSOCIATION, a Delaware not-for-profit corporation, Amway Corporation, a Michigan corporation, Monsanto Company, a Delaware corporation, Plaintiffs-Appellants,
v.
NATURAL RESOURCES COMMISSION, Department of Natural Resources, Water Resources Commission, Governor William G. Milliken, Howard A. Tanner, Frank J. Kelley, Defendants-Appellees.

Docket No. 66789, June Term, 1982.
|
(Calendar No. 4).
|
Argued June 9, 1982.
|
Decided Dec. 23, 1982.

Synopsis

Suit was brought challenging authority of the Natural Resources Commission to promulgate rule limiting amount of phosphorous in cleaning agents sold in state. The Circuit Court, Wayne County, Theodore R. Bohn, J., denied relief and upheld the rule, and appeal was taken. The Court of Appeals, 103 Mich.App. 717, 304 N.W.2d 267, affirmed, and plaintiffs appealed. The Supreme Court, Williams, J., held that: (1) the legislature did not preempt the power to restrict nutrient phosphorous content of cleaning agents to amount less than maximum prescribed in the Cleaning Agents Act, but delegated the power to the Water Resources Commission; (2) the Governor had authority to transfer the rule-making power of the Water Resources Commission to the Natural Resources Commission; and (3) the Governor's executive order did transfer such power.

Affirmed.

Levin, J., joined by Coleman, J., filed a dissenting opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****347 *731** Dykema, Gossett, Spencer, Goodnow & Trigg by Thomas L. Munson, Robert D. Dunwoodie, Bowden V. Brown, Detroit, for plaintiffs-appellants; Baker & Hostetler, Shirley Z. Johnson, Washington, D.C., John E. Stephen, Gen. Counsel, Amway Corp., Ada, of counsel.

****348** Frank J. Kelley, Atty. Gen., Louis J. Caruso, Sol. Gen., Stewart H. Freeman, Asst. Atty. Gen. in Charge, Environmental Protection Div., Susan Peck Iannotti, Asst. Atty. Gen., Lansing, for defendants-appellees.

WILLIAMS, Justice.

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I.

The issue we are asked to address in this case is whether the authority to promulgate 1979 AC, R 323.1173(4), which regulates the phosphorus content permitted in cleaning agents, was lawfully delegated to the Natural Resources Commission, the head of the Department of Natural Resources.

This issue includes three subissues. First, did the Legislature pre-empt the power to "further restrict the nutrient content * * * of cleaning agents" in 1971 P.A. 226, or did it grant this power to the Water Resources Commission? Second, did the Governor have the authority to transfer this power to "further restrict" from the WRC to the ***732** NRC by reason of Const.1963, art. 5, § 2, and the Executive Organization Act? Third, did Executive Order No. 1976–8Executive Order No. 1976–8 in fact and in law transfer the power to "further restrict" from the WRC to the NRC, or did it reserve that power to the WRC?[1]

We find (1) that the Legislature properly delegated the rulemaking authority to regulate the phosphorus content of cleaning agents to the WRC; (2) that the Governor was properly vested with authority to transfer power between executive agencies; and that (3) Executive Order No. 1976–8Executive Order No. 1976–8 did transfer the challenged rulemaking power to the NRC. Therefore, 1979 AC, R 323.1173(4) is a validly promulgated rule.

II. FACTS

In 1971, the Michigan Legislature passed the cleaning agents act, 1971 P.A. 226, M.C.L. §§ 323.231–323.236; M.S.A. §§ 3.533(301)–3.533(306), to protect water quality by restricting the content of cleaning agents. The statute prohibits the sale or use of cleaning agents which contain phosphorus in excess of 8.7% by weight expressed as elemental phosphorus. M.C.L. § 323.232; M.S.A. § 3.533(302). The statute further provides that the WRC shall promulgate rules to effectuate this statute, and that the rules "may further restrict the nutrient content and other contents of cleaning agents and water conditioners". M.C.L. § 323.233; M.S.A. § 3.533(303).

***733** In 1973, the Governor transferred all the statutory powers, duties and functions of the WRC to the Department of Natural Resources. Executive Order No. 1973–2Executive Order No. 1973–2. This executive reorganization was modified in 1976: the Governor reaffirmed the transfer of the WRC's "statutory authority, powers, duties, functions and responsibilities" to the DNR, "*except that* the Water Resources Commission shall continue to exercise independent authority with respect to quasi-judicial functions, rulemaking, and issuance of permits and orders in the water pollution control functions, as specified in Section 2, Section 5, subsection (1) of Section 7, and subsection (b) of Section 8 of Act No. 245 of Public Acts of 1929, as amended". Executive Order No. 1976–8Executive Order No. 1976–8 (emphasis in original). The head of the DNR is the Natural Resources Commission.

On August 26, 1977, the NRC promulgated Rule 323.1173(4), under the authority of the cleaning agents act. The rule provides:

> "After October 1, 1977, a person shall not sell or distribute for use in this state a household laundry detergent which contains phosphorus in any form in excess of 0.5% by weight, expressed as elemental phosphorus."

Appellants—a manufacturer of cleaning agents and household detergents, a manufacturer of phosphates used in some detergents ****349** and cleaning agents, and their trade association—immediately filed suit seeking preliminary and permanent injunctions against the agencies and officials responsible for the rule's enforcement and a judgment declaring the rule void.

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On September 21, 1977, the Wayne Circuit Court denied the injunction. Judge Theodore R. Bohn eloquently explained that ***734** an injunction to prevent enforcement of the phosphorus limiting rule would not maintain the status quo; each day of continued pollution would add to the destruction of Michigan's natural resources, a ravage that may be irreversible.[2]

Appellants then filed an application for emergency leave to appeal to the Court of Appeals, ***735** which was denied. The NRC rule went into effect on October 1, 1977.[3]

Appellants proceeded to file a motion for summary judgment in circuit court challenging the authority of the NRC to promulgate the rule. On June 6, 1979, the circuit court denied the motion. In a final judgment entered on September 17, 1979, the court upheld the rule as a lawful exercise of the NRC's authority. This decision was appealed to the Court of Appeals.

Upon review of the record and hearing of arguments, the Court of Appeals affirmed the circuit court's denial of appellant's motion for summary judgment. 103 Mich.App. 717, 304 N.W.2d 267 (1981). The Court of Appeals held that the Governor intended to transfer the WRC's authority under the cleaning agents act to the NRC, and that he was empowered to make this transfer by the Const.1963, art. 5, § 2, and the Executive Organization Act, M.C.L. § 16.109; M.S.A. § 3.29(9). The Court of Appeals further found that the cleaning agents act authorizes further, more stringent restrictions on the phosphorus content of detergents below the 8.7% ceiling set by statute. 103 Mich.App. at 731, 304 N.W.2d 267.

This Court granted leave to appeal on November 25, 1981. 412 Mich. 863. Oral arguments were had before this Court on June 9, 1982.

****350** III. LEGISLATIVE PRE–EMPTION

The threshold inquiry which we must address is whether, in enacting a maximum limitation (8.7%) on the nutrient phosphorus content in cleaning agents, the Legislature intended to preclude an administrative agency from establishing further, ***736** more stringent standards. Clearly, if the Legislature sought to reserve to itself the regulation of the nutrient phosphorus, and therefore declined to delegate this regulatory power to *any* agency, subsequent challenges to the rule promulgated by the NRC become moot. It is beyond debate that the sole source of an agency's power is the statute creating it.[4] If a certain power, *e.g.,* regulation of phosphorus content in detergents, is withheld in the statute, the agency may not act. However, our reading of the cleaning agents act fails to disclose an intent by the Legislature to retain exclusive control over phosphorus pollution.

The cleaning agents act, which seeks to regulate the content of cleaning agents in order to protect water quality, is short and specific. Section 1 set forth the relevant definitions, including:

> " 'Cleaning agent' means a laundry detergent, dishwashing compound, household cleaner, metal cleaner, degreasing compound, commercial cleaner, industrial cleaner, phosphate compound or other substance intended to be used for cleaning purposes.
>
> " 'Nutrient' means a substance or combination of substances that, when added to any waters of the state in sufficient quantities, provides nourishment that promotes the growth of aquatic vegetation in the waters to such densities as to interfere with or be detrimental to their use by man or by any animal, fish or plant useful to man." M.C.L. § 323.231; M.S.A. § 3.533(301).

Section 2 of the act establishes the maximum limit of the nutrient phosphorus in cleaning agents at 8.7%.

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> ***737** "After July 1, 1972, a person shall not sell or distribute for use in this state a cleaning agent which contains phosphorus in any form *in excess* of 8.7% by weight expressed as elemental phosphorus." M.C.L. § 323.232; M.S.A. § 3.533(302) (emphasis added).

Section 3 delegates to the WRC the authority to enforce the act through promulgation of rules which may further restrict the nutrient content of cleaning agents. Section 3 states in pertinent part:

> "The water resources commission shall promulgate rules in accordance with and subject to [the Administrative Procedures Act of 1969]. The rules may further restrict the nutrient content and other contents of cleaning agents and water conditioners, to prevent unlawful pollution and control nuisance growths of algae, weeds and slimes which are or may become injurious to other lawful water uses, to prevent cleaning agents and water conditioners, separately or in combination with other substances, from rendering or tending to render any waters of this state harmful or inimical to public health, or to animal or aquatic life, or to beneficial water uses, and to minimize any hazard to the health or safety of users of the cleaning agents or water conditioners." M.C.L. § 323.233; M.S.A. § 3.533(303).

And, finally, § 4 forbids the sale of detergents and cleaning agents containing those substances identified by the WRC as having a deleterious effect on water quality or human health. Phosphorus is excluded from this section, having already been legislatively designated as an unlawful pollutant in § 2. Section 4 reads:

> "A person shall not sell detergents or cleaning compounds containing any substance other than phosphorus that may cause unlawful pollution of the waters when discharged thereto, if the water resources commission determines that the other substance will cause ***738** unlawful pollution under the circumstances of its expected ****351** use and disposal or will pose a hazard to human health and safety." M.C.L. § 323.234; M.S.A. § 3.533(304).

The principal rule of statutory construction is that the Legislature intends the meaning that is clearly expressed;[5] an unambiguous statute does not need interpretation.[6] Equally fundamental is the rule that every word, sentence and section should be given effect if possible.[7]

Applying these principles, both the trial court and the Court of Appeals found that a plain reading of the statute revealed the legislative intent of allowing an administrative agency to "further restrict" the phosphorus content of cleaning agents. The trial court found it "clear" that the "in excess of 8.7%" language of § 2, read in conjunction with the authority to "further restrict the nutrient content" by rule in § 3, established a "ceiling", rather than a "floor" on phosphorus regulation. Additionally, the lower court found that § 3 delegated to the administrative agency the discretionary power to regulate phosphorus content of cleaning agents below the 8.7% ceiling [Appendix of Plaintiffs-Appellants, pp 77a–79a]. The Court of Appeals was even more explicit in its interpretation of the statute:

> "The crucial words in this statute are 'further restrict the nutrient content of cleaning agents.'

> "The parties agree, and we concur, that phosphorus is ***739** a nutrient. We also conclude that the word 'further' can have no meaning at all unless it applies to the right to alter the 8.7% limit on phosphorus. No other substance has yet been addressed by the Legislature, so no rule would have the effect of further restricting the nutrient content of a cleaning agent except for a rule regarding phosphorus. Moreover, since the phosphorus limit set by the Legislature was enacted simultaneously with the section permitting further restriction of nutrient content, the Legislature could have easily prohibited agency alteration of that limit. It did not do so, and we will not presume to imply such a prohibition." 103 Mich.App. at 730, 304 N.W.2d 267.

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We agree with this analysis.

However, even if the legislative intent were not as clear on the face of the statute as we feel it is, several rules of statutory interpretation would favor resolving ambiguity against legislative pre-emption.

First, this Court held in *Coffman v. State Board of Examiners in Optometry,* 331 Mich. 582, 50 N.W.2d 322 (1951), that when the Legislature establishes minimum standards by statute and entrusts enforcement of the statute to an agency, the agency is not precluded from setting higher standards. In *Coffman,* the statute required applicants for Michigan's optometry examinations to have completed at least two years in a certified school of optometry. The statute also granted the board of examiners the power to enact rules necessary for governing the practice of optometry, and pursuant to this authority the board adopted a rule requiring a four-year course in optometry. The court upheld the regulation stating:

> "It does not follow that the board cannot, within reason, adopt higher standards than the minimum set up in the legislation." 331 Mich. at 591, 50 N.W.2d 322.

***740** Likewise, in this case, the Legislature's minimum restriction that the phosphorus content in cleaning agents could not exceed 8.7% does not preclude the agency from promulgating more stringent requirements.

Second, or rather as a more general expression of the first rule, it is normally ****352** recognized that a remedial statute, such as the cleaning agents act, which attempts to protect the public health and general welfare, should be liberally construed. 3 Sands, Sutherland Statutory Construction (4th ed), § 65.03, p. 163; 1 Cooper, State Administrative Law, p. 263; *In re School Dist. No. 6, Paris & Wyoming Twps. Kent County,* 284 Mich. 132, 144, 278 N.W. 792 (1938). This is especially true where the administrative agency is granted broad and comprehensive powers as in the case of the WRC. MCL 323.1 *et seq.;* MSA 3.521 *et seq.;* OAG, 1971–1972, No 4721, p. 53, 55–56 (June 7, 1971). See *White Lake Improvement Ass'n. v. City of Whitehall,* 22 Mich.App. 262, 177 N.W.2d 473 (1970). A broad construction of this statute would surely grant the agency the power to further restrict phosphorus content in cleaning agents.

Finally, not only do the plain reading of the statute and statutory rules of construction disfavor a finding of legislative pre-emption, but the Legislature itself, under a statutory duty to review the agency rule, M.C.L. § 24.245(1); M.S.A. § 3.560(145)(1), raised no objection to this delegation of power.[8]

***741** In sum, we conclude that when the Legislature enacted the cleaning agents act it established minimum standards for the regulation of phosphorus in cleaning agents and delegated to an administrative agency the power to promulgate rules to regulate nutrients and other contents of cleaning agents as well as the power to establish more stringent standards for phosphorus regulation.

IV. THE GOVERNOR'S POWER UNDER CONST.1963, art. 5, § 2, AND THE EXECUTIVE ORGANIZATION ACT

A. *History*

The second challenge to the NRC's rule comes in the form of an attack on the Governor's authority to transfer powers between executive agencies. A full understanding of this challenge requires an examination of the history of art. 5, § 2 of the 1963 Constitution and the Executive Organization Act of 1965, M.C.L. § 16.101 *et seq.;* M.S.A. § 3.29(1) *et seq.*

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In 1963, the people of the State of Michigan adopted a new constitution which included an executive organization portion providing for the mandatory reorganization of the executive offices and agencies into no more than 20 principal departments. Article 5, § 2, provides:

> "All executive and administrative offices, agencies and instrumentalities of the executive branch of state government and their respective functions, powers and duties, except for the office of governor and lieutenant governor and the governing bodies of institutions of higher education provided for in this constitution, shall ***742** be allocated by law among and within not more than 20 principal departments. They shall be grouped as far as practicable according to major purposes."

The Legislature was given the authority to undertake the initial reorganization. If the Legislature failed to complete the reassignments in two years, the Governor was given authority to make the initial reorganization within one year thereafter.[9]

****353** Subsequent to this initial reorganization, the Governor was empowered to make further changes through executive orders which could be disapproved by the Legislature. If not disapproved, the executive orders would have the effect of law. Article 5, § 2, provides:

> "Subsequent to the initial allocation, the governor may make changes in the organization of the executive branch or in the assignment of functions among its units which he considers necessary for efficient administration. Where these changes require the force of law, they shall be set forth in executive orders and submitted to the legislature. Thereafter the legislature shall have 60 calendar days of a regular session, or a full regular session if of shorter duration, to disapprove each executive order. Unless disapproved in both houses by a resolution concurred in by a majority of the members elected to and serving in each house, each order shall become effective at a date thereafter to be designated by the governor."

