MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

June 1, 2019 through October 31, 2019

KATHRYN L. LOOMIS
REPORTER OF DECISIONS

VOL. 504
FIRST EDITION

THOMSON REUTERS™

2022

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SUPREME COURT

Term Expires
January 1 of

Chief Justice

BRIDGET M. McCORMACK 2021

Chief Justice Pro Tem

DAVID F. VIVIANO 2025

Justices

STEPHEN J. MARKMAN 2021
BRIAN K. ZAHRA 2023
RICHARD H. BERNSTEIN 2023
ELIZABETH T. CLEMENT 2027
MEGAN K. CAVANAGH 2027

Commissioners

DANIEL C. BRUBAKER, Chief Commissioner

TIMOTHY J. RAUBINGER
SHARI M. OBERG
DEBRA A. GUTIERREZ-McGUIRE
ANNE-MARIE HYNOUS VOICE[1]
MICHAEL S. WELLMAN
GARY L. ROGERS
ANNE E. ALBERS
STACI STODDARD
MARK E. PLAZA
MOLLY E. HENNESSEY
REGINA T. DELMASTRO
CHRISTOPHER M. THOMPSON
CHRISTOPHER M. SMITH
JONATHAN S. LUDWIG
LIZA C. MOORE
KAREN A. KOSTBADE[2]

State Court Administrator

MILTON L. MACK, Jr.

Clerk: LARRY S. ROYSTER
Reporter of Decisions: KATHRYN L. LOOMIS
Crier: JEFFREY A. MILLS

[1] To August 30, 2019.

[2] From August 5, 2019.

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
CHRISTOPHER M. MURRAY	2021
Chief Judge Pro Tem	
JANE M. BECKERING	2025
Judges	
DAVID SAWYER	2023
MARK J. CAVANAGH	2021
KATHLEEN JANSEN	2025
JANE E. MARKEY	2021
PATRICK M. METER	2021
KIRSTEN FRANK KELLY	2025
KAREN FORT HOOD	2021
STEPHEN L. BORRELLO	2025
DEBORAH A. SERVITTO	2025
ELIZABETH L. GLEICHER	2025
CYNTHIA DIANE STEPHENS	2023
MICHAEL J. KELLY	2021
DOUGLAS B. SHAPIRO	2025
AMY RONAYNE KRAUSE	2021
MARK T. BOONSTRA	2021
MICHAEL J. RIORDAN	2025
MICHAEL F. GADOLA	2023
COLLEEN A. O'BRIEN	2023
BROCK A. SWARTZLE	2023
THOMAS C. CAMERON	2023
JONATHAN TUKEL	2021
ANICA LETICA	2021
JAMES R. REDFORD	2021

Chief Clerk: JEROME W. ZIMMER, Jr.

Research Director: JULIE ISOLA RUECKE

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2021
2.	DONNA B. HOWARD	2021
	CHARLES T. LaSATA	2023
	ANGELA PASULA	2025
	JENNIFER L. SMITH	2021
3.	DAVID J. ALLEN	2021
	MARIAM BAZZI	2021
	ANNETTE J. BERRY	2025
	GREGORY D. BILL	2025
	ULYSSES W. BOYKIN	2021
	KAREN Y. BRAXTON	2025
	JEROME C. CAVANAGH	2025
	ERIC WILLIAM CHOLACK	2023
	JAMES R. CHYLINSKI	2023
	KEVIN J. COX	2025
	MELISSA ANNE COX	2023
	PAUL JOHN CUSICK	2025
	CHRISTOPHER D. DINGELL	2021
	PRENTIS EDWARDS, Jr.	2025
	CHARLENE M. ELDER	2021
	WANDA EVANS	2023
	EDWARD EWELL, Jr.	2025
	HELAL A. FARHAT	2021
	PATRICIA SUSAN FRESARD	2023
	SHEILA ANN GIBSON	2023
	JOHN H. GILLIS, Jr.	2021
	ALEXIS GLENDENING	2023
	TRACY E. GREEN	2025
	DAVID ALAN GRONER	2023
	ADEL A. HARB	2025
	BRIDGET MARY HATHAWAY	2025
	CYNTHIA GRAY HATHAWAY	2023
	DANA MARGARET HATHAWAY	2025
	DANIEL ARTHUR HATHAWAY	2021[1]
	THOMAS M.J. HATHAWAY	2023
	CHARLES S. HEGARTY	2025
	CATHERINE HEISE	2025
	NOAH P. HOOD	2021
	SUSAN L. HUBBARD	2023
	MURIEL D. HUGHES	2023

[1] To June 3, 2019.

		Term Expires January 1 of
	EDWARD JOSEPH	2021
	TIMOTHY M. KENNY	2023
	DONALD KNAPP	2021
	QIANA D. LILLARD	2025
	KATHLEEN M. McCARTHY	2025
	CYLENTHIA LaTOYE MILLER	2021[2]
	BRUCE U. MORROW	2023
	JOHN A. MURPHY	2023
	LYNNE A. PIERCE	2021
	LITA MASINI POPKE	2023
	KELLY RAMSEY	2023
	MARK T. SLAVENS	2023
	LESLIE KIM SMITH	2025
	MARTHA M. SNOW	2023
	CRAIG S. STRONG	2021
	BRIAN R. SULLIVAN	2023
	LAWRENCE S. TALON	2021
	CARLA TESTANI	2021
	DEBORAH A. THOMAS	2025
	REGINA DANIELS THOMAS	2025
	MARGARET M. VAN HOUTEN	2021
	SHANNON N. WALKER	2021
4.	SUSAN BEEBE JORDAN	2023
	RICHARD N. LaFLAMME	2023
	JOHN G. McBAIN, JR.	2021
	THOMAS D. WILSON	2025
5.	AMY McDOWELL	2021[3]
6.	JAMES M. ALEXANDER	2021
	MARTHA ANDERSON	2021
	LEO BOWMAN	2025
	MARY ELLEN BRENNAN	2021
	RAE LEE CHABOT	2023
	JACOB JAMES CUNNINGHAM	2025
	KAMESHIA D. GANT	2021[4]
	LISA ORTLIEB GORCYCA	2021
	NANCI J. GRANT	2021
	HALA Y. JARBOU	2023
	SHALINA D. KUMAR	2021
	DENISE LANGFORD-MORRIS	2025

[2] From August 19, 2019.

[3] To October 15, 2019.

[4] From June 3, 2019.

		Term Expires January 1 of
	LISA LANGTON	2023
	JEFFREY S. MATIS	2021
	CHERYL A. MATTHEWS	2023
	JULIE A. McDONALD	2025
	PHYLLIS C. McMILLEN	2025
	DANIEL PATRICK O'BRIEN	2023
	VICTORIA ANN VALENTINE	2023
	MICHAEL D. WARREN, Jr.	2025
7.	DUNCAN M. BEAGLE	2023
	CELESTE D. BELL	2025
	JOSEPH J. FARAH	2023
	JOHN A. GADOLA	2021
	ELIZABETH ANNE KELLY	2025
	DAVID J. NEWBLATT	2023
	BRIAN S. PICKELL	2025
	MICHAEL J. THEILE	2021
	RICHARD B. YUILLE	2021
8.	SUZANNE KREEGER	2021
	RONALD J. SCHAFER	2023
9.	PAUL J. BRIDENSTINE	2025
	GARY C. GIGUERE, Jr.	2021
	STEPHEN D. GORSALITZ	2023
	PAMELA L. LIGHTVOET	2025
	ALEXANDER C. LIPSEY	2023
10.	JANET M. BOES	2025
	JAMES T. BORCHARD	2023
	ANDRÉ R. BORRELLO	2023
	DARNELL JACKSON	2025
	MANVEL TRICE, III	2021
11.	WILLIAM W. CARMODY	2021
12.	CHARLES R. GOODMAN	2021
13.	KEVIN A. ELSENHEIMER	2021
	THOMAS G. POWER	2023
14.	TIMOTHY G. HICKS	2023
	KATHY HOOGSTRA	2021
	WILLIAM C. MARIETTI	2023
	ANNETTE ROSE SMEDLEY	2025
15.	P. WILLIAM O'GRADY	2021
16.	JAMES M. BIERNAT, Jr.	2025
	RICHARD L. CARETTI	2023
	DIANE M. DRUZINSKI	2021
	JENNIFER FAUNCE	2025
	JULIE GATTI	2027
	JAMES M. MACERONI	2021

		Term Expires January 1 of
	CARL J. MARLINGA	2023
	RACHEL RANCILIO	2023
	EDWARD A. SERVITTO, Jr.	2025
	MICHAEL E. SERVITTO	2023
	MARK S. SWITALSKI	2025
	MATTHEW S. SWITALSKI	2021
	JOSEPH TOIA	2021
	KATHRYN A. VIVIANO	2023
	TRACEY A. YOKICH	2025
17.	CURT A. BENSON	2025
	PAUL J. DENENFELD	2023
	CHRISTINA ELMORE	2025
	KATHLEEN A. FEENEY	2021
	DEBORAH McNABB	2023
	GEORGE JAY QUIST	2023
	J. JOSEPH ROSSI	2023
	PAUL J. SULLIVAN	2021
	MARK A. TRUSOCK	2025
	CHRISTOPHER P. YATES	2025
	DANIEL V. ZEMAITIS	2021
18.	HARRY P. GILL	2023
	JOSEPH K. SHEERAN	2021
19.	DAVID A. THOMPSON	2021
20.	KENT D. ENGLE	2023
	JON H. HULSING	2021
	KAREN J. MIEDEMA	2023
	JON VAN ALLSBURG	2025
21.	PAUL H. CHAMBERLAIN	2023[5]
	MARK H. DUTHIE	2025
	SARA SPENCER-NOGGLE	2021[6]
22.	ARCHIE CAMERON BROWN	2023
	PATRICK J. CONLIN, Jr.	2021
	TIMOTHY P. CONNORS	2025
	CAROL A. KUHNKE	2025
	DAVID S. SWARTZ	2021
23.	DAVID C. RIFFEL	2023
24.	DONALD A. TEEPLE	2021
25.	JENNIFER A. MAZZUCHI	2021
26.	MICHAEL G. MACK	2021
27.	ROBERT D. SPRINGSTEAD	2025

[5] To July 31, 2019.