The constitutional provision of art. 5, § 2, was given effect in 1965 when the Legislature enacted ***743** the Executive Organization Act, MCL 16.101 *et seq.;* MSA 3.29(1) *et seq.* The act established 19 principal departments and made the initial allocation of functions among the departments.

The Governor was, therefore, never required to undertake the allocation of his powers. However, on various occasions, the Governor has utilized his power to issue executive reorganization orders.

The executive orders at issue in this case are Executive Orders Nos. 1973–2Executive Orders Nos. 1973–2, 1973–21973–2a and 1976–8. Executive Order No. 1973–2Executive Order No. 1973–2 transferred the "statutory authority, powers, duties, functions, and responsibilities" of the WRC to the DNR. This order was amended by Executive Order 1973–2Executive Order 1973–2a to exclude certain powers from transfer. Finally, Executive Order No. 1976–8Executive Order No. 1976–8 repeated Executive Order No. 1973–2Executive Order No. 1973–2a and reaffirmed the transfer to the DNR, again with certain exceptions.

The appellant manufacturers attack these executive orders on the ground that the constitutional provision, art. 5, § 2, pursuant to which the Governor acted, did not grant the authority to transfer agency rulemaking power.

B. *Changes in the Organization of the Executive Branch*

Appellants introduce their argument that the Governor has no authority to transfer the rulemaking power between agencies as follows:

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" 'Subsequent to the initial allocation, the governor may make changes in the *organization* of the executive branch or in the *assignment* of *functions* among its units which he considers *necessary for efficient administration.*' Const.1963, art. 5, § 2 (emphasis added).

"A transfer of rulemaking power obviously is not a change in organization; nor is it an assignment of functions for 'efficient administration.' " (Appellants' Brief, p 17)

***744** The simple declaration that "[a] transfer of rulemaking power obviously is not a change in organization" is a facile assumption that overlooks stubborn reality. The fact of the matter is that organization comprises at least two elements: 1) the division of personnel, and 2) the division of powers among such personnel. To say that a transfer of personnel to exercise a different power is a change of organization but that a transfer of a power to be exercised by different personnel is not a change of organization is to be oblivious to reality and to torture the concept of "changes in the organization". What president of a corporation who originally had the power of chief executive officer would not recognize that there was a change in corporate organization if the corporate board transferred that power from him to the chairman of the board? So too we would not hold that a transfer of rulemaking power from one executive ****354** segment of government to another executive segment of government was not a change "in the organization of the executive branch".

We find that a transfer of rulemaking power is indeed a change "in the organization of the executive branch".

C. *Assignment of Function*

Since we could not agree with appellants' observation that "[a] transfer of rulemaking power obviously is not a change in organization", it is decisionally unnecessary for us to consider their interpretation of "assignment of functions". However, particularly since this is their only real effort at argument relative to Const.1963, art. 5, § 2, we will consider their arguments on "assignment of functions". The argument focuses on the variation in language between paragraph 1 and 2 of Const.1963, art. 5, § 2.

***745** Paragraph 1 authorized the allocation of the respective "functions, powers and duties" of the agencies within the newly created departments. Under paragraph 2 the Governor is authorized to assign "functions * * * necessary for efficient administration".

Appellants thereafter argue that Executive Orders Nos. 1973–2Executive Orders Nos. 1973–2a and 1976–8 which attempt to reassign "powers", especially the power of rulemaking, are beyond the second alternate authority granted to the Governor in art. 5, § 2.

However, this interpretation of art. 5, § 2, eviscerates the intention of the constitutional convention in including this provision in the constitution, and of the Legislature in their enactment of the Executive Organization Act.

1. *Rules of Constitutional Construction*

In interpreting the constitution, this Court has developed two rules of construction. First, the interpretation given the constitution should be "the sense most obvious to the common understanding"; the one which "reasonable minds, the great mass of people themselves, would give it". *Traverse City School Dist. v. Attorney General,* 384 Mich. 390, 405, 185 N.W.2d 9 (1971); *Council No. 11, AFSCME v. Civil Service Comm.,* 408 Mich. 385, 405, 292 N.W.2d 442 (1980) (quoting Cooley's Const Lim [6th ed], p. 81). Secondly, "the circumstances surrounding the adoption of the constitutional provision

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and the purpose sought to be accomplished may be considered". *Traverse City School Dist.,* 384 Mich. 405, 185 N.W.2d 9. See *Kearney v. Board of State Auditors,* 189 Mich. 666, 673, 155 N.W. 510 (1915).

(a) *Circumstances Surrounding Adoption*

The record of the constitutional convention indicates that the convention's purpose in including art. 5, § 2, was to facilitate economy and efficiency ***746** in the executive agencies. 2 Official Record, Constitutional Convention 1961, p 1847 (comments of Mr. Pollock); p 1836 (comments of Mr. Martin); p 1837 (comments of Mr. Bentley). The convention felt that the Legislature previously had failed to effectuate a reorganization itself, and that the Governor was in the best position to accomplish the desired ends, having intimate knowledge of the problems. 2 Official Record, Constitutional Convention 1961, p. 1846 (comment of Mr. Pollock). The convention recognized that the reorganization power granted the Governor in ¶ 2 of art. 5, § 2, was *clearly legislative.* 2 Official Record, Constitutional Convention 1961, p. 1846 (comments of Mr. Heideman and Mr. Hutchinson).[10] ****355** Nonetheless, the ***747** delegates chose to include this delegation to the Governor in the constitution, subject to vigorously debated checks deemed necessary to restrain the broad grant of power. 2 Official Record, Constitutional Convention 1961, pp. 1843–54.

Therefore, appellant manufacturers' reading of the constitutional section clearly defeats the convention's purpose which was to grant the Governor full legislative power to promote the most efficient possible executive department. Recognition of the broad powers of reorganization granted is found in the provisions for legislative veto of the Governor's reorganization executive orders, not in a diminution of power granted to the Governor.

(b) *Common Understanding Rule*

Secondly, appellant manufacturers' restrictive interpretation of "function" in ¶ 2 distorts the commonly perceived meaning of the word. Though the words "function" and "power" have clear semantic differences and might even have different legal import (though neither the parties' briefs nor our own research disclose any Michigan court's interpretation of the words), the common understanding of the terms an agency's "function" and an agency's "power" must surely be only variations on a theme. Of what use is it to allow the transfer of a function, but leave the power to perform the function behind? And what becomes of the disembodied "power" with no "function" to channel its exercise? In the broad scheme of reorganizing the agencies of the executive branch of the government, what conceivable good can be accomplished by allowing for the transfer of one without the other? We have no doubt that the plain reading of the constitution would indicate to the common understanding that the term "function" inherently includes the accompanying ***748** "power" necessary to give life and substance to the "function".

2. *The Executive Organization Act*

Further support for the logic of this interpretation of the constitution is found in the Executive Organization Act. In *McDonald v. Schnipke,* 380 Mich. 14, 26, 155 N.W.2d 169 (1968), this Court held that art. 5, § 2, of the constitution was not self-executing, but that the Executive Organization Act served as the enabling act of that provision.[11]

The Executive Organization Act establishes 19 principal departments. The act also provides a general mechanism for placing existing agencies into the framework of the 19 principal departments. Three types of transfers could be effectuated. Under a ****356** Type I transfer, an agency is merely identified as being within a particular department; the agency continues to perform its functions as prescribed by statute.[12] Under a Type II assignment, ***749** the agency loses autonomous control of its functions—"all its statutory authority, powers, duties and functions, records, personnel, property, unexpended balances of

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appropriations, allocations or other funds, including the functions of budgeting and procurement [are] transferred to that principal department".[13] Under a Type III transfer, the agency is abolished. M.C.L. § 16.103(c); M.S.A. § 3.29(3)(c).

Finally, the act delineates the relationship between the transferred agency and the principal department which acquires the agency. M.C.L. § 16.107; M.S.A. § 3.29(7). Under subsection (a), the department head is given the power to allocate functions among his agencies with the approval of the Governor, in order to promote economy and efficiency. Substantive functions, vested by law in an agency or officer, however, shall not be removed from that agency or officer, under this section.

However, if a Type II or III transfer is involved, the department head has greater authority. Subsection (b) provides:

> "Except as provided by law or within this act, when any department, commission or board or other agency is transferred by a type II or type III transfer to a principal department under the provisions of this act, the functions of the department, commission or board or other agency shall be administered under the direction ***750** and supervision of the head of the principal department. When a department, commission, board or other agency is transferred by a type II or type III transfer to a principal department all prescribed statutory functions of rule making, licensing and registration including the prescription of rules, regulations, standards and adjudications shall be transferred to the head of the principal department into which the department, commission, board or agency has been incorporated." M.C.L. § 16.107(b); M.S.A. § 3.29(7)(b).

This section carefully defines the agency "functions" over which the department head may exercise control to include "all prescribed *statutory functions* of *rule making,* licensing and registration *including the prescription of rules, regulations, standards*" (emphasis added).

Clearly the Legislature considered "powers" subsumed within the broader category of "functions".

No specific considerations are provided in the Executive Organization Act for the art. 5, § 2, activities—the subsequent reallocations by the Governor. Yet in *McDonald* this Court held that the act was the implementing legislation for the constitutional section. The fair implication of this interpretation is that the Governor, in exercising ****357** his powers, should use the transfer mechanism established in the Executive Organization Act, *i.e.,* the provisions regarding Type I through Type III transfers and the relationship between the departments and the transferred agencies.

This is in fact the mechanism and terminology that has been used by the Governor in his executive orders. See, *e.g.,* Executive Reorganization Order No. 1971–1 (Type II transfer of the Economic Opportunity Office from the Executive Office of the Governor to the Department of Labor); Executive Organization Order No. 1971–2 (Type II transfer of the Building Division of the Bureau of Budget ***751** from the Executive Office of the Governor to the Department of Administration); Executive Reorganization Order No. 1972–2 (Type II transfer of the Corporation Division and the Corporation Franchise Fee Division from the Department of Treasury to the Department of Commerce). Thus, rulemaking power has repeatedly been transferred by the Governor, as a "function", within the scope of art. 5, § 2.

D. *Separation of Powers*

Finally, appellant manufacturers argue that the broad legislative power to reorganize the executive department's bureaucratic maze could not have been intended since it violates the doctrine of separation of powers by commingling executive and legislative functions within one branch of the government [Appellants' Brief, pp 21–23]. This argument fails to understand the fundamental purpose of the doctrine of separation of powers.

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The doctrine of separation of powers is generally attributed to Montesquieu[14] who pinpointed the fault with the vesting of both legislative and executive functions in one branch of the government.

> "When the legislative and executive powers are united in the same person or body * * * there can be no liberty; because *apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner*." (Emphasis added.)
>
> Madison, in The Federalist No. 47, clarifies Montesquieu, explaining that he did not mean there could be no overlapping of functions between branches, or no control over the acts of the other. Rather,
>
> > ***752** "[h]is meaning * * * can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." The Federalist No. 47 (J. Madison).

These principles have been adopted in Michigan. Thus, while art. 3, § 2, of the constitution provides for strict separation of power,[15] this has not been interpreted to mean that the branches must be kept wholly separate. *People v. Piasecki,* 333 Mich. 122, 146, 52 N.W.2d 626 (1952); *In re Southard,* 298 Mich. 75, 83, 298 N.W. 457 (1941). Additionally, where, as in art. 5, § 2, the constitution explicitly grants powers of one branch to another, there can be no separation of powers problem. *Wood v. State Administrative Board,* 255 Mich. 220, 224–225, 238 N.W. 16 (1931).

Article 5, § 2, does not by any means vest "all" or any considerable legislative power in the executive. While it is true that broad legislative power has been delegated to the Governor to effectuate executive reorganization, this power is clearly limited. Three limitations must be emphasized. First, the area of executive exercise of legislative power is very limited and specific. Second, the executive branch is not the sole possessor of this power; the Legislature has concurrent power to transfer functions and powers of the executive agencies. Third, the Legislature is specifically granted the power to veto executive reorganization orders before they become law.

****358** Therefore, the specific intent of the constitutional convention in fashioning art. 5, § 2, having ***753** been to delegate a very limited and specific legislative power to the executive, and this provision having been adopted into the constitution with sufficient checks to restrain an improper exercise of this power, we find no constitutional infirmity negating the Governor's ability to transfer rulemaking authority from one agency to that agency's department head.

V. EXECUTIVE TRANSFER OF RULEMAKING TO NRC

We have so far found: (1) that the Legislature did not preempt the power to restrict the allowable percentage of nutrient phosphorus content in cleaning agents but specifically authorized the WRC to "further restrict the nutrient content * * * of cleaning agents" by rule; (2) that the Governor had the authority to transfer the rulemaking power between executive agencies under constitutional and statutory executive reorganization powers. We come therefore to the third consideration, and that is whether Executive Order No. 1976–8Executive Order No. 1976–8 does in fact and in law transfer to the NRC the power to "further restrict the nutrient content * * * of cleaning agents" by rule.

As the appellant manufacturers stated in their brief, "The NRC purported to promulgate the rule under the cleaning agents act. Section 2 of the act imposed legislative limitations for the first time on the content in cleaning agents of one nutrient, phosphorus * * *. The act also delegated to the Water Resources Commission * * * the authority to 'further restrict the nutrient content and other content of cleaning agents' * * *. No authority was delegated to the NRC by the act" (p. 2). This statement indicates agreement that under the cleaning agents act the WRC had the authority to "further ***754** restrict the

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nutrient content and other content of cleaning agents" and that the issue in the instant case is whether the authority to "further restrict the nutrient content and other content of cleaning agents" provided in the cleaning agents act was transferred from the WRC to the NRC by Executive Order No. 1976–8.Executive Order No. 1976–8.

"Appellants submit that the Court of Appeals completely misconstrued the terms and purpose of the executive order and ignored, without explanation, the Governor's own independently expressed interpretations of it." With this statement the appellants introduce their argument construing Executive Order No. 1976–8Executive Order No. 1976–8 "that the Governor intended to reserve the WRC's rulemaking powers under the cleaning agents act * * * to the WRC" (Appellants' Brief, p 8). Thereafter, the appellants argue that the Executive Order No. 1976–8Executive Order No. 1976–8 must be interpreted in light of (1) a letter from the Governor to appellants' counsel stating the Water Resources Commission "will retain the essential adjudicative and rule making functions", (2) a DNR news bulletin piece stating "[h]owever, the commissions retain their responsibilities for * * * adopting rules as required under their legislative mandates, Governor Milliken states", and (3) a statement relative to his 1976 executive order in the Governor's 1978 State of the State Message as follows: "I will recommend that all permit issuing, regulatory, and quasi-judicial functions of the commissions be transferred to the department" (Appellants' Brief, pp. 8, 9, 10). Appellants claim these documents demonstrate that the executive order reserved transfer of the power to "further restrict the nutrient content * * * of cleaning agents" to the WRC (Appellants' Brief, p. 12). The appellants refer to no authority or rule of law permitting reliance on these extrinsic ***755** documents to aid in the interpretation of the executive order.