[6] From September 9, 2019.

		Term Expires January 1 of
28.	WILLIAM M. FAGERMAN	2021
29.	MICHELLE M. RICK	2023
	RANDY L. TAHVONEN	2021
30.	ROSEMARIE E. AQUILINA	2021
	LAURA BAIRD	2025
	CLINTON CANADY, III	2023
	JOYCE DRAGANCHUK	2023
	JAMES S. JAMO	2025
	JANELLE A. LAWLESS	2021
	WANDA M. STOKES	2021
31.	DANIEL J. KELLY	2021
	CYNTHIA A. LANE	2023
	MICHAEL L. WEST	2025
32.	MICHAEL K. POPE	2021
33.	ROY C. HAYES, III	2021
34.	ROBERT BENNETT	2023
35.	MATTHEW J. STEWART	2021
36.	KATHLEEN M. BRICKLEY	2025
	JEFFREY J. DUFON	2021
37.	JOHN A. HALLACY	2025
	TINA YOST JOHNSON	2023
	BRIAN KIRKHAM	2023
	SARAH SOULES LINCOLN	2021
38.	MARK S. BRAUNLICH	2025
	MICHAEL A. WEIPERT	2023
	DANIEL S. WHITE	2021
39.	ANNA MARIE ANZALONE	2025
	MICHAEL R. OLSAVER	2021
40.	NICK O. HOLOWKA	2023
	BYRON KONSCHUH	2021
41.	MARY BROUILLETTE BARGLIND	2023
	CHRISTOPHER S. NINOMIYA	2021
42.	MICHAEL J. BEALE	2021
	STEPHEN CARRAS	2025
43.	MARK A. HERMAN	2023
44.	L. SUZANNE GEDDIS	2027
	MICHAEL P. HATTY	2025
	MATTHEW J. McGIVNEY	2021[7]
45.	PAUL E. STUTESMAN	2025
46.	COLIN G. HUNTER	2023
	GEORGE J. MERTZ	2021
47.	JOHN B. ECONOMOPOULOS	2023

[7] From July 22, 2019.

		Term Expires January 1 of
48.	MARGARET ZUZICH BAKKER	2023
	ROBERTS KENGIS	2021
49.	KIMBERLY L. BOOHER	2021
	SCOTT P. HILL-KENNEDY	2025
50.	JAMES P. LAMBROS	2025
51.	SUSAN K. SNIEGOWSKI	2021
52.	GERALD M. PRILL	2021
53.	AARON J. GAUTHIER	2021
54.	AMY G. GIERHART	2025
55.	THOMAS R. EVANS	2021
	ROY G. MIENK	2025
56.	JANICE K. CUNNINGHAM	2025
	JOHN DOUGLAS MAURER	2021
57.	CHARLES W. JOHNSON	2025

DISTRICT JUDGES

		Term Expires January 1 of
1.	MICHAEL C. BROWN	2021
	WILLIAM PAUL NICHOLS	2025
	JACK VITALE	2023
2A.	JONATHAN L. POER	2021
	LAURA J. SCHAEDLER	2023
2B.	SARA S. LISZNYAI	2021
3A.	BRENT R. WEIGLE	2021
3B.	JEFFREY C. MIDDLETON	2021
	ROBERT PATTISON	2025
4.	STACEY A. RENTFROW	2021
5.	GARY J. BRUCE	2023
	ARTHUR J. COTTER	2021
	GORDON GARY HOSBEIN	2021
	STERLING R. SCHROCK	2025
	DENNIS M. WILEY	2023
7.	ARTHUR H. CLARKE, III	2021
	MICHAEL T. McKAY	2023
8.	ANNE E. BLATCHFORD	2025
	CHRISTOPHER T. HAENICKE	2025
	KATHLEEN P. HEMINGWAY	2021
	JULIE K. PHILLIPS	2021
	RICHARD A. SANTONI	2021
	VINCENT C. WESTRA	2023
10.	PAUL K. BEARDSLEE	2021
	JASON C. BOMIA	2021[1]
	SAMUEL I. DURHAM, Jr.	2023[2]
	FRANKLIN K. LINE, Jr.	2021
	TRACIE L. TOMAK	2025
12.	JOSEPH S. FILIP	2023
	DANIEL GOOSTREY	2025
	MICHAEL J. KLAEREN	2021
	R. DARRYL MAZUR	2021
14A.	RICHARD E. CONLIN	2021
	J. CEDRIC SIMPSON	2025
	KIRK W. TABBEY	2023
14B.	CHARLES J. POPE	2021
15.	JOSEPH F. BURKE	2025
	ELIZABETH POLLARD HINES	2023
	KAREN Q. VALVO	2021
16.	SEAN P. KAVANAGH	2021
	KATHLEEN J. McCANN	2025
17.	KRISTA LICATA HAROUTUNIAN	2021
	KAREN S. KHALIL	2023

[1] From September 3, 2019.

[2] To August 4, 2019.

		Term Expires January 1 of
18.	SANDRA A. FERENCE CICIRELLI	2025
	MARK A. McCONNELL	2021
19.	L. EUGENE HUNT, Jr.	2023
	SAM A. SALAMEY	2025
	MARK W. SOMERS	2021
20.	MARK J. PLAWECKI	2021
	DAVID TURFE	2025
21.	RICHARD L. HAMMER, Jr.	2021
22.	SABRINA L. JOHNSON	2025
23.	GENO D. SALOMONE	2025
	JOSEPH D. SLAVEN	2021
24.	JOHN T. COURTRIGHT	2021
	RICHARD A. PAGE	2023
25.	GREGORY A. CLIFTON	2021
	DAVID J. ZELENAK	2023
27.	ELIZABETH L. DISANTO	2025
28.	JAMES A. KANDREVAS	2021
29.	LAURA REDMOND MACK	2025
30.	BRIGETTE OFFICER HOLLEY	2023
31.	ALEXIS G. KROT	2021
32A.	DANIEL S. PALMER	2021
33.	JENNIFER COLEMAN HESSON	2023
	JAMES KURT KERSTEN	2021
	MICHAEL K. McNALLY	2025
34.	TINA BROOKS GREEN	2025
	BRIAN A. OAKLEY	2023
	DAVID M. PARROTT	2021
35.	MICHAEL J. GEROU	2023
	RONALD W. LOWE	2025
	JAMES A. PLAKAS	2021
36.	LYDIA NANCE ADAMS	2023
	ROBERTA C. ARCHER	2025
	CHRISTOPHER MICHAEL BLOUNT	2025
	NANCY McCAUGHAN BLOUNT	2021
	DEMETRIA BRUE	2021
	ESTHER LYNISE BRYANT	2021
	DONALD COLEMAN	2025
	KAHLILIA YVETTE DAVIS	2023
	DEBORAH GERALDINE FORD	2023
	RUTH ANN GARRETT	2025
	KRISTINA ROBINSON GARRETT	2023
	WILLIAM AUSTIN GARRETT	2023
	RONALD GILES	2021
	ADRIENNE HINNANT-JOHNSON	2021
	SHANNON A. HOLMES	2021
	PATRICIA L. JEFFERSON	2021
	KENYETTA STANFORD JONES	2023
	ALICIA A. JONES-COLEMAN	2025
	KENNETH J. KING	2021
	DEBORAH L. LANGSTON	2025

		Term Expires January 1 of
	WILLIAM C. McCONICO	2025
	DONNA R. MILHOUSE	2025
	B. PENNIE MILLENDER	2023
	CYLENTHIA L. MILLER	2023[3]
	KEVIN F. ROBBINS	2025
	DAVID S. ROBINSON, Jr.	2025
	ALIYAH SABREE	2025
	MICHAEL E. WAGNER	2021
	LARRY D. WILLIAMS, Jr.	2023
37.	JOHN M. CHMURA	2025
	MICHAEL CHUPA	2021
	SUZANNE M. FAUNCE	2023
	MATTHEW P. SABAUGH	2025
38.	CARL F. GERDS III	2021
39.	JOSEPH F. BOEDEKER	2021
	CATHERINE B. STEENLAND	2023[4]
	KATHLEEN E. TOCCO	2025
40.	MARK A. FRATARCANGELI	2025
	JOSEPH CRAIGEN OSTER	2021
41A.	ANNEMARIE M. LEPORE	2021
	DOUGLAS P. SHEPHERD	2025
	STEPHEN S. SIERAWSKI	2023
	KIMBERLEY ANNE WIEGAND	2025
41B.	JACOB M. FEMMININEO, Jr	2021
	CARRIE LYNN FUCA	2023
	SEBASTIAN LUCIDO	2025
42-1.	DENIS R. LeDUC	2021
42-2.	WILLIAM H. HACKELL III	2025
43.	CHARLES G. GOEDERT	2021
	KEITH P. HUNT	2025
	JOSEPH LONGO	2023
44.	DEREK W. MEINECKE	2025
	JAMES L. WITTENBERG	2023
45.	MICHELLE FRIEDMAN APPEL	2023
	DAVID M. GUBOW	2021
46.	CYNTHIA ARVANT	2023
	SHEILA R. JOHNSON	2021
	DEBRA NANCE	2025
47.	JAMES B. BRADY	2021
	MARLA E. PARKER	2023
48.	MARC BARRON	2023
	DIANE D'AGOSTINI	2025
	KIMBERLY F. SMALL	2021
50.	RONDA FOWLKES GROSS	2025
	MICHAEL C. MARTINEZ	2021

[3] To August 16, 2019.

[4] To July 19, 2019.

		Term Expires January 1 of
	PRESTON G. THOMAS	2023
	CYNTHIA THOMAS WALKER	2021
51.	TODD A. FOX	2025
	RICHARD D. KUHN, Jr.	2021
52-1.	ROBERT BONDY	2025
	THOMAS DAVID LAW	2023
	TRAVIS REEDS	2021
52-2.	JOSEPH G. FABRIZIO	2021
	KELLEY RENAE KOSTIN	2023
52-3.	LISA L. ASADOORIAN	2025
	NANCY TOLWIN CARNIAK	2023
	JULIE A. NICHOLSON	2021
52-4.	KIRSTEN NIELSEN HARTIG	2023
	MAUREEN M. McGINNIS	2021
53.	DANIEL B. BAIN	2021[5]
	THERESA M. BRENNAN	2021[6]
	SHAUNA MURPHY	2023
54A.	LOUISE ALDERSON	2023
	STACIA J. BUCHANAN	2021
	HUGH B. CLARKE, Jr.	2023[7]
	KRISTEN D. SIMMONS	2021[8]
	CYNTHIA M. WARD	2025
54B.	RICHARD D. BALL	2023
	ANDREA ANDREWS LARKIN	2025
55.	DONALD L. ALLEN	2023
	THOMAS P. BOYD	2021
56A.	JULIE O'NEILL	2023
	JULIE H. REINCKE	2021
56B.	MICHAEL LEE SCHIPPER	2025
57.	WILLIAM A. BAILLARGEON	2025
	JOSEPH S. SKOCELAS	2021
58.	CRAIG E. BUNCE	2025
	SUSAN A. JONAS	2021
	BRADLEY S. KNOLL	2021
	JUDITH K. MULDER	2023
59.	PETER P. VERSLUIS	2023
60.	HAROLD F. CLOSZ, III	2021
	MARIA LADAS HOOPES	2021
	RAYMOND J. KOSTRZEWA Jr.	2025
	GEOFFREY THOMAS NOLAN	2023
61.	NICHOLAS S. AYOUB	2023
	DAVID J. BUTER	2021

[5] From October 21, 2019.

[6] To June 28, 2019.

[7] To September 13, 2019.

[8] From October 7, 2019.

		Term Expires January 1 of
	MICHAEL J. DISTEL	2025
	JENNIFER FABER	2023
	JEANINE NEMESI LaVILLE	2025
	KIMBERLY A. SCHAEFER	2021
62A.	PABLO CORTES	2021
	STEVEN M. TIMMERS	2025
62B.	WILLIAM G. KELLY	2021
63.	JEFFREY J. O'HARA	2021
	SARA J. SMOLENSKI	2021
64A.	RAYMOND P. VOET	2021
64B.	DONALD R. HEMINGSEN	2021
65A.	MICHAEL E. CLARIZIO	2021
65B.	STEWART D. McDONALD	2021
66.	WARD L. CLARKSON	2025
	TERRANCE P. DIGNAN	2021
67-1.	DAVID J. GOGGINS	2021
67-2.	MARK W. LATCHANA	2023
	JENNIFER J. MANLEY	2021
67-3.	VIKKI BAYEH HALEY	2021
67-4.	MARK C. McCABE	2021
	CHRISTOPHER R. ODETTE	2025
67-5.	WILLIAM H. CRAWFORD, II	2025
	G. DAVID GUINN	2021
	HERMAN MARABLE, Jr.	2025
	NATHANIEL C. PERRY, III	2021
70-1.	TERRY L. CLARK	2025
	M. RANDALL JURRENS	2023
70-2.	ELIAN FICHTNER	2021
	ALFRED T. FRANK	2021
	DAVID D. HOFFMAN	2025
71A.	LAURA CHEGER BARNARD	2021
71B.	JASON ERIC BITZER	2021[9]
	KIM DAVID GLASPIE	2021[10]
72.	MICHAEL L. HULEWICZ	2023
	JOHN D. MONAGHAN	2025
	CYNTHIA SIEMEN PLATZER	2021
74.	MARK E. JANER	2023
	TIMOTHY J. KELLY	2025
	DAWN A. KLIDA	2021
75.	MICHAEL CARPENTER	2021
76.	ERIC R. JANES	2021
77.	PETER M. JAKLEVIC	2021
78.	H. KEVIN DRAKE	2021
79.	PETER J. WADEL	2021

[9] From August 8, 2019.

[10] To June 14, 2019.

		Term Expires January 1 of
80.	JOSHUA M. FARRELL	2021
82.	RICHARD E. NOBLE	2021
84.	AUDREY D. VAN ALST	2021
86.	ROBERT A. COONEY	2025
	MICHAEL S. STEPKA	2023
89.	MARIA I. BARTON	2021
90.	JAMES N. ERHART	2021
92.	BETH A. GIBSON	2021
93.	MARK E. LUOMA	2021
94.	STEVE PARKS	2021
95A.	ROBERT J. JAMO	2021[11]
95B.	JULIE A. LaCOST	2021
96.	ROGER W. KANGAS	2021
	KARL WEBER	2023
97.	MARK A. WISTI	2021

[11] From July 22, 2019.

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2020
CARL F. JARBOE	2022
THEODORE A. METRY	2020
MATTHEW R. RUMORA	2022

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2025
Alger/Schoolcraft	CHARLES C. NEBEL	2025
Allegan	MICHAEL L. BUCK	2025
Alpena	THOMAS J. LaCROSS	2025
Antrim	NORMAN R. HAYES	2025
Arenac	RICHARD E. VOLLBACH, Jr.	2025
Baraga	TIMOTHY S. BRENNAN	2025
Barry	WILLIAM M. DOHERTY	2025
Bay	JAN A. MINER	2025
Benzie	JOHN D. MEAD	2025
Berrien	BRIAN BERGER	2025
Berrien	MABEL JOHNSON MAYFIELD	2021
Branch	KIRK A. KASHIAN	2025
Calhoun	MICHAEL L. JACONETTE	2023
Cass	SUSAN L. DOBRICH	2025
Cheboygan	DARYL P. VIZINA	2025
Chippewa	ERIC BLUBAUGH	2021
Clare/Gladwin	MARCY A. KLAUS	2025
Clinton	LISA SULLIVAN	2025
Crawford	MONTE J. BURMEISTER	2025
Delta	PERRY R. LUND	2025
Dickinson	THOMAS D. SLAGLE	2025
Eaton	THOMAS K. BYERLEY	2025
Emmet/Charlevoix	VALERIE K. SNYDER	2025
Genesee	JENNIE E. BARKEY	2021
Genesee	F. KAY BEHM	2025
Gogebic	ANNA ROSE TALASKA	2025
Grand Traverse	MELANIE STANTON	2025
Gratiot	KRISTIN M. BAKKER	2025
Hillsdale	MICHELLE SNELL BIANCHI	2025
Houghton	FRASER T. STROME	2025
Huron	DAVID L. CLABUESCH	2025
Huron	DAVID B. HERRINGTON	2021
Ingham	SHAUNA DUNNINGS	2025
Ingham	RICHARD J. GARCIA	2021
Ionia	ROBERT S. SYKES, Jr.	2025
Iosco	CHRISTOPHER P. MARTIN	2025
Iron	DONALD S. POWELL	2025
Isabella	STUART BLACK	2025
Jackson	DIANE M. RAPPLEYE	2025
Kalamazoo	TIFFANY ANKLEY	2021
Kalamazoo	CURTIS J. BELL	2025

County		Term Expires January 1 of
Kalamazoo	G. SCOTT PIERANGELI	2023
Kalkaska	LYNNE M. BUDAY	2025
Kent	TERENCE ACKERT	2023
Kent	PATRICIA D. GARDNER	2025
Kent	G. PATRICK HILLARY	2025
Kent	DAVID M. MURKOWSKI	2021
Keweenaw	KEITH WAREN DeFORGE	2025
Lake	MARK S. WICKENS	2025
Lapeer	JUSTUS C. SCOTT	2025
Leelanau	MARIAN F. KROMKOWSKI	2025
Lenawee	CATHERINE ANN SALA	2025
Livingston	MIRIAM A. CAVANAUGH	2025
Luce/Mackinac	W. CLAYTON GRAHAM	2025
Macomb	KATHRYN A. GEORGE	2021
Macomb	SANDRA A. HARRISON	2025
Manistee	THOMAS N. BRUNNER	2025
Marquette	CHERYL L. HILL	2025
Mason	JEFFREY C. NELLIS	2025
Mecosta/Osceola	TYLER O. THOMPSON	2025
Menominee	DANIEL E. HASS	2025
Midland	DORENE S. ALLEN	2025
Missaukee	MELISSA J. RANSOM	2025
Monroe	FRANK L. ARNOLD	2021
Monroe	CHERYL E. LOHMEYER	2025
Montcalm	CHARLES W. SIMON, III	2025
Montmorency	BENJAMIN T. BOLSER	2025
Muskegon	GREGORY C. PITTMAN	2025
Muskegon	BRENDA E. SPRADER	2023
Newaygo	MELISSA K. DYKMAN	2025
Oakland	JENNIFER S. CALLAGHAN	2023
Oakland	LINDA S. HALLMARK	2025
Oakland	DANIEL A. O'BRIEN	2021
Oakland	KATHLEEN A. RYAN	2023
Oceana	BRADLEY G. LAMBRIX	2025
Ogemaw	SHANA A. LAMBOURN	2025
Ontonagon	JANIS M. BURGESS	2025
Oscoda	CASSANDRA L. MORSE-BILLS	2025
Otsego	MICHAEL K. COOPER	2025
Ottawa	MARK A. FEYEN	2025
Presque Isle	ERIK J. STONE	2025
Roscommon	MARK JERNIGAN	2025
Saginaw	PATRICK J. McGRAW	2025
Saginaw	BARBARA L. METER	2021
St. Clair	ELWOOD L. BROWN	2021