Appellees counter: (1) how can it be argued that the Governor and the Attorney General, defendants in this case, opposed the nutrient content rule, as contrary to their intentions and wishes in Executive Order No. 1976–8Executive Order No. 1976–8, when they both approved the promulgation of the rule under the Administrative Procedures Act of 1969, M.C.L. § 24.245, subds. (1), (2), and § 24.246, subd. (1); M.S.A. § 3.560(145), subds. (1), (2), and § 3.560(146), subd. (1) (Appellees' Brief, p. 12); (2) the Governor's executive order is ****359** the authoritative statement of the Governor as to what the order meant, not his correspondence or message; likewise, the DNR's authoritative statement is the rule, not a press release, and the Attorney General's authoritative statement in his official approval of the rule, not an informal memo of an assistant attorney general (Appellee's Brief, p. 13); (3) "the language of Executive Order No. 1976–8Executive Order No. 1976–8 is unambiguous; consequently no need arises to resort to consideration of the meaning intended" (Appellees' Brief, p. 16); and (4) there is good policy reason for not reserving the power to "further restrict the nutrient content * * * of cleaning agents" to the WRC which is composed of four civil servants and three representatives of special interests rather than to the NRC whose membership represents the general public and is subject to Senate confirmation and removal for cause by the Governor (Appellees' Brief, pp. 21–22). Appellees ground only one of their four arguments on cited legal authority.[16] That authority relates to rules for statutory construction, not construction of executive orders.

***756** We understand the lack of direct authority in the briefs on construction or interpretation of executive orders, because we found little ourselves. However, two rules relating to administrative regulations, which stand in the same position as executive orders, appear in the following quotation of the United States Supreme Court in *Udall v. Tallman,* 380 U.S. 1, 16–17, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1964), which quoted with approval from a previous decision of that Court:

> " 'Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt * * *. [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' *Bowles v. Seminole Rock Co.,* 325 U.S. 410, 413–414 [65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945)]."

The first rule by negative implication is that interpretation is not warranted unless "the meaning of the words used is in doubt". The second rule, of course, is that in case of doubt administrative interpretation is the "ultimate criterion".

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Furthermore, in the *Udall* case, the United States Supreme Court, at least as far as administrative agency interpretation was concerned, seemed to apply the same rules of construction to *statutes* and *administrative regulations.* Specifically, the Court cited a number of statutory interpretation cases and then continued:

> "When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." 380 U.S. at 16, 85 S.Ct. at 801.

The use of the same rules of construction for both ***757** statutes and executive orders or administrative regulations is not illogical because executive orders and administrative regulations are both quasi-legislative in nature. See 1 Sands, Sutherland Statutory Construction, p. 219; J. Asselin, *Executive Orders: Discretion vs Accountability,* 51 Conn.Bar.J. 383 (1977).

With these premises, we believe it is in order to apply the following rules to construing Executive Order No. 1976–8Executive Order No. 1976–8:

1. The executive intends the meaning that is clearly expressed; an unambiguous executive order does not need interpretation.

2. A corollary of rule 1 is that every word, sentence and section should be given effect, if possible.

3. If the meaning of an executive order is in doubt, the interpretation given by the agency administering it is persuasive as to the meaning of the order "unless it is plainly erroneous or inconsistent with the" order.

We proceed to an examination of the executive order.

Executive Order No. 1976–8Executive Order No. 1976–8 in pertinent part reads as follows:

> ****360** "*The statutory authority, powers, duties, functions and responsibilities of the Water Resources Commission* created under Section 1, Act 245, P.A. 1929, as amended, being Section 323.1 of the Compiled Laws of 1948, *are hereby transferred to the Department of Natural Resources by a Type II transfer* as defined by Section 3(b) of Act 380 of the Public Acts of 1965, *except that* the Water Resources Commission shall continue to exercise independent authority with respect to quasi-judicial functions, rule-making, and issuance of permits and orders in the water pollution control functions, as specified in Section 2, Section 5, subsection (1) of Section 7, and subsection (b) of Section 8 of Act No. 245 of the Public Acts of 1929, as amended. In all other ***758** areas it shall serve in an advisory capacity to the Natural Resources Commission and staff." (Emphasis added.)

Before determining whether this order transferred to the NRC the power to set by rule nutrient content in cleaning agents, it is well to first note that there are three principal and critical parts to the order. The transfer to the NRC is:

1. of "[t]he statutory authority, powers, duties, functions and responsibilities of the Water Resources Commission created under Section 1, Act 245, P.A. 1924, as amended";

2. "by a Type II transfer as defined by Section 3(b) of Act 380 of the Public Acts of 1965";

3. "*except that* the Water Resources Commission shall continue to exercise independent authority with respect to quasi-judicial functions, rule-making, and issuance of permits and orders in the water pollution control functions, as specified in Section 2, Section 5, subsection (1) of Section 7, and subsection (b) of Section 8 of Act No. 245 of the Public Acts of 1929, as amended".

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We conclude from examination individually of each of the three parts of Executive Order No. 1976–8Executive Order No. 1976–8 and examination of all three parts together that the executive order clearly transfers to the NRC the power to "further restrict the nutrient content * * * of cleaning agents" by rule without any ambiguity.

The first part of the order sets forth what is to be transferred both specifically and with completeness. The language is: "[t]he statutory authority, powers, duties, functions and responsibilities of the Water Resources Commission created under Section 1, Act 245, P.A. 1929, as amended". The WRC, as already noted in Part II of this opinion, and, as ***759** referred to in appellant manufacturer's statement, had the power by authority of § 3 of 1971 P.A. 226, the cleaning agents at, to "promulgate rules [to] further restrict the nutrient content". Therefore it is clear beyond peradventure that the language "[t]he statutory authority, powers, duties, functions and responsibilities of the Water Resources Commission" transfers to the NRC the authority in question, *i.e.,* to "further restrict [by rule] the nutrient content * * * of cleaning agents.

We note in passing that the reference to the WRC act is exclusively "*created* under Section 1, Act 245, P.A. 1929, as amended". Section 1 of the act merely *creates* the commission, naming the membership, etc. Consequently, reference to § 1 of 1929 P.A. 245 only identifies the commission with specificity. It in no way describes or delimits the transferred powers to those powers created by 1929 P.A. 245. Thus if the WRC has powers by virtue of any other act, those powers too are transferred to the NRC. We will see that this is in contrast to the powers reserved or excepted in the third part of the order which are pinned down to those created by specific sections of 1929 P.A. 245, as amended. So thus far it is clear that the executive order transfers to the NRC the power in question in this case.

The second part of the order emphasizes that the basic powers of WRC are being transferred to the NRC. The transfer is "by a Type II transfer as defined by Section 3(b) of Act 380 of the Public Acts of 1965". As we noted in Part III of this opinion, "Under a Type II assignment, the agency loses autonomous control of its functions—' ****361** all its statutory authority, powers, duties and functions * * * [are] transferred to that principal department' ". In other words, it is clear beyond ***760** ambiguity that a Type II transfer transferred all the WRC's rulemaking powers including those under the cleaning agents act to the NRC. In fact, that is what a Type II transfer was created to do.

The third part of the order consequently becomes crucial since there is no doubt that the first two parts transfer the WRC powers including the power at issue to the NRC. The ultimate and dispositive question therefore becomes whether from all that was transferred from the WRC to the NRC the power at issue was excepted.

Again the executive order is very clear and specific:

> "*except that* the Water Resources Commission shall continue to exercise independent authority with respect to quasi-judicial functions, rule-making, and issuance of permits and orders in the water pollution control functions, *as specified* in Section 2, Section 5, subsection (1) of Section 7, and subsection (b) of Section 8 of Act No. 245 of the Public Acts of 1929, as amended." (Emphasis added for "as specified".)

We will bypass the argument between appellant manufacturers and the opinion of the Court of Appeals whether "the Act 245 powers reserved to the WRC in the executive order concerned only the limited area of 'waste discharge' " (see Appellants' Brief, p 14) because we believe there is a clearer, simpler argument and that this argument is dispositive.[17]

***761** This Court is of the opinion that it is clear on the face of the executive order: (1) that, as already indicated in this opinion's analysis, the Governor's order transferred all of the WRC's powers, whatsoever, among others the power to "further restrict nutrient * * * content" as provided in 1971 P.A. 226, the cleaning agents act; (2) that the reserved or excepted powers, however, are only those powers, as stated in the executive order, "as specified in Section 2, Section 5, subsection (1) of Section 7, and subsection (b) of Section 8 of Act No. 245 of the Public Acts of 1929, as amended"; (3) that the power to

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"further restrict the nutrient content of * * * cleaning agents", the power in question, is found in 1971 P.A. 226, the cleaning agents act, and not in any of the aforesaid sections of 1929 P.A. 245, reserved to the WRC; and (4) therefore, since the exception clause does not except the 1971 P.A. 226 power to "further restrict the nutrient content * * * of cleaning agents", which was granted in the transferring clause, that power to "further restrict" is duly transferred to and is a part of the powers of the NRC. In short, Executive Order No. 1976–8Executive Order No. 1976–8 transferred to the NRC ****362** the power to promulgate ***762** the rule to which appellant manufacturers object. This, in effect, decides this case.

What the specified sections of 1929 P.A. 245 do contain, to use appellants' descriptions most favorable to them follow:

> "Section 2 of Act 245 directs the WRC to 'promulgate *such rules* as may be deemed necessary to carry out this act.' MCL 323.2; MSA 3.522 (emphasis added). Similarly, Section 5 of Act 245 grants the WRC power to '*make rules and orders* restricting the polluting content of any waste material or polluting substance [*e.g.,* cleaning agents] * * *.' MCL 323.5; MSA 3.525 (emphasis added). Section 8(b) concerns *permit issuance* and Section 7(1) concerns *adjudication.*" (Appellants' Brief, p 11, Emphasis in original.)

Whatever these sections include, they obviously do not include the cleaning agents act, or its pertinent § 3.

Appellant manufacturers argue in the above-quoted paragraph, however, that "Section 5 of Act 245 grants the WRC power to *make rules and orders* restricting the polluting content of any waste material or polluting substance" and that consequently the WRC under act 245 can control the nutrient content of cleaning agents. This argument is immaterial. Even if appellants were correct in their interpretation that the Legislature intended to include cleaning agents in the terms "waste material" or "polluting substance" as used in § 5 of 1929 P.A. 245, that would have no effect whatsoever on the transfer of the power to the NRC, which is the basis of their promulgating 1979 AC, R 323.1173, because the basis of promulgating that rule is 1971 P.A. 226, § 3, not 1929 P.A. 245, § 5.

It might be argued that the executive order ***763** reserved to the WRC a concurrent power to "further restrict the nutrient content * * * of cleaning agents" because of § 5 of 1929 P.A. 245. However, the value of such an argument at this point is highly speculative for a number of reasons, even conceding that § 5 of 1929 P.A. 245 provides such power. First, we are not concerned here with whether the WRC has such power. Second, the WRC has not exercised such power. Third, the ability of the WRC to effectively exercise such power in the face of the present executive organization and specific legislative grant of authority in § 3 of 1971 P.A. 226 is highly problematical. In any event, the decisive consideration is that even if the WRC had concurrent power, that does not affect the NRC's power, and that is the question before us.

We believe that three features of the executive order make it clear and unambiguous that the power in question was transferred to the NRC and not reserved to the WRC. First, the litany of powers transferred is universal. Second, the use of a Type II fundamental and comprehensive transfer indicates the Governor's intention to transfer all basic powers. Third, the limited reservation is particularly apparent in the significant contrast, on the one hand, in the first granting reference to 1929 P.A. 245, § 1 creating the WRC indicating that the litany of powers was inclusive of all those possessed by the WRC wherever found, and, on the other hand, to the second reserving reference to the particular specified sections of 1929 P.A. 245, none of which included the power to "further restrict the nutrient content * * * of cleaning agents" as that power is found in 1971 P.A. 226.

We must conclude that having in mind the comprehensive task of transfer and reservation, ***764** Executive Order No. 1976–8Executive Order No. 1976–8 is certainly unambiguous and more than sufficiently clear to those whose job it is to work with it. In short, we believe we are justified in stating that the order is clear and unambiguous.

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However, if the language is considered doubtful, then our rules of construction would require us to apply the rule of deference to the administrative construction. The NRC in issuing the rule in question has obviously interpreted Executive Order No. 1976–8Executive Order No. 1976–8 to transfer to it the necessary rulemaking power. As noted by appellees, this interpretation has also been agreed with by the Governor, who promulgated the order in the first place, and by the Attorney General, the chief executive law officer. It would appear that the executive department was unanimous in this interpretation, ****363** because the WRC which might also be concerned has not contested the interpretation or attempted to exercise the power itself as far as the record reveals. Finally, while the Legislature would have no input as to what the Governor intended in his order, its approval of the rule must signify its belief in its legality as well as public policy.

If the language of Executive Order No. 1976–8Executive Order No. 1976–8 were really in doubt, or if there was not strong authority to rely on the administrative agency's interpretation, and if the administrative agency's and general executive position were not so clear, then it might be profitable to refer to the extrinsic, informal material relied on by appellees for whatever their merits warranted. However, under the existing circumstances such reference is not justifiable.

CONCLUSION

We hold: (1) that § 3 of 1971 P.A. 226 makes it ***765** very clear that the Legislature did not intend to pre-empt, and did not pre-empt, the power to "further restrict the nutrient content * * * of cleaning agents", but placed it in the WRC; (2) that Const. 1963, art. 5, § 2, and the Executive Organization Act granted the Governor the authority to transfer powers between executive agencies; and (3) that Executive Order No. 1976–8Governor the authority to transfer powers between executive agencies; and (3) that Executive Order No. 1976–8 transferred to the NRC the power to promulgate 1979 AC, R 323.1173(4). As a consequence, the Court of Appeals and the trial court are affirmed. No costs, a public question being involved.

RYAN, FITZGERALD and KAVANAGH, JJ., concur.

RILEY, J., not participating.

LEVIN, Justice (dissenting).

The executive order transferred to the Department of Natural Resources the statutory authority, powers, duties, functions and responsibilities of the Water Resources Commission created under § 1, 1929 P.A. 245, as amended, M.C.L. § 323.1; M.S.A. § 3.521. Section 1 provides for the establishment of the Water Resources Commission and for the appointment of its members. The executive order excepts rule-making and certain other functions under §§ 2 and 5, subsection 1 of § 7, and subsection (b) of § 8 of act 245, as amended, thereby indicating that it was intended to transfer all powers and duties with the exceptions indicated.[1]

***766** The DNR justifies the regulation being challenged on the basis that it was thus the intent of ***767** the executive order to transfer to the DNR the Water Resources Commission's authority under the cleaning agent ****364** act, 1971 P.A. 226, M.C.L. § 323.231; M.S.A. § 3.533(301), a separate act not adverted to in the executive order.

There is in our opinion an ambiguity whether it was intended to retain in the Water Resources Commission the rule-making functions under the cleaning agent act so retained in respect to the general enabling act, act 245. The Governor's letter of

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October 6, 1976[2] and the DNR announcement, ****365 *768** [3] both of which were issued contemporaneously with the executive order, some eight months ***769** before the challenged regulation was promulgated, suggest that it was.

If the Governor desired that the DNR exercise rule-making power under the cleaning agent act, all that needed to be done to make that clear was to amend the executive order to so specifically provide. Absent such specific statement, it would seem that the Governor's letter of October 6, 1976, stating that the Water Resources Commission "will retain the essential adjudicative and rule-making functions",[4] should apply to the cleaning agent act, as well as to the general enabling act, act 245.

It is clear that the Governor did not confer on the DNR the Water Resources Commission's rule-making powers under the general enabling act, act 245. No reason appears why the Governor would want to retain in the Water Resources Commission rule-making authority under the general enabling act and confer on the DNR the Water Resources Commission's rule-making authority under other acts not specifically referred to in the executive order.

The argument that this was a Type II transfer and that, by the terms of the statute providing therefore (M.C.L. § 16.103[b]; M.S.A. § 3.29[3]), all statutory authority, powers, and duties were transferred, ignores the fact that all authority, powers, and duties were not transferred.

We would reverse.

COLEMAN, J., concurs.