County		Term Expires January 1 of
St. Clair	JOHN D. TOMLINSON	2025
St. Joseph	DAVID C. TOMLINSON	2025
Sanilac	GREGORY S. ROSS	2021
Shiawassee	THOMAS J. DIGNAN	2025
Tuscola	NANCY THANE	2025
Van Buren	DAVID DiSTEFANO	2025
Washtenaw	DARLENE A. O'BRIEN	2025
Washtenaw	JULIA OWDZIEJ	2021
Wayne	DAVID BRAXTON	2021
Wayne	FREDDIE G. BURTON, Jr.	2025
Wayne	JUDY A. HARTSFIELD	2021
Wayne	TERRANCE A. KEITH	2021
Wayne	LISA MARIE NEILSON	2023
Wayne	LAWRENCE PAOLUCCI	2023
Wayne	DAVID PERKINS	2025
Wayne	FRANK S. SZYMANSKI	2025
Wexford	EDWARD VAN ALST	2025

JUDICIAL CIRCUITS

County	Seat	Circuit
Alcona	Harrisville	23
Alger	Munising	11
Allegan	Allegan	48
Alpena	Alpena	26
Antrim	Bellaire	13
Arenac	Standish	23
Baraga	L'Anse	12
Barry	Hastings	5
Bay	Bay City	18
Benzie	Beulah	19
Berrien	St. Joseph	2
Branch	Coldwater	15
Calhoun	Marshall, Battle Creek	37
Cass	Cassopolis	43
Charlevoix	Charlevoix	33
Cheboygan	Cheboygan	53
Chippewa	Sault Ste. Marie	50
Clare	Harrison	55
Clinton	St. Johns	29
Crawford	Grayling	46
Delta	Escanaba	47
Dickinson	Iron Mountain	41
Eaton	Charlotte	56
Emmet	Petoskey	57
Genesee	Flint	7
Gladwin	Gladwin	55
Gogebic	Bessemer	32
Grand Traverse	Traverse City	13
Gratiot	Ithaca	29
Hillsdale	Hillsdale	1
Houghton	Houghton	12
Huron	Bad Axe	52
Ingham	Mason, Lansing	30
Ionia	Ionia	8
Iosco	Tawas City	23
Iron	Crystal Falls	41
Isabella	Mount Pleasant	21
Jackson	Jackson	4
Kalamazoo	Kalamazoo	9
Kalkaska	Kalkaska	46
Kent	Grand Rapids	17
Keweenaw	Eagle River	12
Lake	Baldwin	51
Lapeer	Lapeer	40
Leelanau	Suttons Bay	13
Lenawee	Adrian	39
Livingston	Howell	44
Luce	Newberry	11
Mackinac	St. Ignace	11
Macomb	Mount Clemens	16
Manistee	Manistee	19
Marquette	Marquette	25
Mason	Ludington	51
Mecosta	Big Rapids	49
Menominee	Menominee	41
Midland	Midland	42
Missaukee	Lake City	28
Monroe	Monroe	38
Montcalm	Stanton	8
Montmorency	Atlanta	26
Muskegon	Muskegon	14
Newaygo	White Cloud	27
Oakland	Pontiac	6
Oceana	Hart	27
Ogemaw	West Branch	34
Ontonagon	Ontonagon	32
Osceola	Reed City	49
Oscoda	Mio	23
Otsego	Gaylord	46
Ottawa	Grand Haven	20
Presque Isle	Rogers City	53
Roscommon	Roscommon	34
Saginaw	Saginaw	10
St. Clair	Port Huron	31
St. Joseph	Centreville	45
Sanilac	Sandusky	24
Schoolcraft	Manistique	11
Shiawassee	Corunna	35
Tuscola	Caro	54
Van Buren	Paw Paw	36
Washtenaw	Ann Arbor	22
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ADMINISTRATIVE ORDER No. 2019-2

REQUIREMENTS FOR E-FILING ACCESS PLANS

Entered June 5, 2019, effective September 1, 2019 (File No. 2002-37)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Administrative Order No. 2019-2 is adopted, effective September 1, 2019.

AO No. 2019-2 — Trial Court Requirements for Providing Meaningful Access to the Court for Mandated Electronic Filers.

To ensure that those individuals required to electronically file court documents have meaningful access to Michigan courts, the Michigan Supreme Court adopts this order requiring courts that seek permission to mandate that all litigants e-File to first submit an e-Filing Access Plan for approval by the State Court Administrative Office.

Each plan must conform to the model promulgated by the State Court Administrator and ensure access to at least one computer workstation per county. The plan shall be submitted to and approved by the State Court Administrative Office as a local administrative order

under MCR 8.112. The State Court Administrative Office may revoke approval of an e-Filing Access Plan due to litigant grievances.

ADMINISTRATIVE ORDER No. 2019-3

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 41ST CIRCUIT COURT, THE 95A DISTRICT COURT, THE 95B DISTRICT COURT, AND THE DICKINSON, IRON, AND MENOMINEE COUNTY PROBATE COURTS

Entered August 14, 2019, effective immediately (File No. 2004-04)—REPORTER.

Administrative Order No. 2003-1 and MCL 600.401 *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Court.

The Court hereby rescinds Administrative Order No. 2005-1 and approves adoption of the following concurrent jurisdiction plan, effective immediately:

• The 41st Circuit Court, the 95A District Court, the 95B District Court, and the Dickinson, Iron, and Menominee County Probate Courts.

The plan shall remain on file with the State Court Administrator.

Amendments to concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

RESCINDED ADMINISTRATIVE ORDER No. 1997-5

RESCISSION OF ADMINISTRATIVE ORDER NO. 1997-5
(DEFENDERS — THIRD CIRCUIT COURT)

Entered September 18, 2019, effective immediately (File No. 2018-27)—REPORTER.

On order of the Court, Administrative Order No. 1997-5 is rescinded, effective immediately.

ADMINISTRATIVE ORDER
No. 2019-4

ELECTRONIC FILING IN THE
3RD, 6TH, 13TH, 16TH, AND 20TH CIRCUIT COURTS

Entered October 23, 2019, effective immediately (File No. 2002-37) —REPORTER.

Administrative Order No. 2019-4 — Electronic Filing in the 3rd, 6th, 13th, 20th, and 16th Circuit Courts.

On order of the Court, the 3rd, 6th, 13th, 16th, and 20th Circuit Courts are authorized to continue their e-Filing programs in accordance with this order while the State Court Administrative Office develops and implements a statewide e-Filing system (known as MiFILE). This order rescinds and replaces Michigan Supreme Court Administrative Orders 2007-3 (Oakland County), 2010-4 (the 13th Judicial Circuit), 2010-6 (the 16th Judicial Circuit), 2011-1 (the 3rd Circuit Court), and 2011-4 (Ottawa County).

1. Construction.

Until each court is fully implemented on MiFILE, each court shall operate its current e-Filing system in accordance with this order and Michigan Court Rules 1.109(G) and 8.119. This includes that each court may continue to exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties until the

court is fully implemented on MiFILE. The Michigan Rules of Court govern all other aspects of the cases that are required to be filed electronically.

2. Participation in E-Filing.

a. Mandatory Participation.

Participation in the e-Filing system is mandatory for the case types in place and for parties currently required to e-File in each court, as of the date of this order. Each court shall post on its website and in the clerk's office a list of the case types, mandated filers, and types of filings as specified in State Court Administrative Office Memo 2019-4. The State Court Administrative Office shall also maintain this information on its One Court of Justice website.

On or before the date a pilot court is transitioned to MiFILE, the court must have in place an approved e-Filing access plan as required by Administrative Order 2019-2. Approval of the e-Filing plan means that the court has demonstrated full access for self-represented litigants. Nothing in this order precludes a court from implementing an e-Filing access plan before full implementation of MiFILE.

b. Exemption from E-Filing Participation.

Circumstances may arise that will prevent a party from e-Filing where e-Filing is mandated by these courts. A filer may file a request for exemption from e-Filing under MCR 1.109(G)(3). The court shall consider those requests with factors described in MCR 1.109(G)(3)(g)-(h) and shall comply with all other requirements in the rule. The clerk of the court must promptly mail or hand-deliver the order of exemption to the individual.

3. E-Filing Rules, Standards, and Local Requirements.

a. Court Responsibility.

With the exception of the e-Filing requirements in the Michigan Court Rules and any e-Filing standards prescribed by the State Court Administrative Office, each court will comply with the requirements of this order and, to the extent possible, continue to accept and process e-Filed documents for the case types, case initiation procedures, subsequent filing procedures, and filer requirements in place in each court as of the date of this order. Each court shall make this information readily available to filers from the court's website and at the clerk's office.

b. Filer Responsibility.

With the exception of the e-Filing requirements in the Michigan Court Rules and any e-Filing standards prescribed by the State Court Administrative Office, filers will comply with the requirements of this order and the e-Filing procedures and requirements in place in each court as of the date of this order.

4. Personal Identifying Information.

a. With respect to any document submitted through the e-Filing system, the following requirements for personal identifying information apply:

i. Social Security Numbers: Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in public documents. If an individual's social security number must be referenced in a public document, only the last four digits of that number may be used, with the number specified in the following format: XXX-XX-1234.

ii. Names of Minor Children: Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in a public document. If a non-

party minor child must be mentioned, only the initials of that child's name may be used.

iii. Dates of Birth: Except as required by statute, court rule, or administrative order, an individual's full birth date shall not be included in a public document. If an individual's date of birth must be referenced in a public document, only the year may be used, with the date specified in the following format: XX/XX/1998.

iv. Financial Account Numbers: Full financial account numbers shall not be included in public documents unless required by statute, court rule, or other authority. If a financial account number must be referenced in a public document, only the last four digits of these numbers may be used, with the number specified in the following format: XXXXX1234.

v. Driver's License Numbers and State-Issued Personal Identification Card Numbers: A person's full driver's license number and state issued personal identification number shall not be included in a public document. If an individual's driver's license number or state-issued personal identification card number must be referenced in a public document, only the last four digits of that number may be used, with the number specified in the following format: X-XXX-XXX-XX1-234.

vi. Home Addresses: With the exception of a self-represented party, full home addresses shall not be included in e-Filings. If an individual's home address must be referenced in an e-Filing, only the city and state should be used. For a party whose address has been made confidential by court order pursuant to MCR 3.203(F), the alternate address shall be treated as specified above.

b. Parties wanting to file a pleading containing a complete personal data identifier as listed above may:

i. Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal, may still require that an e-Filing that does not reveal the complete personal data identifier be filed for the public files; or,

ii. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-Filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

c. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

i. Medical records, treatment, and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

vi. Information regarding an individual's cooperation with the government; and

vii. Personal information regarding the victim of any criminal activity.

d. These rules are designed to protect the private personal identifiers and information of individuals involved or referenced in actions before the court.

Nothing in these rules should be interpreted as authority for counsel or a self-represented litigant to deny discovery to the opposing party.

e. These rules regarding personal information will remain in effect until they are superseded by amendments of MCR 1.109, MCR 8.119, and Administrative Order 1999-4. Those amendments, adopted by the Court on May 22, 2019, are effective on January 1, 2021.

ADMINISTRATIVE ORDER No. 2019-5

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 17TH CIRCUIT COURT AND THE KENT COUNTY PROBATE COURT

Entered October 23, 2019, effective immediately (File No. 2004-04) —REPORTER.

Administrative Order No. 2003-1 and MCL 600.401, *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Court.

The Court hereby approves adoption of the following concurrent jurisdiction plan, effective immediately:

- The 17th Circuit Court and the Kent County Probate Court.

The plan shall remain on file with the State Court Administrator.

Amendments to concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401, *et seq*.

ADMINISTRATIVE ORDER No. 2019-6

ADMINISTRATIVE ORDER NO. 2019-6

Entered October 23, 2019, effective immediately (File No. 2019-16) —REPORTER.

Administrative Order No. 2019-6—Briefs Formatted for Optimized Reading on Electronic Displays.

On order of the Court, effective immediately, the Michigan Supreme Court and Court of Appeals are authorized to implement a pilot program in which lawyers and self-represented parties may file briefs that are formatted, within the parameters set forth below, to be more readable on electronic displays, such as computer monitors, laptops, and tablets, instead of complying with the current formatting rules. This pilot program will run for two years from the effective date above, after which the Courts will make recommendations for future practice. The Courts have the discretion to terminate the pilot program early.

(A) Application.

(1) This pilot program shall apply to the length and formatting of briefs, applications for leave to appeal, responses, replies, and other pleadings (collectively "briefs") that are required to be filed in conformity with MCR 7.212 or 7.312.

(2) Filing briefs under the pilot program is optional. Briefs filed under the pilot program must include the words, in bold, "Filed under AO 2019-6" on the caption of the brief and must comply with the following requirements in place of MCR 7.212(B) or 7.312(A). Any requirements not addressed by subsection (B) of this administrative order shall be governed by MCR 7.212 or 7.312.

(B) Length and Format of Briefs.

(1) Length. Unless otherwise lengthened or shortened by the Court of Appeals on motion, the principal briefs of the appellant(s) and appellee(s) and the briefs of amici curiae shall be no longer than 16,000 words, and the reply briefs of the appellant shall be no longer than 3,200 words. Briefs shall contain pagination as specified by MCR 7.212(B). The title page, table of contents, index of authorities, statement of the basis of jurisdiction, statement of the questions involved, signature block and listing of counsel at the end of the brief, certificate of compliance, proof of service, exhibits, and appendices do not count toward the word limit. Footnotes within the non-excluded sections also count toward the word total, as do any words contained in embedded graphics.

Each brief shall contain a certificate of compliance after the signature block, signed by the attorney or self-represented party, stating the number of countable words in the document and the typeface and size used. The person preparing the certificate may rely on the word count of the word-processing system used to prepare the document.

(2) Font. The body text of briefs shall be set in a proportional font no smaller than 12 point. Narrow-

style or compressed fonts and condensed spacing are prohibited. Other fonts may be used in captions and headings.

(3) Line Spacing. The line spacing of all text must be set between 133% and 150% of the point size of the text. For example, text set in a 12-point font must be set with line spacing between 16 and 18 points. There shall be a minimum of 6 points of additional spacing between paragraphs and around headings.

(4) Line Length and Margins. The left and right side margins may not be less than 1.5 inches each. This does not apply to captions or headings, which may be formatted with 1-inch side margins.

(5) Electronic format. Briefs must be filed in a text-searchable PDF format that is created electronically by a word processor or similar program. An unsearchable image file of a scanned document is not acceptable.

The electronic brief must be bookmarked to include, at a minimum, all major divisions and headings, and should track the table of contents.

Page numbers in the electronic brief must correspond to the PDF page numbers.

MICHIGAN RULE CHANGES

Adopted June 5, 2019, effective September 1, 2019 (File No. 2002-37)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 1.109 of the Michigan Court Rules is adopted, effective September 1, 2019.

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

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1)-(2) [Unchanged.]

(3) Scope and Applicability.

(a)-(f) [Unchanged.]

(g) Where electronic filing is mandated, a party may file paper documents with that court and be served with paper documents according to subrule (G)(6)(a)(ii) if the party can demonstrate good cause for an exemption. For

purposes of this rule, a court shall consider the following factors in determining whether the party has demonstrated good cause:

(i) Whether the person has a lack of reliable access to an electronic device that includes access to the Internet;

(ii) Whether the person must travel an unreasonable distance to access a public computer or has limited access to transportation and is unable to access the e-Filing system from home;

(iii) Whether the person has the technical ability to use and understand email and electronic filing software;

(iv) Whether access from a home computer system or the ability to gain access at a public computer terminal present a safety issue for the person;

(v) Any other relevant factor raised by a person.

(h) Upon request, the following persons are exempt from electronic filing without the need to demonstrate good cause:

(i) a person who has a disability that prevents or limits the person's ability to use the electronic filing system;

(ii) a person who has limited English proficiency that prevents or limits the person's ability to use the electronic filing system; and

(iii) a party who is confined by governmental authority, including but not limited to an individual who is incarcerated in a jail or prison facility, detained in a juvenile facility, or committed to a medical or mental health facility.

(i) A request for an exemption must be filed with the court in paper where the individual's case will be or

has been filed. If the individual filed paper documents at the same time as the request for exemption, the clerk shall process the documents for filing. If the documents meet the filing requirements of subrule (D), they will be considered filed on the day they were submitted.

(i) The request for an exemption must be on a form approved by the State Court Administrative Office and verified under MCR 1.109(D)(3). There is no fee for the request.

(ii) The request must specify the reasons that prevent the individual from filing electronically. The individual may file supporting documents along with the request for the court's consideration.

(iii) A judge must review the request and any supporting documentation and issue an order granting or denying the request within two business days of the date the request was filed.

(iv) The clerk of the court must promptly mail the order to the individual. The clerk must place the request, any supporting documentation, and the order in the case file. If there is no case file, the documents must be maintained in a group file.

(v) An exemption granted under this rule is valid only for the court in which it was filed and for the life of the case unless the individual exempted from filing electronically registers with the electronic-filing system. In that event, the individual waives the exemption and becomes subject to the rules of electronic filing and the requirements of the electronic-filing system. An individual who waives an exemption under this rule may file another request for exemption.

(4)-(7) [Unchanged.]

Staff Comment: The amendment of MCR 1.109 provides a single statewide process for requesting an exemption from the requirement to e-File, including both an automatic exemption for certain persons, and a list of factors for the court to consider when determining whether to exempt a person from the requirement to e-File.

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

Adopted June 12, 2019, effective immediately (File No. 2015-21)—REPORTER.

On order of the Court, this is to advise that the amendments of Rules 3.965, 3.971, 3.972, 3.973, and 3.993 of the Michigan Court Rules are adopted, effectively immediately. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendments. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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

RULE 3.965. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(14) [Unchanged.]

(15) If the court orders removal of the child from a parent's care or custody, the court shall advise the parent, guardian, or legal custodian of the right to appeal that action.

(C)-(D) [Unchanged.]

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) [Unchanged.]

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1)-(4) [Unchanged.]