All Citations

415 Mich. 728, 330 N.W.2d 346, 18 ERC 1617

Footnotes

1 This Court has not been asked to address the merits of the rule and, therefore, will assume that the rule represents a valid exercise of the police power. Similar rules have been upheld on the merits in Dade County, Florida, *Soap & Detergent Ass'n v. Clark,* 330 F.Supp. 1218 (S.D.Fla.1971); in Indiana, *Soap & Detergent Ass'n v. Offutt,* 3 ERC 1117 (S.D.Ind.1971); and in the City of Chicago, *Procter & Gamble Co. v. Chicago,* 509 F.2d 69 (CA 7, 1975), *cert. den.* 421 U.S. 978, 95 S.Ct. 1980, 44 L.Ed.2d 470 (1975) (no violation of the Commerce Clause).

2 In his decision denying plaintiffs' request for a preliminary injunction, Judge Bohn wrote:
"Michigan has been bountifully blessed with a great number of water bodies. The People of Michigan, as well as tourists, relish this gift. Yet if care is not taken to protect our waters they will no longer be a blessing to us but rather a curse. In order to grasp the significance of the harm confronting the state it is necessary to examine the effect of phosphates on water quality.
"Eutrophication is the process of nutrient enrichment of water accompanied by a depletion of oxygen. Cultural eutrophication is the acceleration of the eutrophication of a body of water by reason of discharge into it of man-derived nutrients, particularly phosphorus and nitrogen. The immediate result of cultural eutrophication is increased production of algae and aquatic plants. Heavy growths of algae, a sign of rapid eutrophication, kill fish, cause water to taste and smell foul, and eventually destroy most productive life forms.

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"Eutrophication may be controlled by reducing the level of one of the major nutrient elements, necessary for the life of the water body, below the level essential to its life. The nutrient in shortest supply in relation to all the other elements needed to create algal blooms is known as the limiting element. The more prevalent view in the scientific community is that phosphorus is the most likely nutrient for controlling eutrophication because of its comparative abundance in the waters and the more ready means for reducing its input into the waters. It is impracticable to attempt to remove other major nutrients, carbon and nitrogen, from the water. Carbon requirements of algae can normally be satisfied from carbon dioxide in the atmosphere, from the natural carbonate in water, and from bacterial degradation. Similarly nitrogen can be drawn from the atmosphere by blue-green algae and other types of algae. The logical deduction is that any concerted action to reduce the nutrient level in the waters must of necessity focus on the removal of the only major nutrient substantially controllable by man—phosphorus. See *Soap & Detergent Ass'n v. Clark* 3 ERC 1075 (S.D.Fla.1971); Detergent Phosphate Ban, draft publication, Region V, Environmental Protection Agency.

"Plaintiffs asserted that since phosphate pollution has been going on for a number of years a few more weeks could not possibly hurt. This assertion lacks merit for each continued day of pollution makes the reversal process more difficult if not even impossible." [Appendix of Plaintiffs-Appellants, 65a–66a]

3 The appellant manufacturers have substantially complied with Rule 323.1173(4)'s 0.5% limit on phosphorus [Transcript of Oral Argument before the Michigan Supreme Court, June 9, 1982].

4 *Coffman v. State Board of Examiners in Optometry,* 331 Mich. 582, 590, 50 N.W.2d 322 (1951), quoting 42 Am Jur, § 26, p 316: "Administrative boards, commissions, and officers have no common-law powers. Their powers are limited by the statutes creating them to those conferred expressly or by necessary or fair implication."

5 *Dussia v. Monroe County Employees Retirement System,* 386 Mich. 244, 248–49, 191 N.W.2d 307 (1971); *MacQueen v. City Comm. of Port Huron,* 194 Mich. 328, 342, 160 N.W. 627 (1916).

6 *Bidwell v. Whitaker,* 1 Mich. 469, 479 (1850).

7 *Grand Rapids v. Crocker,* 219 Mich. 178, 182, 189 N.W. 221 (1922); *Melia v. Employment Security Comm.,* 346 Mich. 544, 562, 78 N.W.2d 273 (1956).

8 The Department of the Attorney General is likewise under a statutory duty to review agency rules and approve them if they are found to be legal, M.C.L. § 24.245(1); M.S.A. § 3.560(145)(1). Therefore, appellant manufacturer's argument that two informal memoranda by an assistant attorney general should be given "considerable weight" [Plaintiffs-Appellant's Brief, pp 29–30], lacks merit. The two letters of the attorney interpret the cleaning agents act as precluding agency regulation of phosphorus. However, an agency attorney's informal letter does not authoritatively bind the agency. 1 Cooper, State Administrative Law, p 244; Davis, Administrative Law of the Seventies, § 21.08, p 480 (1976); *Attorney General v. Michigan Public Service Comm.,* 412 Mich. 385, 420, 316 N.W.2d 187 (1982). The Department of the Attorney General's approval of the legality of the rule is the dispositive binding opinion of that department.

9 Const. 1963, Schedule and Temporary Provisions, § 12:

> "The initial allocation of departments by law pursuant to Section 2 of Article V of this constitution, shall be completed within two years after the effective date of this constitution. If such allocation shall not have been completed within such period, the governor, within one year thereafter, by executive order, shall make the initial allocation."

10 The nature and extent of the power granted to the Governor in art. 5, § 2, was most thoroughly discussed by the convention in the context of what restraints should be placed upon the Governor's exercise of the power. At one point an amendment was proposed to allow an executive organization plan submitted under ¶ 2 to be disapproved by a majority vote of either house. The following comments were made during a discussion of this amendment.

"MR. HEIDEMAN: I would like to speak in favor of this amendment. If I were a poet, I would write a poem on our pale, poor, abused legislature. One day we give the powers to the supreme court; *on another day we give the powers to the governor;* on still another day, we give legislative powers to civil service; on another, to a quasi legislative or

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judicial body or commission. One day the Democrats kick the legislature; on another day the Republicans do the same. There is a seeming bipartisan approach to this, a cooperation, as it were, here at the constitutional convention, to cut down or whittle away the powers of the legislature.

"MR. HUTCHINSON: * * * With that I take issue and would argue this way: under this arrangement you are turning the traditional system upside down, to begin with. Instead of giving to the legislature the lawmaking function in these reorganization plans, and to the governor a veto, *you are giving to the governor, in effect, the power to make the law and you are according to the legislature a veto.*" 2 Official Record, Constitutional Convention 1961, p 1846 (emphasis added).

In view of the convention's recognition that the Governor was being granted broad legislative power, subject to legislative veto, appellants' argument that that power granted to the Governor in art. 5, § 2, ¶ 2 is different in kind from legislative power of ¶ 1 [Appellants' brief, p 16] is simply mistaken.

11 The appellant manufacturers argued [Appellants' Brief 20–21] that the Court of Appeals reliance on the Executive Organization Act to interpret the constitutional provision was erroneous, citing *White v. Ann Arbor,* 406 Mich. 554, 281 N.W.2d 283 (1979). However, *White* is inapposite. In that case the parties sought to use a later, unrelated legislative enactment using the words "public utility" to interpret the same phrase in the constitution. In this case, the Executive Organization Act is addressing not only the identical problem discussed in the constitutional provision, but the *Schnipke* case held that the act was the legislation which implemented the constitution. The Court of Appeals, therefore, correctly found the Executive Organization Act relevant to interpreting Const. 1963, art. 5, § 2. 103 Mich.App. at 728, 304 N.W.2d 267.

12 M.C.L. § 16.103(a); M.S.A. § 3.29(3)(a) provides:

> "Under this act, a type I transfer means the transferring intact of an existing department, board, commission or agency to a principal department established by this act. When any board, commission, or other agency is transferred to a principal department under a type I transfer, that board, commission or agency shall be administered under the supervision of that principal department. Any board, commission or other agency granted a type I transfer shall exercise its prescribed statutory powers, duties and functions of rule-making, licensing and registration including the prescription of rules, rates, regulations and standards, and adjudication independently of the head of the department. Under a type I transfer all budgeting, procurement and related management functions of any transferred board, agency or commission shall be performed under the direction and supervision of the head of the principal department."

13 M.C.L. § 16.103(b); M.S.A. § 3.29(3)(b) provides:

> "Under this act, a type II transfer means transferring of an existing department, board, commission or agency to a principal department established by this act. Any department, board, commission or agency assigned to a type II transfer under this act shall have all its statutory authority, powers, duties and functions, records, personnel, property, unexpended balances of appropriations, allocations or other funds, including the functions of budgeting and procurement, transferred to that principal department."

14 The Federalist No. 47 (J. Madison).

15 State governments are not constitutionally required to adhere to the doctrine of separation of powers. *Sweezy v. New Hampshire,* 354 U.S. 234, 255, 77 S.Ct. 1203, 1214, 1 L.Ed.2d 1311 (1957).

16 "See *Detroit v. Redford Twp.,* 253 Mich. 453, 455, 235 N.W. 217 (1931); *Scholten v. Rhoades,* 67 Mich.App. 736, 745, 242 N.W.2d 509 (1976)." (Appellees' Brief, p. 26)

17 While we believe it is preferable and clearer to decide whether the power to "further restrict nutrient content" was reserved by the analysis that none of the named sections of 1929 P.A. 245 is now the repository of that power, we have examined and reflected on the difference of opinion between appellant manufacturers and the Court of Appeals.

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We are not persuaded on analysis of the four pertinent sections of 1929 P.A. 245 that they pertain to the regulation of content of cleaning agents. As appellants quote on page 11 of their brief: "Section 2 of Act 245 directs the WRC to 'promulgate *such rules* as may be deemed necessary to carry out this act.' " "This act" does refer to "waste disposal" (see § 2 itself, § 5, § 7[1] and § 8) but nowhere refers to nutrient content of cleaning agents. In general, 1929 P.A. 245 appears designed to limit the discharge into state waters rather than prescribing the characteristics of materials. Appellants state: "Similarly Section 5 of Act 245 grants the WRC power to '*make rules and orders* restricting the polluting content of any waste material or polluting substance' [*e.g.,* cleaning agents]". This comes closest to prescribing the characteristics of materials. But appellants failed to include the rest of the sentence: "waste material or polluting substance discharged or sought to be discharged into any lake, river, stream, or other waters of the state". In other words, the objective was to control directly the discharge into state waters. Whether or not the appellants believe that this would have permitted the WRC to limit the nutrient content in cleaning agents, the matter was sufficiently unclear that the Legislature saw fit to enact the cleaning agents act. In short, while an arguments could be made that 1929 P.A. 245 was directed toward controlling waste disposal, it is certainly difficult to argue that it contemplated restricting nutrient content in cleaning agents, even before the passage of the cleaning agents act.

[1] The challenged executive order, Executive Order No. 1976–8Executive Order No. 1976–8, reads in pertinent part as follows:

"1. Executive Order 1973–2Executive Order 1973–2a is hereby repealed and this order shall supersede the provisions of that order.

"2. Executive Order 1973–2Executive Order 1973–2 shall remain in full force and effect as amended in the following manner:

"a. Paragraph 2, page 1, as amended, reads as follows:

"The statutory authority, powers, duties, functions and responsibilities of the Water Resources Commission created under Section 1, Act 245, P.A. 1929, as amended, being Section 323.1 of the Compiled Laws of 1948, are hereby transferred to the Department of Natural Resources by a Type II transfer as defined by Section 3(b) of Act 380 of the Public Acts of 1965, *except that* the Water Resources Commission shall continue to exercise independent authority with respect to quasi-judicial functions, rule-making, and issuance of permits and orders in the water pollution control functions, as specified in Section 2, Section 5, subsection (1) of Section 7, and subsection (b) of Section 8 of Act No. 245 of the Public Acts of 1929, as amended. In all other areas it shall serve in an advisory capacity to the Natural Resources Commission and staff."

Executive Order No. 1973–2Executive Order No. 1973–2a reads in pertinent part as follows:

"1. All of paragraph 2, page 2, of said executive order [1973–2] is stricken and in lieu thereof the following is hereby ordered:

" '2. The statutory authority, powers, duties, functions, responsibilities of the Water Resources Commission created under Section 1, Act 245, P.A. 1929, as amended, being Section 323.1 of the Compiled Laws of 1948, are hereby transferred to the Department of Natural Resources by a Type II transfer as defined by Section 3(b) of Act 380 of the Public Acts of 1965, *except that* the following powers, duties and responsibilities specifically related to that function shall be exercised by the Water Resources Commission independent of the Department of Natural Resources.

"a. Sections 2–6, 6(a), 6(b), 7–9 and 13 of Act 245, P.A. 1929 as amended; Sections 4, 8, and 10 of Act 167, P.A. 1970; Sections 4 and 5 of Act 211, P.A. 1956, as amended; Sections 3–5, 7, 10, 12, 14–17 of Act 329, P.A. 1966, as amended; Section 3 of Act 222, P.A. 1966; Sections 4, 5, 7, 11, 13, 14 and 15 of Act 347, P.A. 1972; and Section 423 of Act 40, P.A. 1956, as amended, by Act 298, P.A. 1972.

"b. The Water Resources Commission shall continue to exercise independent authority with respect to quasi-judicial functions in the rule-making, enforcement, and issuance of orders in the water pollution control functions. In all other areas it shall serve in an advisory capacity to the Natural Resources Commission and staff.

"c. All records, property, personnel and unexpended balances of appropriations and allocations and other funds

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used, held, employed, available, or to be made available to the Water Resources Commission are transferred to the Department of Natural Resources.' "

Executive Order No. 1973–2Executive Order No. 1973–2 reads in pertinent part as follows:

"2. The statutory authority, powers, duties, functions, and responsibilities of the Water Resources Commission created under Section 1, Act 245 of Public Acts of 1929, as amended, being section 323.1 of the Compiled Laws of 1948, are hereby transferred to the Department of Natural Resources by a Type II transfer as defined by Section 3(b) of Act 380 of the Public Acts of 1965.

"a. The Water Resources Commission shall serve in an advisory capacity to the Natural Resources Commission and staff.

"b. All records, property, personnel and unexpended balances of appropriations and allocations and other funds used, held, employed, available, or to be made available, to the Water Resources Commission are transferred to the Department of Natural Resources."

Executive Order No. 1973–2Executive Order No. 1973–2 was promulgated January 11, 1973, to become effective April 1, 1973. Executive Order No. 1973–2Executive Order No. 1973–2a was promulgated March 13, 1973, to become effective May 14, 1973. Executive Order No. 1976–8Executive Order No. 1976–8 was to become effective September 1, 1976; the effective date was extended by Executive Order No. 1976–8Executive Order No. 1976–8a to November 1, 1976.

2 "[Letterhead of the Governor of the State of Michigan]

"October 6, 1976

"Mr. Thomas L. Munson
2700 City National Bank Building
Detroit, Michigan 48226

"Dear Mr. Munson:

"Thank you for your letter expressing concern over Executive Order 1976–8Executive Order 1976–8 and 19761976–8a which allow the reorganization of the Department of Natural Resources.

"The net result of this reorganization will be to shift the administration of certain functions from the Air Pollution Control Commission and the Water Resources Commission to the Natural Resources Commission. *The Air and Water Commissions will retain the essential adjudicative and rule making functions.* These commissions will, by rule, promulgate standards; and issue, revoke, and modify permits and orders to implement such standards while the investigative and prosecutorial functions are shifted to the Department of Natural Resources. Thus, the professional staff of the Department of Natural Resources, subject to supervision of the Director and Natural Resources Commission, will investigate the facts and institute proceedings in which the Air and Water Commissions will make any necessary administrative adjudications.

"By separating the functions of the administrative prosecutor and administrative judge, I believe we have improved the system of checks and balances which you referred to in your letter.

"With respect to your concern that all interested parties should be given time to comment on the proposed order; prior to receiving my signature, the order was reviewed by the interested commissions, department directors, and the Office of the Attorney General. Their comments and concerns were given full consideration. In addition, the Legislature has been given four months, twice the amount of time required under the Constitution, to review the order. I believe that the opportunity for review has been adequate and fair.