(5) if parental rights are subsequently terminated, the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.;

(6) that appellate review is available to challenge a court's initial order of disposition following adjudication, and such a challenge can include any issues leading to the disposition, including any errors in the adjudicatory process;

(7) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal of the initial dispositional order and to preparation of relevant transcripts; and

(8) the respondent may be barred from challenging the assumption of jurisdiction in an appeal from the order terminating parental rights if they do not timely file an appeal of the initial dispositional order under MCR 3.993(A)(1), 3.993(A)(2), or a delayed appeal under MCR 3.993(C).

(C) Right to Appellate Review. The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are terminated at the initial dispositional hearing pursuant to MCR 3.977(E). In addition, the respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to subrule (B)(6)-(8).

(D~~C~~) [Relettered but otherwise unchanged.]

RULE 3.972. TRIAL.

(A)-(E) [Unchanged.]

(F) Respondent's Rights Following Trial and Possible Disposition. If the trial results in a verdict that one or more statutory grounds for jurisdiction has been proven, the court shall advise the respondent orally or in writing that:

(1) appellate review is available to challenge a court's assumption of jurisdiction in an appeal of the initial order of disposition,

(2) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts, and

(3) the respondent may be barred from challenging the assumption of jurisdiction if they do not timely file an appeal under MCR 3.993(A)(1), 3.993(A)(2), or a delayed appeal under MCR 3.993(C).

(G) Right to Appellate Review. The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are termi-

nated at the initial dispositional hearing pursuant to MCR 3.977(E). In addition, the respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to subrule (F)(1)-(3).

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(F) [Unchanged.]

(G) Respondent's Rights Upon Entry of Dispositional Order. When the court enters an initial order of disposition following adjudication the court shall advise the respondent orally or in writing:

(1) that at any time while the court retains jurisdiction over the minor, the respondent may challenge the continuing exercise of that jurisdiction by filing a motion for rehearing, MCL 712A.21 or MCR 3.992, or by filing an application for leave to appeal with the Michigan Court of Appeals,

(2) that appellate review is available to challenge both an initial order of disposition following adjudication and any order removing a child from a parent's care and custody,

(3) that an indigent respondent is entitled to appointment of an attorney to represent the respondent on any appeal as of right and to preparation of relevant transcripts, and

(4) the respondent may be barred from challenging the assumption of jurisdiction or the removal of the minor from a parent's care and custody in an appeal from the order terminating parental rights if they do not timely file an appeal under MCR 3.993(A)(1), 3.993(A)(2), or a delayed appeal under MCR 3.993(C).

(H) Right to Appellate Review. The respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the respondent's parental rights are terminated at the initial dispositional hearing pursuant to MCR 3.977(E). In addition, the respondent may challenge the assumption of jurisdiction in an appeal from the order terminating respondent's parental rights if the court fails to properly advise the respondent of their right to appeal pursuant to subrule (G)(2)-(4).

(G)-(H) [Relettered (I)-(J) but otherwise unchanged.]

RULE 3.993. APPEALS.

(A) The following orders are appealable to the Court of Appeals by right:

(1) any order removing a child from a parent's care and custody,

(2) an initial order of disposition following adjudication in a child protective proceeding,

(3~~1~~) an order of disposition placing a minor under the supervision of the court in a delinquency proceeding~~or removing the minor from the home~~,

(2)-(5) [Renumbered (4)-(7) but otherwise unchanged.]

In any appeal as of right, an indigent respondent is entitled to appointment of an attorney to represent the respondent on appeal and to preparation of relevant transcripts.

(B)-(C) [Unchanged.]

Staff Comment: The amendments of MCR 3.965, 3.971, 3.972, 3.973, and 3.993 incorporate a requirement for a trial court to notify a respondent in a child protection proceeding of the right to appeal following a child's removal from the home and the initial dispositional order, and that failure to do so may bar respondent from later challenging the court's assumption of jurisdiction.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the amendment may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-21. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted June 19, 2019, effective January 1, 2020 (File No. 2018-19) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.105, 2.301, 2.302, 2.305, 2.306, 2.307, 2.309, 2.310, 2.312, 2.313, 2.314, 2.316, 2.401, 2.411, 2.506, 3.201, 3.206, 3.922, 3.973, 3.975, 3.976, 3.977, and 5.131 and addition of Rule 3.229 of the Michigan Court Rules are adopted, effective January 1, 2020.

[Rule 3.229 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.105. CONSTRUCTION.

These rules are to be construed, administered, and employed by the parties and the court to secure the just, speedy, and economical determination of every action and to avoid the consequences of error that does not affect the substantial rights of the parties.

RULE 2.301. AVAILABILITY AND TIMING~~COMPLETION~~ OF DISCOVERY.

(A) Availability of Discovery.

(1) In a case where initial disclosures are required, a party may seek discovery only after the party serves its initial disclosures under MCR 2.302(A). Otherwise, a party may seek discovery after commencement of the action when authorized by these rules, by stipulation, or by court order.

(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.

(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.

(4) After a post judgment motion is filed in a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.

(B) Completion of Discovery.

(1~~A~~) In circuit and probate court, the time for completion of discovery shall be set by an order entered under MCR 2.401(B)~~(2)(a)~~.

(2~~B~~) In an action in which discovery is available only on leave of the court or by stipulation, the order or stipulation shall set a time for completion of discovery. A time set by stipulation may not delay the scheduling of the action for trial.

(3~~C~~) After the time for completion of discovery, a deposition of a witness taken solely for the purpose of

preservation of testimony may be taken at any time before commencement of trial without leave of court.

(4) Unless ordered otherwise, a date for the completion of discovery means the serving party shall initiate the discovery by a time that provides for a response or appearance, per these rules, before the completion date. As may be reasonable under the circumstances, or by leave of court, motions with regard to discovery may be brought after the date for completion of discovery.

(C) Course of Discovery. The court may control the scope, order, and amount of discovery, consistent with these rules.

RULE 2.302. DUTY TO DISCLOSE; GENERAL RULES GOVERNING DISCOVERY.

~~(A) Availability of Discovery.~~

~~(1) After commencement of an action, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.~~

~~(2) In actions in the district court, no discovery is permitted before entry of judgment except by leave of the court or on the stipulation of all parties. A motion for discovery may not be filed unless the discovery sought has previously been requested and refused.~~

~~(3) Notwithstanding the provisions of this or any other rule, discovery is not permitted in actions in the small claims division of the district court or in civil infraction actions.~~

~~(4) After a postjudgment motion is filed pursuant to a domestic relations action as defined by subchapter 3.200 of these rules, parties may obtain discovery by any means provided in subchapter 2.300 of these rules.~~

(A) Required Initial Disclosures.

(1) In General. Except as exempted by these rules, stipulation, or court order, a party must, without awaiting a discovery request, provide to the other parties:

(a) the factual basis of the party's claims and defenses;

(b) the legal theories on which the party's claims and defenses are based, including, if necessary for a reasonable understanding of the claim or defense, citations to relevant legal authorities;

(c) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(d) a copy—or a description by category and location—of all documents, ESI, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(e) a description by category and location of all documents, ESI, and tangible things that are not in the disclosing party's possession, custody, or control that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment. The description must include the name and, if known, the address and telephone number of the person who has possession, custody, or control of the material;

(f) a computation of each category of damages claimed by the disclosing party, who must also make available for inspection and copying as under MCR

2.310 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;

(g) a copy (or an opportunity to inspect a copy) of pertinent portions of any insurance, indemnity, security equivalent, or suretyship agreement under which another person may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment, including self-insured retention and limitations on coverage, indemnity, or reimbursement for amounts available to satisfy a judgment; and

(h) the anticipated subject areas of expert testimony.

(2) Additional Disclosures for No-Fault Cases. In addition to the disclosures under subrule (A)(1), in a case asserting a first-party claim for benefits under the Michigan no-fault act, MCL 500.3101, *et seq*., the following disclosures must be made without awaiting a discovery request:

(a) A defendant from whom no-fault benefits are claimed must disclose:

(i) a copy of the first-party claim file and a privilege log for any redactions and

(ii) the payments the insurance company has made on the claim.

(b) The plaintiff must disclose all applicable claims, including all of the following information within the plaintiff's possession, custody, or control:

(i) the identity of those who provided medical, household, and attendant care services to plaintiff,

(ii) all provider bills or outstanding balances for which the plaintiff seeks reimbursement,

(iii) the name, address, and phone number of plaintiff's employers, and

(iv) the additional disclosures under subrule (A)(3).

(3) Additional Disclosures by Claimants for Damages for Personal Injury. A party claiming damages for injury arising from a mental or physical condition must provide the other parties with executed medical record authorizations in the form approved by the State Court Administrative Office or in a form agreed by the parties for all persons, institutions, hospitals, and other custodians in actual possession of medical information relating to the condition, unless the party asserts privilege pursuant to MCR 2.314(B).

(4) Cases Exempt from Initial Disclosure. Unless otherwise stipulated or ordered, the following are exempt from initial disclosure under subrule (A)(1)-(3):

(a) an appeal to the circuit court under subchapter 7.100;

(b) an action in district court (see MCR 2.301[A][2]);

(c) an action under subchapter 3.200;

(d) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(e) an action to enforce or quash an administrative summons or a subpoena;

(f) a proceeding ancillary to a proceeding in another court, including an action for a subpoena under MCR 2.305(E) or (F);

(g) an action to compel or stay arbitration or to confirm, vacate, enforce, modify, or correct an arbitration award;

(h) an action for collection of penalties, fines, forfeitures, or forfeited recognizances under MCR 3.605;

(i) personal protection proceedings under subchapter 3.700; and

(j) an action for habeas corpus under MCR 3.303 and 3.304.

(5) Time for Initial Disclosures.

(a) Application of Time Limits. These deadlines apply unless a stipulation or order sets a different time.

(b) In General.

(i) A party that files a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within 14 days after any opposing party files an answer to that pleading.

(ii) A party answering a complaint, counterclaim, cross-claim, or third-party complaint must serve its initial disclosures within the later of 14 days after the opposing party's disclosures are due or 28 days after the party files its answer.

(iii) A party serving disclosures need only serve parties that have appeared. The party must serve later-appearing parties within 14 days of the appearance.

(c) Parties Served or Joined Later. A party first served or otherwise joined after the time for initial disclosures under subrule (A)(5)(a) or (b) must serve its initial disclosures within 14 days after filing the party's first pleading, unless a stipulation or order sets a different time.

(6) Basis for Initial Disclosure; Unacceptable Excuses. A party must serve initial disclosures based on the information then reasonably available to the party. However, a party is not excused from making disclosures because the party has not fully investigated the case or because the party challenges the sufficiency of

another party's disclosures or because another party has not made its disclosures.

(7) Form of Disclosures. Disclosures under subrule (A) are subject to MCR 2.302(G), must be in writing, signed, and served, and a proof of service must be promptly filed.

(B) Scope of Discovery.

(1) In General. Parties may obtain discovery regarding any ~~matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of another party, including the existence, description, nature, custody, condition, and location of books, documents, or other tangible things, or electronically stored information and the identity and location of persons having knowledge of a discoverable matter. It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.~~ non-privileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, taking into account all pertinent factors, including whether the burden or expense of the proposed discovery outweighs its likely benefit, the complexity of the case, the importance of the issues at stake in the action, the amount in controversy, and the parties' resources and access to relevant information. Information within the scope of discovery need not be admissible in evidence to be discoverable.

(2)-(3) [Unchanged.]

(4) Trial Preparation; Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subrule (B)(1) and

acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(a)-(d) [Unchanged.]

(e) Subrule (B)(3)(a) protects drafts of any interrogatory answer required under subrule (B)(4)(a)(i), regardless of the form in which the draft is recorded.

(f) Subrule (B)(3)(a) protects communications between the party's attorney and any expert witness under subrule (B)(4), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(5) ~~Electronically Stored Information~~ Duty to Preserve ESI. A party has the same obligation to preserve ~~electronically stored information~~ESI as it does for all other types of information. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

(6) Limitation of Discovery of ~~Electronic Materials~~ESI. A party need not provide discovery of ~~electronically stored information~~ESI from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discov-

ery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery ~~from such sources~~ if the requesting party shows good cause, considering proportionality under subrule (B)(1) and the limitations of ~~MCR 2.302~~subrule (C). The court may specify conditions for the discovery~~.~~, including allocation of the expense, and may limit the frequency or extent of discovery of ESI (whether or not the ESI is from a source that is reasonably accessible).

(7) [Unchanged.]

(C) [Unchanged.]

(D) Sequence ~~and Timing~~ of Discovery. Unless the court orders otherwise, ~~on motion, for the convenience of parties and witnesses and in the interests of justice,~~ methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, does not operate to delay another party's discovery.

(E) ~~Supplementation of~~ Supplementing Disclosures and Responses.

(1) Duty to Supplement. ~~A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information acquired later, except as follows:~~

~~(a) A party is under a duty seasonably to supplement the response with respect to a question directly addressed to~~

~~(i) the identity and location of persons having knowledge of discoverable matters; and~~

~~(ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on~~

~~which the expert is expected to testify, and the substance of the expert's testimony.~~

(a) In General. A party that has made a disclosure under MCR 2.302(A)—or that has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing or

(ii) as ordered by the court.

~~(b) A party is under a duty seasonably to amend a prior response if the party obtains information on the basis of which the party knows that~~

~~(i) the response was incorrect when made; or~~

~~(ii) the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~

(b~~c~~) Order, Agreement, or Request. A duty to supplement disclosures or responses may be imposed by order of the court, agreement of the parties, or at any time before trial through ~~new~~ requests for supplementation ~~of prior disclosures or responses~~.

(2) Failure to Supplement. If the court finds, by way of motion or otherwise, that a party has not ~~seasonably~~ supplemented disclosures or responses as required by this subrule, the court may enter an order as is just, including an order providing the sanctions stated in MCR 2.313(B), and, in particular, MCR 2.313(B)(2)(b).

(F) ~~Stipulations Regarding~~Changes to Discovery Procedure. ~~Unless the~~A court order~~s otherwise, the parties may by~~ or written and filed stipulation of the affected parties may:

(1) [Unchanged.]

(2) ~~modify the procedures of these rules for other methods of discovery, except that stipulations extending the time within which discovery may be sought or for responses to discovery may be made only with the approval of the court.~~ change the disclosure requirements in MCR 2.302(A) and the limits on interrogatories in MCR 2.309(A)(2); and

(3) modify or waive the other procedures of these rules regarding discovery so long as not inconsistent with a court order, but a stipulation may not change scheduling order deadlines without court approval.

(G) Signing of Disclosures, Discovery Requests, Responses, and Objections; Sanctions.

(1) In addition to any other signature required by these rules, every disclosure under MCR 2.302(A), every request for discovery, and every response or objection to such a request made by a party represented by an attorney shall be signed by at least one attorney of record. A party who is not represented by an attorney must sign the disclosure, request, response, or objection.

(2) If a disclosure, request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the disclosure, request, response, or objection, and another party need not take any action with respect to it until it is signed.

(3) The signature of the attorney or party constitutes a certification that he or she has read the disclosure, request, response, or objection, and that to the best of

the signer's knowledge, information, and belief formed after a reasonable inquiry ~~it is~~:

(a) the disclosure is

(i) complete and correct as of the time it is made; and

(ii~~a~~) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law.

(b) the discovery request, response, or objection is:

(i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(ii~~b~~) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(iii~~c~~) not unreasonable or unduly burdensome or expensive, given the needs of the case, the disclosure and discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(4) If a certification is made in violation of this rule, the court, on the motion of a party or on its own initiative, ~~shall~~may impose upon the person who made the certification, the party on whose behalf the disclosure, request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

(H) Filing and Service of Disclosure and Discovery Materials.

(1) Unless required by a particular rule, ~~requires filing of disclosure or discovery materials,~~ disclosures,

requests, responses, depositions, and other discovery materials may not be filed with the court except as follows:

(a) If ~~discovery~~the materials are to be used in connection with a motion, they must either be filed separately or be attached to the motion, response, or an accompanying affidavit.

(b) If ~~discovery~~the materials are to be used at trial, they must be made an exhibit ~~pursuant to~~under MCR 2.518 or MCR 3.930.

(c) The court may order disclosure or discovery materials to be filed.

(2) Copies of disclosure and discovery materials served under these rules must be served on all parties ~~to the action~~, unless the court has entered an order under MCR 2.107(F).

(3) On appeal, only disclosure and discovery materials that were filed or made exhibits are part of the record on appeal.

(4) MCR 2.316 governs r~~R~~emoval and destruction of disclosure and discovery materials ~~are governed by MCR 2.316~~.

RULE. 2.305 DISCOVERY SUBPOENA ~~FOR TAKING DEPOSITION~~TO A NON-PARTY.

(A) General Provisions.

(1) A represented party may issue a subpoena to a non-party for a deposition, production or inspection of documents, inspection of tangible things, or entry to land upon court order or after all parties have had a reasonable opportunity to obtain an attorney, as determined under MCR 2.306(A). An unrepresented party may move the court for issuance of non-party discovery subpoenas. MCR 2.306(B)(1)-(2) and (C)-(G) apply to a

subpoena under this rule. This rule governs discovery from a non-party under MCR 2.303(A)(4), 2.307, 2.310(D) or 2.315. MCR 2.506(A)(2) and (3) apply to any request for production of ESI. A subpoena for hospital records is governed by MCR 2.506(I).~~Subpoenas shall not be issued except in compliance with MCR 2.306(A)(1). After serving the notice provided for in MCR 2.303(A)(2), 2.306(B), or 2.307(A)(2), a party may have a subpoena issued in the manner provided by MCR 2.506 for the person named or described in the notice. Service on a party or a party's attorney of notice of the taking of the deposition of a party, or of a director, trustee, officer, or employee of a corporate party, is sufficient to require the appearance of the deponent; a subpoena need not be issued.~~

~~(2) The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated documents or other tangible things relevant to the subject matter of the pending action and within the scope of discovery under MCR 2.302(B). The procedures in MCR 2.310 apply to a party deponent.~~

(2~~3~~) A ~~deposition notice and a~~ subpoena ~~under this rule~~ may provide that ~~the deposition~~ it is solely for producing documents or other tangible things for inspection and copying, and that the party does not intend to examine the deponent. The subpoena shall specify whether an inspection is requested or whether the subpoena may be satisfied by delivering a copy of the requested documents. Any request for documents shall indicate that the subpoenaing party will pay reasonable copying costs.

(3) A subpoena shall provide a minimum of 14 days after service of the subpoena (or a shorter time if the court directs) for the requested act. The subpoenaing

party may file a motion to compel compliance with the subpoena under MCR 2.313(A). The motion must include a copy of the request and proof of service of the subpoena. The movant must serve the motion on the non-party as provided in MCR 2.105.

(4) A subpoena issued under this rule is subject to the provisions of MCR 2.302(C), and the court in which the action is pending or in which the subpoena is served, on timely motion made by a party or the subpoenaed non-party before the time specified in the subpoena for compliance, may:

(a)-(b) [Unchanged.]