"Kind personal regards.

"Sincerely,
/s/ William G. Milliken
Governor"

(Emphasis supplied.)

3 "GOVERNOR'S ORDER REORGANIZING DEPARTMENT TAKES EFFECT

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MICHIGAN DEPARTMENT OF NATURAL RESOURCES NEWS BULLETIN

"Lansing—Governor William G. Milliken's executive order which officially reorganizes the Department of Natural Resources under a centralization plan recommended last December by Director Howard A. Tanner takes effect November 1.

"The order (1976–8) repeals Executive Order 1973–2Executive Order 1973–2a and amends Executive Order 1973–2Executive Order 1973–2, under which the Water Resources Commission and Air Pollution Control Commission were transferred to the department.

"*The order transfers the enforcement functions of the commissions to the department central staff. However, the commissions retain their responsibilities for setting standards, issuing orders and adopting rules as required under their legislative mandates, Governor Milliken states.*

"It also authorizes Tanner to appoint executive secretaries to the commissions—with the advice and consent of the commission members.

"The order officially eliminates the DNR's two-branch organizational structure—with separate branches for natural resources management and environmental protection functions. It permits uniting those responsibilities into a more centralized organization designed for efficiency.

"The Governor says the order permits the placing of the DNR's divisions with environmental protection mandates—air and water quality and resource recovery—under one roof: the Bureau of Environmental Protection.

"The order also permits the DNR to focus additional attention on the problems of land use and water management; included among the new divisions in the restructured department is a DNR Bureau of Land and Water Management.

" 'I am pleased that Director Tanner has taken special note of the rising importance of land use in his restructuring of the department,' remarks Milliken. 'This is an important step toward coordinating functions previously scattered among many elements of the DNR.'

"The reorganization of the department also will help implement Milliken's directive to the department that it do all it can to eliminate administrative delays in the permit-issuing process."

(Emphasis supplied.)

[4] See fn 2.

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136 S.Ct. 1899
Supreme Court of the United States

Terrance WILLIAMS, Petitioner
v.
PENNSYLVANIA.

No. 15–5040.
|
Argued Feb. 29, 2016.
|
Decided June 9, 2016.

Synopsis
Background: Following affirmance of his convictions and death sentence for first-degree murder and robbery, 524 Pa. 218, 570 A.2d 75, inmate petitioned for postconviction relief. The Court of Common Pleas, Criminal Division, Philadelphia County, M. Teresa Sarmina, J., vacated death sentence, and the Commonwealth appealed. The Supreme Court of Pennsylvania, Eakin, J., 629 Pa. 533, 105 A.3d 1234, reinstated the death sentence. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

under Due Process Clause there is an impermissible risk of actual bias when judge earlier had significant, personal involvement as a prosecutor in critical decision regarding a defendant's case;

Pennsylvania Supreme Court justice, who as district attorney had given approval to seek death penalty against inmate, violated due process by not recusing himself and participating in decision to reinstate death sentence; and

Pennsylvania Supreme Court justice's due process violation was structural error not subject to harmless-error review, regardless of whether his vote was dispositive.

Vacated and remanded.

Chief Justice Roberts filed dissenting opinion, in which Justice Alito joined.

Justice Thomas filed dissenting opinion.

Procedural Posture(s): On Appeal.

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****1901** *Syllabus*[*]

***1** Petitioner Williams was convicted of the 1984 murder of Amos Norwood and sentenced to death. During the trial, the then-district attorney of Philadelphia, Ronald Castille, approved the trial prosecutor's request to seek the death penalty against Williams. Over the next 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review. In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), arguing that the prosecutor had obtained false testimony from his codefendant and suppressed material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Finding that the trial prosecutor had committed *Brady* violations, the PCRA court stayed Williams's execution and ordered a new sentencing hearing. The Commonwealth asked the Pennsylvania Supreme Court, whose chief justice was former District Attorney Castille, to vacate the stay. Williams filed a response, along with a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the motion to the full court for decision. Without explanation, the chief justice denied Williams's motion for recusal and the request for its referral. He then joined the State Supreme Court opinion vacating the PCRA court's grant of penalty-phase relief and reinstating Williams's death sentence. Two weeks later, Chief Justice Castille retired from the bench.

***2** *Held* :

1. Chief Justice Castille's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment. Pp. 1905 – 1909.

(a) The Court's due process precedents do not set forth a specific test governing recusal when a judge had prior involvement in a case as a prosecutor; but the principles on which these precedents rest dictate the rule that must control in the circumstances here: Under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case. The Court applies an objective standard that requires recusal when the likelihood of bias on the part of the judge "is too high to be constitutionally tolerable." *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208. A constitutionally intolerable probability of bias exists when the same person serves as both accuser and adjudicator in a case. See *In re Murchison,* 349 U.S. 133, 136–137, 75 S.Ct. 623, 99 L.Ed. 942. No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. As a result, a serious question arises as to whether a judge who has served as an advocate for the State in the very case the court is now asked to adjudicate would be influenced by an improper, if ****1902** inadvertent, motive to validate and preserve the result obtained through the adversary process. In these circumstances, neither the involvement of multiple actors in the case nor the passage of time relieves the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences his or her own earlier, critical decision may have set in motion. Pp. 1905 – 1907.

(b) Because Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision, his failure to recuse from Williams's case presented an unconstitutional risk of bias. The decision to pursue the death penalty is a critical choice in the adversary process, and Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against

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Williams. Given the importance of this decision and the profound consequences it carries, a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion. The fact that many jurisdictions, including Pennsylvania, have statutes and professional codes of conduct that already require recusal under the circumstances of this case suggests that today's decision will not occasion a significant change in recusal practice. Pp. 1907 – 1909.

2. An unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether ***3** the judge's vote was dispositive, *Puckett v. United States,* 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266. Because an appellate panel's deliberations are generally confidential, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to ensure that jurists can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. It does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position—an outcome that does not lessen the unfairness to the affected party. A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. Because Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below, Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation ... not to hold the balance nice, clear and true between the State and the accused," *Tumey v. Ohio,* 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749. Pp. 1908 – 1910.

629 Pa. 533, 105 A.3d 1234, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ROBERTS, C.J., filed a dissenting opinion, in which ALITO, J., joined. THOMAS, J., filed a dissenting opinion.

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Ronald Eisenberg, Deputy District Attorney, Hugh J. Burns, Jr., Chief, Appeals Unit, George D. Mosee, Jr., First Assistant District Attorney, R. Seth Williams, District Attorney, Philadelphia District Attorney's Office, Philadelphia, PA, for Respondent.

Opinion

***4** Justice KENNEDY delivered the opinion of the Court.

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In this case, the Supreme Court of Pennsylvania vacated the decision of a postconviction court, which had granted relief to a prisoner convicted of first-degree murder and sentenced to death. One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case. The justice in question denied the prisoner's motion for recusal and participated in the decision to deny relief. The question presented is whether the justice's denial of the recusal motion and his subsequent judicial participation violated the Due Process Clause of the Fourteenth Amendment.

This Court's precedents set forth an objective standard that requires recusal when the likelihood of bias on the part of the judge " 'is too high to be constitutionally tolerable.' " *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 872, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)). Applying this standard, the Court concludes that due process compelled the justice's recusal.

I

Petitioner is Terrance Williams. In 1984, soon after Williams turned 18, he murdered 56–year–old Amos Norwood in Philadelphia. At trial, the Commonwealth presented evidence that Williams and a friend, Marc Draper, had been standing on a street corner when Norwood drove by. Williams and Draper requested a ride home from Norwood, who agreed. Draper then gave Norwood false directions that led him to drive toward a cemetery. Williams and Draper ordered Norwood out of the car and into the cemetery. There, ***5** the two men tied Norwood in his own clothes and beat him to death. Testifying for the Commonwealth, Draper suggested that robbery was the motive for the crime. Williams took the stand in his own defense, stating that he was not involved in the crime and did not know the victim.

During the trial, the prosecutor requested permission from her supervisors in the district attorney's office to seek the death penalty against Williams. To support the request, she prepared a memorandum setting forth the details of the crime, information supporting two statutory aggravating factors, and facts in mitigation. After reviewing the memorandum, the then-district attorney of Philadelphia, Ronald Castille, wrote this note at the bottom of the document: "Approved to proceed on the death penalty." App. 426a.

During the penalty phase of the trial, the prosecutor argued that Williams deserved a death sentence because he killed Norwood " 'for no other reason but that a kind man offered him a ride home.' " Brief for Petitioner 7. The jurors found two aggravating circumstances: that the murder ****1904** was committed during the course of a robbery and that Williams had a significant history of violent felony convictions. That criminal history included a previous conviction for a murder he had committed at age 17. The jury found no mitigating circumstances and sentenced Williams to death. Over a period of 26 years, Williams's conviction and sentence were upheld on direct appeal, state postconviction review, and federal habeas review.

In 2012, Williams filed a successive petition pursuant to Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa. Cons.Stat. § 9541 *et seq.* (2007). The petition was based on new information from Draper, who until then had refused to speak with Williams's attorneys. Draper told Williams's counsel that he had informed the Commonwealth before trial that Williams had been in a sexual relationship

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with Norwood and that the relationship was the real motive for Norwood's murder. According to Draper, the Commonwealth ***6** had instructed him to give false testimony that Williams killed Norwood to rob him. Draper also admitted he had received an undisclosed benefit in exchange for his testimony: the trial prosecutor had promised to write a letter to the state parole board on his behalf. At trial, the prosecutor had elicited testimony from Draper indicating that his only agreement with the prosecution was to plead guilty in exchange for truthful testimony. No mention was made of the additional promise to write the parole board.

The Philadelphia Court of Common Pleas, identified in the proceedings below as the PCRA court, held an evidentiary hearing on Williams's claims. Williams alleged in his petition that the prosecutor had procured false testimony from Draper and suppressed evidence regarding Norwood's sexual relationship with Williams. At the hearing, both Draper and the trial prosecutor testified regarding these allegations. The PCRA court ordered the district attorney's office to produce the previously undisclosed files of the prosecutor and police. These documents included the trial prosecutor's sentencing memorandum, bearing then-District Attorney Castille's authorization to pursue the death penalty. Based on the Commonwealth's files and the evidentiary hearing, the PCRA court found that the trial prosecutor had suppressed material, exculpatory evidence in violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and engaged in "prosecutorial gamesmanship." App. 168a. The court stayed Williams's execution and ordered a new sentencing hearing.

Seeking to vacate the stay of execution, the Commonwealth submitted an emergency application to the Pennsylvania Supreme Court. By this time, almost three decades had passed since Williams's prosecution. Castille had been elected to a seat on the State Supreme Court and was serving as its chief justice. Williams filed a response to the Commonwealth's application. The disclosure of the trial prosecutor's sentencing memorandum in the PCRA proceedings had alerted Williams to Chief Justice Castille's involvement in the decision to seek a death sentence in his case. ***7** For this reason, Williams also filed a motion asking Chief Justice Castille to recuse himself or, if he declined to do so, to refer the recusal motion to the full court for decision. The Commonwealth opposed Williams's recusal motion. Without explanation, Chief Justice Castille denied the motion for recusal and the request for its referral. Two days later, the Pennsylvania Supreme Court denied the application to vacate the stay and ordered full briefing on the issues raised in the appeal. The State Supreme Court then vacated the PCRA court's order granting penalty-phase relief and reinstated Williams's ****1905** death sentence. Chief Justice Castille and Justices Baer and Stevens joined the majority opinion written by Justice Eakin. Justices Saylor and Todd concurred in the result without issuing a separate opinion. See 629 Pa. 533, ——, 105 A.3d 1234, 1245 (2014).

Chief Justice Castille authored a concurrence. He lamented that the PCRA court had "lost sight of its role as a neutral judicial officer" and had stayed Williams's execution "for no valid reason." *Id.,* at ——, 105 A.3d, at 1245. "[B]efore condemning officers of the court," the chief justice stated, "the tribunal should be aware of the substantive status of *Brady* law," which he believed the PCRA court had misapplied. *Id.,* at ——, 105 A.3d, at 1246. In addition, Chief Justice Castille denounced what he perceived as the "obstructionist anti-death penalty agenda" of Williams's attorneys from the Federal Community Defender Office. *Ibid.* PCRA courts "throughout Pennsylvania need to be vigilant and circumspect when it comes to the activities of this particular advocacy group," he wrote, lest Defender Office lawyers turn postconviction proceedings "into a circus where [they] are the ringmasters, with their parrots and puppets as a sideshow." *Id.,* at ——, 105 A.3d, at 1247.

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Two weeks after the Pennsylvania Supreme Court decided Williams's case, Chief Justice Castille retired from the bench. This Court granted Williams's petition for certiorari. 576 U.S. ——, 136 S.Ct. 28, 192 L.Ed.2d 999 (2015).

***8** II

A

Williams contends that Chief Justice Castille's decision as district attorney to seek a death sentence against him barred the chief justice from later adjudicating Williams's petition to overturn that sentence. Chief Justice Castille, Williams argues, violated the Due Process Clause of the Fourteenth Amendment by acting as both accuser and judge in his case.

The Court's due process precedents do not set forth a specific test governing recusal when, as here, a judge had prior involvement in a case as a prosecutor. For the reasons explained below, however, the principles on which these precedents rest dictate the rule that must control in the circumstances here. The Court now holds that under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case.

Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison,* 349 U.S. 133, 136, 75 S.Ct. 623, 99 L.Ed. 942 (1955). Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.' " *Caperton,* 556 U.S., at 881, 129 S.Ct. 2252. Of particular relevance to the instant case, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case. See *Murchison,* 349 U.S., at 136–137, 75 S.Ct. 623. This objective risk of bias is reflected in the due process maxim that "no man can ***9** be a judge in his own case and no man is permitted to try cases where he has an interest ****1906** in the outcome." *Id.*, at 136, 75 S.Ct. 623.

The due process guarantee that "no man can be a judge in his own case" would have little substance if it did not disqualify a former prosecutor from sitting in judgment of a prosecution in which he or she had made a critical decision. This conclusion follows from the Court's analysis in *In re Murchison*. That case involved a "one-man judge-grand jury" proceeding, conducted pursuant to state law, in which the judge called witnesses to testify about suspected crimes. *Id.*, at 134. During the course of the examinations, the judge became convinced that two witnesses were obstructing the proceeding. He charged one witness with perjury and then, a few weeks later, tried and convicted him in open court. The judge charged the other witness with contempt and, a few days later, tried and convicted him as well. This

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Court overturned the convictions on the ground that the judge's dual position as accuser and decisionmaker in the contempt trials violated due process: "Having been a part of [the accusatory] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.*, at 137.

No attorney is more integral to the accusatory process than a prosecutor who participates in a major adversary decision. When a judge has served as an advocate for the State in the very case the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome. There is, furthermore, a risk that the judge "would be so psychologically wedded" to his or her previous position as a prosecutor that the judge "would consciously or unconsciously avoid the appearance of having erred or changed position." *Withrow,* 421 U.S., at 57, 95 S.Ct. 1456. In addition, the judge's "own personal knowledge and impression" of the case, acquired through his or her role in the prosecution, may ***10** carry far more weight with the judge than the parties' arguments to the court. *Murchison, supra,* at 138, 75 S.Ct. 623; see also *Caperton, supra,* at 881, 129 S.Ct. 2252.

Pennsylvania argues that *Murchison* does not lead to the rule that due process requires disqualification of a judge who, in an earlier role as a prosecutor, had significant involvement in making a critical decision in the case. The facts of *Murchison,* it should be acknowledged, differ in many respects from a case like this one. In *Murchison,* over the course of several weeks, a single official (the so-called judge-grand jury) conducted an investigation into suspected crimes; made the decision to charge witnesses for obstruction of that investigation; heard evidence on the charges he had lodged; issued judgments of conviction; and imposed sentence. See 349 U.S., at 135, 75 S.Ct. 623 (petitioners objected to "trial before the judge who was at the same time the complainant, indicter and prosecutor"). By contrast, a judge who had an earlier involvement in a prosecution might have been just one of several prosecutors working on the case at each stage of the proceedings; the prosecutor's immediate role might have been limited to a particular aspect of the prosecution; and decades might have passed before the former prosecutor, now a judge, is called upon to adjudicate a claim in the case.

These factual differences notwithstanding, the constitutional principles explained in *Murchison* are fully applicable where a judge had a direct, personal role in the defendant's prosecution. The involvement of other actors and the passage of time are consequences of a complex criminal justice system, in which a single ****1907** case may be litigated through multiple proceedings taking place over a period of years. This context only heightens the need for objective rules preventing the operation of bias that otherwise might be obscured. Within a large, impersonal system, an individual prosecutor might still have an influence that, while not so visible as the one-man grand jury in *Murchison,* is nevertheless significant. A prosecutor may bear responsibility for any number ***11** of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process. The involvement of multiple actors and the passage of time do not relieve the former prosecutor of the duty to withdraw in order to ensure the neutrality of the judicial process in determining the consequences that his or her own earlier, critical decision may have set in motion.

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B

This leads to the question whether Chief Justice Castille's authorization to seek the death penalty against Williams amounts to significant, personal involvement in a critical trial decision. The Court now concludes that it was a significant, personal involvement; and, as a result, Chief Justice Castille's failure to recuse from Williams's case presented an unconstitutional risk of bias.

As an initial matter, there can be no doubt that the decision to pursue the death penalty is a critical choice in the adversary process. Indeed, after a defendant is charged with a death-eligible crime, whether to ask a jury to end the defendant's life is one of the most serious discretionary decisions a prosecutor can be called upon to make.

Nor is there any doubt that Chief Justice Castille had a significant role in this decision. Without his express authorization, the Commonwealth would not have been able to pursue a death sentence against Williams. The importance of this decision and the profound consequences it carries make it evident that a responsible prosecutor would deem it to be a most significant exercise of his or her official discretion and professional judgment.

***12** Pennsylvania nonetheless contends that Chief Justice Castille in fact did not have significant involvement in the decision to seek a death sentence against Williams. The chief justice, the Commonwealth points out, was the head of a large district attorney's office in a city that saw many capital murder trials. Tr. of Oral Arg. 36. According to Pennsylvania, his approval of the trial prosecutor's request to pursue capital punishment in Williams's case amounted to a brief administrative act limited to "the time it takes to read a one-and-a-half-page memo." *Ibid.* In this Court's view, that characterization cannot be credited. The Court will not assume that then-District Attorney Castille treated so major a decision as a perfunctory task requiring little time, judgment, or reflection on his part.

Chief Justice Castille's own comments while running for judicial office refute the Commonwealth's claim that he played a mere ministerial role in capital sentencing decisions. During the chief justice's election campaign, multiple news outlets reported his statement that he "sent 45 people to death rows" as district attorney. Seelye, Castille Keeps His Cool in Court Run, Philadelphia Inquirer, Apr. 30, 1993, ****1908** p. B1; see also, *e.g.*, Brennan, State Voters Must Choose Next Supreme Court Member, Legal Intelligencer, Oct. 28, 1993, pp. 1, 12. Chief Justice Castille's willingness to take personal responsibility for the death sentences obtained during his tenure as district attorney indicate that, in his own view, he played a meaningful role in those sentencing decisions and considered his involvement to be an important duty of his office.

Although not necessary to the disposition of this case, the PCRA court's ruling underscores the risk of permitting a former prosecutor to be a judge in what had been his or her own case. The PCRA court determined that the trial prosecutor—Chief Justice Castille's former subordinate in the district attorney's office—had engaged in multiple, intentional *Brady* violations during Williams's prosecution. App. ***13** 131–145, 150–154. While there is no indication that Chief Justice Castille was aware of the alleged prosecutorial misconduct, it would be difficult for a judge in his position not to view the PCRA court's findings as a criticism of his former office and, to some extent, of his own leadership and supervision as district attorney.

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The potential conflict of interest posed by the PCRA court's findings illustrates the utility of statutes and professional codes of conduct that "provide more protection than due process requires." *Caperton,* 556 U.S., at 890, 129 S.Ct. 2252. It is important to note that due process "demarks only the outer boundaries of judicial disqualifications." *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). Most questions of recusal are addressed by more stringent and detailed ethical rules, which in many jurisdictions already require disqualification under the circumstances of this case. See Brief for American Bar Association as *Amicus Curiae* 5, 11–14; see also ABA Model Code of Judicial Conduct Rules 2.11(A)(1), (A)(6)(b) (2011) (no judge may participate "in any proceeding in which the judge's impartiality might reasonably be questioned," including where the judge "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding"); ABA Center for Professional Responsibility Policy Implementation Comm., Comparison of ABA Model Judicial Code and State Variations (Dec. 14, 2015), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2_11.authcheckdam.pdf (as last visited June 7, 2016) (28 States have adopted language similar to ABA Model Judicial Code Rule 2.11); 28 U.S.C. § 455(b)(3) (recusal required where judge "has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding"). At the time Williams filed his recusal motion with the Pennsylvania Supreme Court, for example, Pennsylvania's Code of Judicial Conduct disqualified judges from any ***14** proceeding in which "they served as a lawyer in the matter in controversy, or a lawyer with whom they previously practiced law served during such association as a lawyer concerning the matter...." Pa.Code of Judicial Conduct, Canon 3C (1974, as amended). The fact that most jurisdictions have these rules in place suggests that today's decision will not occasion a significant change in recusal practice.

Chief Justice Castille's significant, personal involvement in a critical decision in Williams's case gave rise to an unacceptable risk of actual bias. This risk so endangered the appearance of neutrality that his participation in the case "must be forbidden if the guarantee of due process is to be ****1909** adequately implemented." *Withrow,* 421 U.S., at 47, 95 S.Ct. 1456.

III

Having determined that Chief Justice Castille's participation violated due process, the Court must resolve whether Williams is entitled to relief. In past cases, the Court has not had to decide the question whether a due process violation arising from a jurist's failure to recuse amounts to harmless error if the jurist is on a multimember court and the jurist's vote was not decisive. See *Lavoie, supra,* at 827–828, 106 S.Ct. 1580 (addressing "the question whether a decision of a multimember tribunal must be vacated because of the participation of one member who had an interest in the outcome of the case," where that member's vote was outcome determinative). For the reasons discussed below, the Court holds that an unconstitutional failure to recuse constitutes structural error even if the judge in question did not cast a deciding vote.

The Court has little trouble concluding that a due process violation arising from the participation of an interested judge is a defect "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive. *Puckett v. United States,* 556 U.S. 129, 141, 129 S.Ct. 1423, 173 L.Ed.2d 266

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(2009) (emphasis deleted). The deliberations of an appellate panel, as a general ***15** rule, are confidential. As a result, it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process. Indeed, one purpose of judicial confidentiality is to assure jurists that they can reexamine old ideas and suggest new ones, while both seeking to persuade and being open to persuasion by their colleagues. As Justice Brennan wrote in his *Lavoie* concurrence,

> "The description of an opinion as being 'for the court' connotes more than merely that the opinion has been joined by a majority of the participating judges. It reflects the fact that these judges have exchanged ideas and arguments in deciding the case. It reflects the collective process of deliberation which shapes the court's perceptions of which issues must be addressed and, more importantly, how they must be addressed. And, while the influence of any single participant in this process can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate disposition." 475 U.S., at 831, 106 S.Ct. 1580.

These considerations illustrate, moreover, that it does not matter whether the disqualified judge's vote was necessary to the disposition of the case. The fact that the interested judge's vote was not dispositive may mean only that the judge was successful in persuading most members of the court to accept his or her position. That outcome does not lessen the unfairness to the affected party. See *id.*, at 831–832, 106 S.Ct. 1580 (Blackmun, J., concurring in judgment).

A multimember court must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part. An insistence on the appearance of neutrality is not some artificial attempt to mask imperfection in the judicial process, but rather an ***16** essential means of ensuring the reality of a fair adjudication. Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself. When the objective risk of actual bias on the part of a judge rises to an unconstitutional ****1910** level, the failure to recuse cannot be deemed harmless.

The Commonwealth points out that ordering a rehearing before the Pennsylvania Supreme Court may not provide complete relief to Williams because judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case. Brief for Respondent 51, 62. An inability to guarantee complete relief for a constitutional violation, however, does not justify withholding a remedy altogether. Allowing an appellate panel to reconsider a case without the participation of the interested member will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations.

Chief Justice Castille's participation in Williams's case was an error that affected the State Supreme Court's whole adjudicatory framework below. Williams must be granted an opportunity to present his claims to a court unburdened by any "possible temptation ... not to hold the balance nice, clear and true between the State and the accused." *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749 (1927).

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Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in the defendant's case, the risk of actual bias in the judicial proceeding rises to an unconstitutional level. Due process entitles Terrance Williams to "a proceeding in which he may present his case with assurance" that no member of the court is "predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

***17** The judgment of the Supreme Court of Pennsylvania is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Chief Justice ROBERTS, with whom Justice ALITO joins, dissenting.
In 1986, Ronald Castille, then District Attorney of Philadelphia, authorized a prosecutor in his office to seek the death penalty against Terrance Williams. Almost 30 years later, as Chief Justice of the Pennsylvania Supreme Court, he participated in deciding whether Williams's fifth habeas petition—which raised a claim unconnected to the prosecution's decision to seek the death penalty—could be heard on the merits or was instead untimely. This Court now holds that because Chief Justice Castille made a "critical" decision as a prosecutor in Williams's case, there is a risk that he "would be so psychologically wedded" to his previous decision that it would violate the Due Process Clause for him to decide the distinct issues raised in the habeas petition. *Ante,* at 1905 – 1906 (internal quotation marks omitted). According to the Court, that conclusion follows from the maxim that "no man can be a judge in his own case." *Ante,* at 1905 – 1906 (internal quotation marks omitted).

The majority opinion rests on proverb rather than precedent. This Court has held that there is "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). To overcome that presumption, the majority relies on *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). We concluded there that the Due Process Clause is violated when a judge adjudicates the same question—based on the same facts—that he had already considered as a grand juror in the same case. Here, however, Williams does not allege that Chief Justice Castille had *any* previous ****1911** knowledge of the contested facts at issue in the habeas ***18** petition, or that he had previously made *any* decision on the questions raised by that petition. I would accordingly hold that the Due Process Clause did not require Chief Justice Castille's recusal.

I

In 1986, petitioner Terrance Williams stood trial for the murder of Amos Norwood. Prosecutors believed that Williams and his friend Marc Draper had asked Norwood for a ride, directed him to a cemetery, and then beat him to death with a tire iron after robbing him. Andrea Foulkes, the Philadelphia Assistant District Attorney prosecuting the case, prepared a one-and-a-half page memo for her superiors—Homicide Unit Chief Mark Gottlieb and District Attorney Ronald Castille—"request[ing] that we actively seek the death penalty." App. 424a. The memo briefly described the facts of the case and

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Williams's prior felonies, including a previous murder conviction. Gottlieb read the memo and then passed it to Castille with a note recommending the death penalty. *Id.,* at 426a. Castille wrote at the bottom of the memo, "Approved to proceed on the death penalty," and signed his name. *Ibid.*

At trial, Williams testified that he had never met Norwood and that someone else must have murdered him. After hearing extensive evidence linking Williams to the crime, the jury convicted him of murder and sentenced him to death. 524 Pa. 218, 227, 570 A.2d 75, 79–80 (1990).

In 1995, Williams filed a habeas petition in Pennsylvania state court, alleging that his trial counsel had been ineffective for failing to present mitigating evidence of his childhood sexual abuse, among other claims. At a hearing related to that petition, Williams acknowledged that he knew Norwood and claimed that Norwood had sexually abused him. 629 Pa. 533, ——, 105 A.3d 1234, 1240 (2014). The petition was denied. Williams filed two more state habeas petitions, which were both dismissed as untimely, and a federal ***19** habeas petition, which was also denied. See *Williams v. Beard,* 637 F.3d 195, 238 (C.A.3 2011).

This case arises out of Williams's fifth habeas petition, which he filed in state court in 2012. In that petition, Williams argued that he was entitled to a new sentencing proceeding because the prosecution at trial had failed to turn over certain evidence suggesting that "Norwood was sexually involved with boys around [Williams's] age at the time of his murder." Crim. No. CP–51–CR–0823621–1984 (Phila. Ct. Common Pleas, Nov. 27, 2012), App. 80a.

It is undisputed that Williams's fifth habeas petition is untimely under Pennsylvania law. In order to overcome that time bar, Pennsylvania law required Williams to show that "(1) the failure to previously raise [his] claim was the result of interference by government officials and (2) the information on which he relies could not have been obtained earlier with the exercise of due diligence." — Pa., at ——, 105 A.3d, at 1240. The state habeas court held that Williams met that burden because "the government withheld multiple statements from [Williams's] trial counsel, all of which strengthened the inference that Amos Norwood was sexually inappropriate with a number of teenage boys," and Williams was unable to access those statements until an evidentiary proceeding ordered by the court. App. 95a.

The Commonwealth appealed to the Pennsylvania Supreme Court, and Williams filed a motion requesting that Chief Justice Castille recuse himself on the ground that he had "personally authorized ****1912** his Office to seek the death penalty" nearly 30 years earlier. *Id.,* at 181a (emphasis deleted). Chief Justice Castille summarily denied the recusal motion, and the six-member Pennsylvania Supreme Court proceeded to hear the case. The court unanimously reinstated Williams's sentence.

According to the Pennsylvania Supreme Court, Williams failed to make the threshold showing necessary to overcome the time bar because there was "abundant evidence" that ***20** Williams "knew of Norwood's homosexuality and conduct with teenage boys well before trial, sufficient to present [Norwood] as unsympathetic before the jury." —— Pa., at ——, 105 A.3d, at 1241. The court pointed out that Williams was, of course, personally aware of Norwood's abuse and could have raised the issue at trial, but instead chose to disclaim having ever met Norwood. The court also noted that Williams had raised similar claims of abuse in his first state habeas proceeding. *Ibid.* Chief Justice Castille concurred separately, criticizing the lower court for failing to dismiss Williams's petition as "time-barred and frivolous." *Id.,* at ——, 105 A.3d, at 1245.

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II

A

In the context of a criminal proceeding, the Due Process Clause requires States to adopt those practices that are fundamental to principles of liberty and justice, and which inhere "in the very idea of free government" and are "the inalienable right of a citizen of such a government." *Twining v. New Jersey,* 211 U.S. 78, 106, 29 S.Ct. 14, 53 L.Ed. 97 (1908). A fair trial and appeal is one such right. See *Lisenba v. California,* 314 U.S. 219, 236, 62 S.Ct. 280, 86 L.Ed. 166 (1941); *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 825, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986). In ensuring that right, "it is normally within the power of the State to regulate procedures under which its laws are carried out," unless a procedure "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.,* at 821, 106 S.Ct. 1580 (internal quotation marks omitted).

It is clear that a judge with "a direct, personal, substantial, pecuniary interest" in a case may not preside over that case. *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927). We have also held that a judge may not oversee a criminal contempt proceeding where the judge has previously served as grand juror in the same case, or where the party charged with contempt has conducted "an insulting attack upon the integrity of the ***21** judge carrying such potential for bias as to require disqualification." *Mayberry v. Pennsylvania,* 400 U.S. 455, 465–466, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (internal quotation marks omitted); see *Murchison,* 349 U.S., at 139, 75 S.Ct. 623.

Prior to this Court's decision in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), we had declined to require judicial recusal under the Due Process Clause beyond those defined situations. In *Caperton,* however, the Court adopted a new standard that requires recusal "when the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Id.,* at 872, 129 S.Ct. 2252 (internal quotation marks omitted). The Court framed the inquiry as "whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Id.,* at 883–884, 129 S.Ct. 2252 (internal quotation marks omitted).

****1913** B

According to the majority, the Due Process Clause required Chief Justice Castille's recusal because he had "significant, personal involvement in a critical trial decision" in Williams's case. *Ante,* at 1907.

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Otherwise, the majority explains, there is "an unacceptable risk of actual bias." *Ante,* at 1908. In the majority's view, "[t]his conclusion follows from the Court's analysis in *In re Murchison*." *Ante,* at 1906. But *Murchison* does not support the majority's new rule—far from it.

Murchison involved a peculiar Michigan law that authorized the same person to sit as both judge and "one-man grand jury" in the same case. 349 U.S., at 133, 75 S.Ct. 623 (internal quotation marks omitted). Pursuant to that law, a Michigan judge—serving as grand jury—heard testimony from two witnesses in a corruption case. The testimony "persuaded" the judge that one of the witnesses "had committed perjury"; the second witness refused to answer questions. *Id.,* at 134–135, 75 S.Ct. 623. ***22** The judge accordingly charged the witnesses with criminal contempt, presided over the trial, and convicted them. *Ibid.* We reversed, holding that the trial had violated the Due Process Clause. *Id.,* at 139, 75 S.Ct. 623.

The Court today, acknowledging that *Murchison* "differ[s] in many respects from a case like this one," *ante,* at 1906, earns full marks for understatement. The Court in fact fails to recognize the differences that are critical.

First, *Murchison* found a due process violation because the judge (sitting as grand jury) accused the witnesses of contempt, and then (sitting as judge) presided over their trial on that charge. As a result, the judge had made up his mind about the only issue in the case before the trial had even begun. We held that such prejudgment violated the Due Process Clause. 349 U.S., at 137, 75 S.Ct. 623.

Second, *Murchison* expressed concern that the judge's recollection of the testimony he had heard as grand juror was "likely to weigh far more heavily with him than any testimony given" at trial. *Id.,* at 138, 75 S.Ct. 623. For that reason, the Court found that the judge was at risk of calling "on his own personal knowledge and impression of what had occurred in the grand jury room," rather than the evidence presented to him by the parties. *Ibid.*

Neither of those due process concerns is present here. Chief Justice Castille was involved in the decision to seek the death penalty, and perhaps it would be reasonable under *Murchison* to require him to recuse himself from any challenge casting doubt on that recommendation. But that is not this case.

This case is about whether Williams may overcome the procedural bar on filing an untimely habeas petition, which required him to show that the government interfered with his ability to raise his habeas claim, and that "the information on which he relies could not have been obtained earlier with the exercise of due diligence." — Pa., at ——, 105 A.3d, at 1240. Even if Williams were to overcome the timeliness ***23** bar, moreover, the only claim he sought to raise on the merits was that the prosecution had failed to turn over certain evidence at trial. The problem in *Murchison* was that the judge, having been "part of the accusatory process" regarding the guilt or innocence of the defendants, could not then be "wholly disinterested" when called upon to decide that very same issue. 349 U.S., at 137, 75 S.Ct. 623. In this case, in contrast, neither the procedural question nor Williams's merits claim in any way concerns the pretrial decision to seek the death penalty.

****1914** It is abundantly clear that, unlike in *Murchison,* Chief Justice Castille had *not* made up his mind about either the contested evidence or the legal issues under review in Williams's fifth habeas petition.

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How could he have? Neither the contested evidence nor the legal issues were ever before him as prosecutor. The one-and-a-half page memo prepared by Assistant District Attorney Foulkes in 1986 did not discuss the evidence that Williams claims was withheld by the prosecution at trial. It also did not discuss Williams's allegation that Norwood sexually abused young men. It certainly did not discuss whether Williams could have obtained that evidence of abuse earlier through the exercise of due diligence.

Williams does not assert that Chief Justice Castille had any prior knowledge of the alleged failure of the prosecution to turn over such evidence, and he does not argue that Chief Justice Castille had previously made any decision with respect to that evidence in his role as prosecutor. Even assuming that Chief Justice Castille remembered the contents of the memo almost 30 years later—which is doubtful—the memo could not have given Chief Justice Castille any special "impression" of facts or issues not raised in that memo. *Id.,* at 138, 75 S.Ct. 623.

The majority attempts to justify its rule based on the "risk" that a judge "would be so psychologically wedded to his or her previous position as a prosecutor that the judge would consciously or unconsciously avoid the appearance of ***24** having erred or changed position." *Ante,* at 1906 (internal quotation marks omitted). But as a matter of simple logic, nothing about how Chief Justice Castille might rule on Williams's fifth habeas petition would suggest that the judge had erred or changed his position on the distinct question whether to seek the death penalty prior to trial. In sum, there was not such an "objective risk of actual bias," *ante,* at 1909, that it was fundamentally unfair for Chief Justice Castille to participate in the decision of an issue having nothing to do with his prior participation in the case.

* * *

The Due Process Clause did not prohibit Chief Justice Castille from hearing Williams's case. That does not mean, however, that it was appropriate for him to do so. Williams cites a number of state court decisions and ethics opinions that prohibit a prosecutor from later serving as judge in a case that he has prosecuted. Because the Due Process Clause does not mandate recusal in cases such as this, it is up to state authorities—not this Court—to determine whether recusal should be required.

I would affirm the judgment of the Pennsylvania Supreme Court, and respectfully dissent from the Court's contrary conclusion.

Justice THOMAS, dissenting.

The Court concludes that it violates the Due Process Clause for the chief justice of the Supreme Court of Pennsylvania, a former district attorney who was not the trial prosecutor in petitioner Terrance Williams' case, to review Williams' fourth petition for state postconviction review. *Ante,* at 1906 – 1907, 1910. That conclusion is flawed. The specter of bias alone in a judicial proceeding is not a deprivation of due process. Rather than constitutionalize every judicial disqualification rule, the Court has left such rules to legislatures, bar associations, and the judgment of individual adjudicators. ***25** Williams, moreover, is not a criminal defendant. His complaint is instead that the due process protections in his state postconviction proceedings—an altogether new civil matter, not a continuation of his criminal trial—were lacking. ****1915** Ruling in Williams' favor, the Court ignores this posture and our precedents

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commanding less of state postconviction proceedings than of criminal prosecutions involving defendants whose convictions are not yet final. I respectfully dissent.

I

A reader of the majority opinion might mistakenly think that the prosecution against Williams is ongoing, for the majority makes no mention of the fact that Williams' sentence has been final for more than 25 years. Because the postconviction posture of this case is of crucial importance in considering the question presented, I begin with the protracted procedural history of Williams' repeated attempts to collaterally attack his sentence.

A

Thirty-two years ago, Williams and his accomplice beat their victim to death with a tire iron and a socket wrench. *Commonwealth v. Williams*, 524 Pa. 218, 222–224, 570 A.2d 75, 77–78 (1990) (*Williams I*). Williams later returned to the scene of the crime, a cemetery, soaked the victim's body in gasoline, and set it on fire. *Id.*, at 224, 570 A.2d, at 78. After the trial against Williams commenced, both the Chief of the Homicide Unit and the District Attorney, Ronald Castille, approved the trial prosecutor's decision to seek the death penalty by signing a piece of paper. See App. 426. That was Castille's only involvement in Williams' criminal case. Thereafter, a Pennsylvania jury convicted Williams of first-degree murder, and he was sentenced to death. *Williams I*, 524 Pa., at 221–222, 570 A.2d, at 77. The Supreme Court of Pennsylvania affirmed his conviction and sentence. *Id.*, at 235, 570 A.2d, at 84.

***26** Five years later, Williams filed his first petition for state postconviction relief. *Commonwealth v. Williams*, 581 Pa. 57, 65, 863 A.2d 505, 509 (2004) (*Williams II*). The postconviction court denied the petition. *Id.*, at 65, 863 A.2d, at 510. Williams appealed, raising 23 alleged errors. *Ibid.* The Supreme Court of Pennsylvania, which included Castille in his new capacity as a justice of that court, affirmed the denial of relief. *Id.*, at 88, 863 A.2d, at 523. The court rejected some claims on procedural grounds and denied the remaining claims on the merits. *Id.*, at 68–88, 863 A.2d, at 511–523. The court's lengthy opinion did not mention the possibility of Castille's bias, and Williams apparently never asked for his recusal.

Then in 2005, Williams filed two more petitions for state postconviction relief. Both petitions were dismissed as untimely, and the Supreme Court of Pennsylvania affirmed. *Commonwealth v. Williams*, 589 Pa. 355, 909 A.2d 297 (2006) (*per curiam*) (*Williams III*); *Commonwealth v. Williams*, 599 Pa. 495, 962 A.2d 609 (2009) (*per curiam*) (*Williams IV*). Castille also presumably participated in those proceedings, but, again, Williams apparently did not ask for him to recuse.[1]

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Williams then made a fourth attempt to vacate his sentence in state court in 2012. 629 Pa. 533, ——, 105 A.3d 1234, 1237 (2014) (*Williams VI*). Williams alleged that the prosecution violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose exculpatory evidence. The allegedly exculpatory evidence was information about Williams' motive. According to Williams, the prosecution should have disclosed to ****1916** his counsel that it knew that Williams and the victim had previously engaged in a sexual relationship when Williams was a minor. ***27** *Williams VI,* —— Pa., at ——, 105 A.3d, at 1237.[2] The state postconviction court agreed and vacated his sentence. *Id.,* at ——, 105 A.3d, at 1239.

The Commonwealth appealed to the Supreme Court of Pennsylvania. Only then—the *fourth* time that Williams appeared before Castille—did Williams ask him to recuse. App. 181. Castille denied the recusal motion and declined to refer it to the full court. *Id.*, at 171. Shortly thereafter, the court vacated the postconviction court's order and reinstated Williams' sentence. The court first noted that Williams' fourth petition "was filed over 20 years after [Williams'] judgment of sentence became final" and "was untimely on its face." *Williams VI,* —— Pa., at ——, 105 A.3d, at 1239. The court rejected the trial court's conclusion that an exception to Pennsylvania's timeliness rule applied and reached "the inescapable conclusion that [Williams] is not entitled to relief." *Id.,* at ——, 105 A.3d, at 1239–1241; see also *id.,* at ——, 105 A.3d, at 1245 (Castille, J., concurring) (writing separately "to address the important responsibilities of the [state postconviction] trial courts in serial capital [state postconviction] matters").

Finally, Williams filed an application for reargument. App. 9. The court denied the application *without* Castille's ***28** participation. *Id.,* at 8. Castille had retired from the bench nearly two months before the court ruled.

B

As this procedural history illustrates, the question presented is hardly what the majority makes it out to be. The majority incorrectly refers to the case before us and Williams' criminal case (that ended in 1990) as a decades-long "single case" or "matter." *Ante,* at 1906; see also *ante,* at 1906 – 1907. The majority frames the issue as follows: whether the Due Process Clause permits Castille to "ac[t] as both accuser and judge in [Williams'] case." *Ante,* at 1905. The majority answers: "When a judge has served as an advocate for the State *in the very case* the court is now asked to adjudicate, a serious question arises as to whether the judge, even with the most diligent effort, could set aside any personal interest in the outcome." *Ante,* at 1906 (emphasis added). Accordingly, the majority holds that "[w]here a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision *in the defendant's case,* the risk of actual bias in the judicial proceeding rises to an unconstitutional level." *Ante,* at 1910 (emphasis added). That is all wrong.

There has been, however, no "single case" in which Castille acted as both prosecutor and adjudicator. Castille was still ****1917** serving in the district attorney's office when Williams' criminal proceedings ended and his sentence of death became final. Williams' filing of a petition for state postconviction relief did not continue (or resurrect) that already final criminal proceeding. A postconviction proceeding "is

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not part of the criminal proceeding itself" but "is in fact considered to be civil in nature," *Pennsylvania v. Finley,* 481 U.S. 551, 556–557, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), and brings with it fewer procedural protections. See, *e.g., District Attorney's Office for Third Judicial Dist. v. Osborne,* 557 U.S. 52, 68, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).

Williams' case therefore presents a much different question from that posited by the majority. It is more accurately ***29** characterized as whether a judge may review a petition for postconviction relief when that judge previously served as district attorney while the petitioner's criminal case was pending. For the reasons that follow, that different question merits a different answer.

II

The "settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors" are the touchstone of due process. *Tumey v. Ohio,* 273 U.S. 510, 523, 47 S.Ct. 437, 71 L.Ed. 749 (1927); see also *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 277, 15 L.Ed. 372 (1856). What due process requires of the judicial proceedings in the Pennsylvania postconviction courts, therefore, is guided by the historical treatment of judicial disqualification. And here, neither historical practice nor this Court's case law constitutionalizing that practice requires a former prosecutor to recuse from a prisoner's postconviction proceedings.

A

At common law, a fair tribunal meant that "no man shall be a judge in his own case." 1 E. Coke, Institutes of the Laws of England § 212, *141a ("[*A*]*liquis non debet esse judex in propiâ causâ*"). That common-law conception of a fair tribunal was a narrow one. A judge could not decide a case in which he had a direct and personal financial stake. For example, a judge could not reap the fine paid by a defendant. See, *e.g., Dr. Bonham's Case,* 8 Co. Rep. 107a, 114a, 118a, 77 Eng. Rep. 638, 647, 652 (C.P. 1610) (opining that a panel of adjudicators could not all at once serve as "judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture"). Nor could he adjudicate a case in which he was a party. See, *e.g., Earl of Derby's Case,* 12 Co. Rep. 114, 77 Eng. Rep. 1390 (K.B. 1614). But mere bias—without any financial stake in a case—was not grounds for disqualification. The biases of ***30** judges "cannot be challenged," according to Blackstone, "[f]or the law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." 3 W. Blackstone, Commentaries on the Laws of England, 361 (1768) (Blackstone); see also, *e.g., Brookes v. Earl of Rivers,* Hardres 503, 145 Eng. Rep. 569 (Exch. 1668) (deciding that a judge's "favour shall not be presumed" merely because his brother-in-law was involved).

The early American conception of judicial disqualification was in keeping with the "clear and simple" common-law rule—"a judge was disqualified for direct pecuniary interest and for nothing else." Frank, Disqualification of Judges, 56 Yale L.J. 605, 609 (1947) (Frank); see also R. ****1918** Flamm, Judicial

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Disqualification: Recusal and Disqualification of Judges § 1.4, p. 7 (2d ed. 2007). Most jurisdictions required judges to recuse when they stood to profit from their involvement or, more broadly, when their property was involved. See *Moses v. Julian,* 45 N.H. 52, 55–56 (1863); see also, *e.g., Jim v. State,* 3 Mo. 147, 155 (1832) (deciding that a judge was unlawfully interested in a criminal case in which his slave was the defendant). But the judge's pecuniary interest had to be directly implicated in the case. See, *e.g., Davis v. State,* 44 Tex. 523, 524 (1876) (deciding that a judge, who was the victim of a theft, was not disqualified in the prosecution of the theft); see also T. Cooley, Constitutional Limitations 594 (7th ed. 1903) (rejecting a financial stake "so remote, trifling, and insignificant that it may fairly be supposed to be incapable of affecting the judgment"); *Moses, supra,* at 57 ("[A] creditor, lessee, or debtor, may be judge in the case of his debtor, landlord, or creditor, except in cases where the amount of the party's property involved in the suit is so great that his ability to meet his engagements with the judge may depend upon the success of his suit"); *Inhabitants of Readington Twp. Hunterdon County v. Dilley,* 24 N.J.L. 209, 212–213 (N.J.1853) (deciding that a judge, who had previously ***31** been paid to survey the roadway at issue in the case, was not disqualified).

Shortly after the founding, American notions of judicial disqualification expanded in important respects. Of particular relevance here, the National and State Legislatures enacted statutes and constitutional provisions that diverged from the common law by requiring disqualification when the judge had served as counsel for one of the parties. The first federal recusal statute, for example, required disqualification not only when the judge was "concerned in interest," but also when he "ha[d] been of counsel for either party." Act of May 8, 1792, § 11, 1 Stat. 278–279. Many States followed suit by enacting similar disqualification statutes or constitutional provisions expanding the common-law rule. See, *e.g., Wilks v. State,* 27 Tex.App. 381, 385, 11 S.W. 415, 416 (1889); *Fechheimer v. Washington,* 77 Ind. 366, 368 (1881) (*per curiam*); *Sjorberg v. Nordin,* 26 Minn. 501, 503, 5 N.W. 677, 678 (1880); *Whipple v. Saginaw Circuit Court Judge,* 26 Mich. 342, 343 (1873); *Mathis v. State,* 50 Tenn. 127, 128 (1871); but see *Owings v. Gibson,* 9 Ky. 515, 517–518 (1820) (deciding that it was for the judge to choose whether he could fairly adjudicate a case in which he had served as a lawyer for the plaintiff in the same action). Courts applied this expanded view of disqualification not only in cases involving judges who had previously served as counsel for private parties but also for those who previously served as former attorneys general or district attorneys. See, *e.g., Terry v. State,* 24 S.W. 510, 510–511 (Tex.Crim.App.1893); *Mathis, supra,* at 128.

This expansion was modest: disqualification was required only when the newly appointed judge had served as counsel in the *same case*. In *Carr v. Fife,* 156 U.S. 494, 15 S.Ct. 427, 39 L.Ed. 508 (1895), for example, this Court rejected the argument that a judge was required to recuse because he had previously served as counsel for some of the defendants in another matter. *Id.,* at 497–498, 15 S.Ct. 427. The Court left it to the judge "to decide for himself ***32** whether it was improper for him to sit in trial of the suit." *Id*., at 498, 15 S.Ct. 427. Likewise, in *Taylor v. Williams,* 26 Tex. 583 (1863), the Supreme Court of Texas acknowledged that a judge was not, "by the common law, disqualified from sitting in a cause in which he had been of counsel" and concluded "that the fact that the presiding judge had been of counsel in the case did not necessarily render him ****1919** interested in it." *Id.,* at 585–586. *a fortiori,* the texas court held, a judge was not "interested" in a case " merely from his having been of counsel in *another cause* involving the same title." *Id.,* at 586 (emphasis added); see also *The Richmond,* 9 F. 863, 864 (C.C.E.D.La.1881) ("The decisions, so far as I have been able to find, are unanimous that 'of counsel' means 'of counsel for a party in that cause and in that controversy,' and if either the cause or

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controversy is not identical the disqualification does not exist"); *Wolfe v. Hines,* 93 Ga. 329, 20 S.E. 322 (1894) (same); *Cleghorn v. Cleghorn,* 66 Cal. 309, 5 P. 516 (1885) (same).

This limitation—that the same person must act as counsel and adjudicator in *the same case*—makes good sense. At least one of the State's highest courts feared that any broader rule would wreak havoc: "If the circumstance of the judge having been of counsel, for some parties in some case involving some of the issues which had been theretofore tried[,] disqualified him from acting in every case in which any of those parties, or those issues should be subsequently involved, the most eminent members of the bar, would, by reason of their extensive professional relations and their large experience be rendered ineligible, or useless as judges." *Blackburn v. Craufurd,* 22 Md. 447, 459 (1864). Indeed, any broader rule would be at odds with this Court's historical practice. Past Justices have decided cases involving their former clients in the private sector or their former offices in the public sector. See Frank 622–625. The examples are legion; chief among them is *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), in which then-Secretary of State John ***33** Marshall sealed but failed to deliver William Marbury's commission and then, as newly appointed Chief Justice, Marshall decided whether mandamus was an available remedy to require James Madison to finish the job. See Paulsen, Marbury's Wrongness, 20 Constitutional Commentary 343, 350 (2003).

Over the next century, this Court entered the fray of judicial disqualifications only a handful of times. Drawing from longstanding historical practice, the Court announced that the Due Process Clause compels judges to disqualify in the narrow circumstances described below. But time and again, the Court cautioned that "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey,* 273 U.S., at 523, 47 S.Ct. 437. And "matters of kinship, personal bias, state policy, remoteness of interest would seem generally to be matters merely of legislative discretion." *Ibid.*; see also *Aetna Life Ins. Co. v. Lavoie,* 475 U.S. 813, 828, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986) ("The Due Process Clause demarks only the outer boundaries of judicial disqualifications").

First, in *Tumey,* the Court held that due process would not tolerate an adjudicator who would profit from the case if he convicted the defendant. The Court's holding paralleled the common-law rule: "[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court, the judge of which has a *direct, personal, substantial pecuniary interest* in reaching a conclusion against him in his case." 273 U.S., at 523, 47 S.Ct. 437 (emphasis added); see also *Ward v. Monroeville,* 409 U.S. 57, 59, 61, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972) (deciding that a mayor could not adjudicate traffic violations if revenue from convictions constituted a substantial portion of the municipality's revenue). Later, applying *Tumey* 's rule in *Aetna Life Ins.,* the Court held that a judge who decided a case involving an insurance company had a "direct, personal, substantial, and pecuniary" interest because he had brought a ****1920** similar case against an insurer and ***34** his opinion for the court "had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case." 475 U.S., at 824, 106 S.Ct. 1580 (alterations and internal quotation marks omitted).

Second, in *In re Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), the Court adopted a constitutional rule resembling the historical practice for disqualification of former counsel. *Id.,* at 139, 75 S.Ct. 623. There, state law empowered a trial judge to sit as a " 'one man judge-grand jury,' " meaning that he could "compel witnesses to appear before him in secret to testify about suspected

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crimes." *Id.,* at 133, 75 S.Ct. 623. During those secret proceedings, the trial judge suspected that one of the witnesses, Lee Roy Murchison, had committed perjury, and he charged another, John White, with contempt after he refused to answer the judge's questions without counsel present. See *id.,* at 134–135, 75 S.Ct. 623. The judge then tried both men in open court and convicted and sentenced them based, in part, on his interrogation of them in the secret proceedings. See *id.,* at 135, 138–139, 75 S.Ct. 623. The defendants appealed, arguing that the "trial before the judge who was at the same time the complainant, indicter and prosecutor, constituted a denial of fair and impartial trial required by" due process. *Id.,* at 135, 75 S.Ct. 623. This Court agreed: "It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations." *Id.,* at 137, 75 S.Ct. 623. Broadly speaking, *Murchison* 's rule constitutionalizes the early American statutes requiring disqualification when a single person acts as both counsel and judge in a single civil or criminal proceeding.[3]

***35** Both *Tumey* and *Murchison* arguably reflect historical understandings of judicial disqualification. Traditionally, judges disqualified themselves when they had a direct and substantial pecuniary interest or when they served as counsel in the same case.

B

Those same historical understandings of judicial disqualification resolve Williams' case. Castille did not serve as both prosecutor and judge in the case before us. Even assuming Castille's supervisory role as district attorney was tantamount to serving as "counsel" in Williams' criminal case, that case ended nearly five years before Castille joined the Supreme Court of Pennsylvania. Castille then participated in a separate proceeding by reviewing Williams' petition for postconviction relief.

As discussed above, see Part I–B, *supra,* this postconviction proceeding is not an extension of Williams' criminal case but is instead a new civil proceeding. See *Finley,* 481 U.S., at 556–557, 107 S.Ct. 1990. Our case law bears out the many distinctions between the two proceedings. In his criminal case, Williams was presumed innocent, *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 39 L.Ed. 481 (1895), and the Constitution guaranteed him counsel, *Gideon v. Wainwright,* 372 U.S. 335, 344–345, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama,* 287 U.S. 45, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932), a public trial by a jury of his peers, *Duncan* ****1921** *v. Louisiana,* 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and empowered him to confront the witnesses against him, *Crawford v. Washington,* 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), as well as all the other requirements of a criminal proceeding. But in postconviction proceedings, "the presumption of innocence [has] disappear[ed]." *Herrera v. Collins,* 506 U.S. 390, 399, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). The postconviction petitioner has no constitutional right to counsel. *Finley, supra,* at 555–557, 107 S.Ct. 1990; see also *Johnson v. Avery,* 393 U.S. 483, 488, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969). Nor has this Court ever held that he has a right to demand that his postconviction court consider a freestanding claim of actual ***36** innocence, *Herrera, supra,* at 417–419, 113 S.Ct. 853 or to demand the State to turn over exculpatory evidence, *Osborne,* 557 U.S., at 68–70, 129 S.Ct. 2308; see also *Wright v. West,* 505 U.S. 277, 293, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) (plurality opinion)

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(cataloguing differences between direct and collateral review and concluding that "[t]hese differences simply reflect the fact that habeas review entails significant costs" (internal quotation marks omitted)). And, under the Court's precedents, his due process rights are "not parallel to a trial right, but rather must be analyzed in light of the fact that he has already been found guilty at a fair trial, and has only a limited interest in postconviction relief." *Osborne, supra,* at 69, 129 S.Ct. 2308.

Because Castille did not act as both counsel and judge in the same case, Castille's participation in the postconviction proceedings did not violate the Due Process Clause. Castille might have been "personal[ly] involve[d] in a critical trial decision," *ante,* at 1907, but that "trial" was Williams' criminal trial, not the postconviction proceedings before us now. Perhaps Castille's participation in Williams' postconviction proceeding was unwise, but it was within the bounds of historical practice. That should end this case, for it "is not for Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is 'due' process." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 28, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (Scalia, J., concurring in judgment).

C

Today's holding departs both from common-law practice and this Court's prior precedents by ignoring the critical distinction between criminal and postconviction proceedings. Chief Justice Castille had no "direct, personal, substantial pecuniary interest" in the adjudication of Williams' fourth postconviction petition. *Tumey,* 273 U.S., at 523, 47 S.Ct. 437. And although the majority invokes *Murchison, ante,* at 1905 – 1907, it wrongly relies on that decision too. In *Murchison,* the judge acted as both the accuser and judge in the *same* proceeding ***37** . 349 U.S., at 137–139, 75 S.Ct. 623. But here, Castille did not. See Part II–B, *supra*.

The perceived bias that the majority fears is instead outside the bounds of the historical expectations of judicial recusal. Perceived bias (without more) was not recognized as a constitutionally compelled ground for disqualification until the Court's recent decision in *Caperton v. A.T. Massey Coal Co.,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009). In *Caperton,* the Court decided that due process demanded disqualification when "extreme facts" proved "the probability of actual bias." *Id.,* at 886–887, 129 S.Ct. 2252. *Caperton,* of course, elicited more questions than answers. *Id.,* at 893–898, 129 S.Ct. 2252 (ROBERTS, C.J., dissenting). And its conclusion that bias alone could be grounds for disqualification as a constitutional ****1922** matter "represents a complete departure from common law principles." Frank 618–619; see Blackstone 361 ("[T]he law will not suppose a possibility of bias or favor in a judge").

The Court, therefore, should not so readily extend *Caperton* 's "probability of actual bias" rule to state postconviction proceedings. This Court's precedents demand far less "process" in postconviction proceedings than in a criminal prosecution. See *Osborne, supra,* at 69, 129 S.Ct. 2308; see also *Cafeteria & Restaurant Workers v. McElroy,* 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961) (concluding that the Due Process Clause does not demand "inflexible procedures universally applicable to every imaginable situation"). If a state habeas petitioner is not entitled to counsel as a constitutional matter in state postconviction proceedings, *Finley, supra,* at 555–557, 107 S.Ct. 1990 it is not

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unreasonable to think that he is likewise not entitled to demand, as a constitutional matter, that a state postconviction court consider his case anew because a judge, who had no direct and substantial pecuniary interest and had not served as counsel in this case, failed to recuse himself.

The bias that the majority fears is a problem for the state legislature to resolve, not the Federal Constitution. See, *e.g.*, *Aetna Life Ins.*, 475 U.S., at 821, 106 S.Ct. 1580 ("We need not decide ***38** whether allegations of bias or prejudice by a judge of the type we have here would ever be sufficient under the Due Process Clause to force recusal"). And, indeed, it appears that Pennsylvania has set its own standard by requiring a judge to disqualify if he "served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding" in its Code of Judicial Conduct. See Pa.Code of Judicial Conduct Rule 2.11(A)(6)(b) (West 2016). Officials in Pennsylvania are fully capable of deciding when their judges have "participated personally and substantially" in a manner that would require disqualification without this Court's intervention. Due process requires no more, especially in state postconviction review where the States "ha[ve] more flexibility in deciding what procedures are needed." *Osborne, supra,* at 69, 129 S.Ct. 2308.

III

Even if I were to assume that an error occurred in Williams' state postconviction proceedings, the question remains whether there is anything left for the Pennsylvania courts to remedy. There is not.

The majority remands the case to "[a]llo[w] an appellate panel to reconsider a case without the participation of the interested member," which it declares "will permit judges to probe lines of analysis or engage in discussions they may have felt constrained to avoid in their first deliberations." *Ante,* at 1910. The majority neglects to mention that the Supreme Court of Pennsylvania might have done just that. It entertained Williams' motion for reargument without Castille, who had retired months before the court denied the motion. The Supreme Court of Pennsylvania is free to decide on remand that it cured any alleged deprivation of due process in Williams' postconviction proceeding by considering his motion for reargument without Castille's participation.

* * *

***39** This is not a case about the " 'accused.' " *Ante,* at 1910 (quoting *Tumey, supra,* at 532, 47 S.Ct. 437). It is a case about the due process rights of the already convicted. Whatever those rights might be, they do not include policing alleged violations of state codes of judicial ethics in postconviction proceedings. The Due Process Clause does not require any and all conceivable ****1923** procedural protections that Members of this Court think "Western liberal democratic government ought to guarantee to its citizens." Monaghan, Our Perfect Constitution, 56 N.Y.U.L. Rev. 353, 358 (1981) (emphasis deleted). I respectfully dissent.

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 In 2005, Williams also filed a federal habeas petition, which the federal courts ultimately rejected. *Williams v. Beard,* 637 F.3d 195, 238 (C.A.3 2011) (*Williams V*), cert. denied, *Williams v. Wetzel,* 567 U.S. ——, 133 S.Ct. 65, 183 L.Ed.2d 711 (2012).

2 Setting aside how a prosecutor could violate *Brady* by failing to disclose information to the defendant about the defendant's motive to kill, it is worth noting that this allegation merely repackaged old arguments. During a state postconviction hearing in 1998, Williams had presented evidence of his prior sexual abuse, including "multiple sexual victimizations (including sodomy) during his childhood," to support his ineffective assistance claim. *Williams II,* 581 Pa. 57, 98, 863 A.2d 505, 530 (2004) (Saylor, J., dissenting). And he had "argued [that the victim] engaged in homosexual acts with him." *Williams VI,* —— Pa., at ——, 105 A.3d, at 1236. Then, in his federal habeas proceedings, Williams admitted that his plan on the night of the murder was to threaten to reveal to the victim's wife that the victim was a homosexual, and he contended that his attorney should have presented related evidence of the victim's prior sexual relationship with him. *Williams V, supra,* at 200, 225–226, 229–230.

3 The Court has applied *Murchison* in later cases involving contempt proceedings in which a litigant's contemptuous conduct is so egregious that the judge "become[s] so 'personally embroiled' " in the controversy that it is as if the judge is a party himself. *Mayberry v. Pennsylvania,* 400 U.S. 455, 465, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971); see also *Taylor v. Hayes,* 418 U.S. 488, 501–503, 94 S.Ct. 2697, 41 L.Ed.2d 897 (1974).

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