(c) ~~condition denial of~~conditionally deny the motion on prepayment by the ~~person~~party on whose behalf the subpoena is issued of the reasonable cost of producing ~~books, papers,~~ documents~~,~~ or other tangible things.

The non-party's obligation to respond to the subpoena is stayed until the motion is resolved.

(5) Service of a subpoena on the deponent must be made as provided in MCR 2.506(G). A copy of the subpoena must be served on all other parties on the date of issuance~~in the same manner as the deposition notice~~.

(6) In a subpoena for a non-party deposition, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The subpoena shall be served at least 14 days prior to the scheduled deposition. No later than 10 days after being served with the subpoena, the subpoenaed entity may serve objections, or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or

move to enforce the subpoena. The organization named must designate one or more officers, directors, managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The deposition of each produced witness may not exceed one day of seven hours. The persons designated shall testify to matters known or reasonably available to the organization.

(7) Upon written request from another party and payment of reasonable copying costs, the subpoenaing party shall provide copies of documents received pursuant to a subpoena.

~~(B) Inspection and Copying of Documents. A subpoena issued under subrule (A) may command production of documents or other tangible things, but the following rules apply:~~

~~(1) The subpoena must be served at least 14 days before the time for production. The subpoenaed person may, not later than the time specified in the subpoena for compliance, serve on the party serving the subpoena written objection to inspection or copying of some or all of the designated materials.~~

~~(2) If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials without an order of the court in which the action is pending.~~

~~(3) The party serving the subpoena may, with notice to the deponent, move for an order compelling production of the designated materials. MCR 2.313(A)(5) applies to motions brought under this subrule.~~

(B~~C~~) Place of ~~Examination~~ Compliance.

~~(1)~~ Except for a subpoena for delivery of copies of documents only under subrule (A)(2), a~~A deponent~~ non-

party served with a subpoena in Michigan may be required to ~~attend an examination~~comply with the subpoena only in the county where the deponent resides, is employed, has its principal place of business or transacts relevant business; or at the location of the things to be inspected or land to be entered; ~~in person~~ or at another convenient place specified by order of the court.

~~(2) In an action pending in Michigan, the court may order a nonresident plaintiff or an officer or managing agent of the plaintiff to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the defendant of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

~~(3) If it is shown that the deposition of a nonresident defendant cannot be taken in the state where the defendant resides, the court may order the defendant or an officer or managing agent of the defendant to appear for a deposition at a designated place in Michigan or elsewhere on terms and conditions that are just, including payment by the plaintiff of the reasonable expenses of travel, meals, and lodging incurred by the deponent in attending.~~

(C~~D~~) Petition to Courts Outside Michigan ~~to Compel Testimony~~. When the place of ~~examination~~ compliance is in another state, territory, or country, the subpoenaing party ~~desiring to take the deposition~~ may petition a court of that state, territory, or country for a subpoena or equivalent process ~~to require the deponent to attend the examination~~.

(D~~E~~) Action Pending in Another Country. An officer or a person authorized by the laws of another country to ~~take a deposition~~issue a subpoena in Michigan, with or without a commission, in an action pending in a court of that country may submit an application to a

court of record in the county in which the ~~deponent~~ subpoenaed person resides, is employed, has its principal place of business, transacts relevant business ~~in person~~, or is found, for a subpoena ~~to compel the deponent to give testimony~~. The court may hear and act on the application with or without notice, as the court directs.

(E~~F~~) [Relettered but otherwise unchanged.]

RULE 2.306. DEPOSITIONS ON ORAL EXAMINATION OF A PARTY.

(A) When Depositions May Be Taken; Limits.

(1) Subject to MCR 2.301(A) and these rules, a~~A~~fter commencement of the action, a party may take the testimony of a ~~person, including a~~ party~~,~~ by deposition on oral examination. Leave of court, granted with or without notice, must be obtained ~~only~~ if the plaintiff seeks to take a deposition before the defendant has had a reasonable time to obtain an attorney. A reasonable time is deemed to have elapsed if:

(a)-(e) [Unchanged.]

(2) [Unchanged.]

(3) A deposition may not exceed one day of seven hours.

(B) Notice of Examination; ~~Subpoena;~~ Production of Documents and Things.

(1) A party desiring to take the deposition of a ~~person~~ party on oral examination must give reasonable notice in writing to every other party to the action. The notice must state:

(a)-(b) [Unchanged.]

~~If the subpoena to be served directs the deponent to produce documents or other tangible things, the desig-~~

~~nation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice.~~

~~(2) On motion for good cause, the court may extend or shorten the time for taking the deposition. The court may regulate the time and order of taking depositions to best serve the convenience of the parties and witnesses and the interests of justice.~~

~~(3) The attendance of witnesses may be compelled by subpoena as provided in MCR 2.305.~~

(2~~4~~) The notice ~~to a party deponent~~ may be accompanied by a request for the production of documents and tangible things at the taking of the deposition. MCR 2.310 applies to the request.

(3~~5~~) In a notice ~~and subpoena~~, a party may name as the deponent a public or private corporation, partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. The notice shall be served at least 14 days prior to the scheduled deposition. No later than 10 days after being served with the notice, the noticed entity may serve objections or file a motion for protective order, upon which the party seeking discovery may either proceed on topics as to which there was no objection or motion, or move to enforce the notice. The organization named must designate one or more officers, directors, or managing agents, or other persons, who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The deposition of each produced witness may not exceed one day of seven hours. ~~A subpoena must advise a nonparty organization of its duty to make the designation.~~ The persons designated shall testify to matters known or reason-

ably available to the organization. This subrule does not preclude taking a deposition by another procedure authorized in these rules.

(C)-(G) [Unchanged.]

RULE 2.307. DEPOSITIONS ON WRITTEN QUESTIONS.

(A) Serving Questions; Notice.

(1) Under the same circumstances and under the same limitations as set out in MCR 2.305(A) and MCR 2.306(A), a party may take the testimony of a person, including a party, by deposition on written questions. The attendance of ~~the~~non-party witnesses may be compelled by the use of a subpoena as provided in MCR 2.305. A deposition on written questions may be taken of a public or private corporation or partnership or association or governmental agency in accordance with the provisions of MCR 2.305(A)(6) or 2.306(B)(3~~5~~).

(2)-(3) [Unchanged.]

(B) [Unchanged.]

RULE 2.309. INTERROGATORIES TO PARTIES.

(A) Availability; Procedure for Service; Limits.

(1) A party may serve on another party written interrogatories to be answered by the party served or, if the party served is a public or private corporation, partnership, association, or governmental agency, by an officer or agent. Subject to MCR 2.302(B), i~~I~~nterrogatories may, without leave of court, be served:

(~~1~~a) on the plaintiff after commencement of the action or

(~~2~~b) on a defendant with or after the service of the summons and complaint on that defendant.

(2) Each separately represented party may serve no more than twenty interrogatories upon each party. A discrete subpart of an interrogatory counts as a separate interrogatory.

(B)-(E) [Unchanged.]

RULE 2.310. REQUESTS FOR PRODUCTION OF DOCUMENTS AND OTHER THINGS; ENTRY ON LAND FOR INSPECTION AND OTHER PURPOSES.

(A) Definitions. For the purpose of this ~~rule~~subchapter,

(1) "Documents" includes writings, drawings, graphs, charts, photographs, ~~phono records~~sound recordings, images, and other data or data compilations ~~from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form~~stored in any medium, including ESI.

(2) "ESI" means electronically stored information, regardless of format, system, or properties.

(3~~2~~) [Renumbered but otherwise unchanged.]

(B)-(C) [Unchanged.]

~~(D) Request to Nonparty.~~

~~(1) A request to a nonparty may be served at any time, except that leave of the court is required if the plaintiff seeks to serve a request before the occurrence of one of the events stated in MCR 2.306(A)(1).~~

~~(2) The request must be served on the person to whom it is directed in the manner provided in MCR 2.105, and a copy must be served on the other parties.~~

~~(3) The request must~~

~~(a) list the items to be inspected and tested or sampled, either by individual item or by category, and describe each item and category with reasonable particularity,~~

~~(b) specify a reasonable time, place, and manner of making the inspection and performing the related acts, and~~

~~(c) inform the person to whom it is directed that unless he or she agrees to allow the inspection or entry at a reasonable time and on reasonable conditions, a motion may be filed seeking a court order to require the inspection or entry.~~

~~(4) If the person to whom the request is directed does not permit the inspection or entry within 14 days after service of the request (or a shorter time if the court directs), the party seeking the inspection or entry may file a motion to compel the inspection or entry under MCR 2.313(A). The motion must include a copy of the request and proof of service of the request. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.~~

~~(5) The court may order the party seeking discovery to pay the reasonable expenses incurred in complying with the request by the person from whom discovery is sought.~~

~~(6) This rule does not preclude an independent action against a nonparty for production of documents and other things and permission to enter on land or a subpoena to a nonparty under MCR 2.305.~~

RULE 2.312. REQUEST FOR ADMISSION.

(A) Availability; Scope. Within the time for completion of discovery, a party may serve on another party a written request for the admission of the truth of a

matter within the scope of MCR 2.302(B) stated in the request that relates to statements or opinions of fact or the application of law to fact, including the genuineness of documents described in the request. Copies of the documents must be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request must clearly identify in the caption and before each request that it is a Request for Admission. Each matter of which an admission is requested must be stated separately.

(B)-(F) [Unchanged.]

RULE 2.313. FAILURE TO SERVE DISCLOSURE OR TO PROVIDE OR TO PERMIT DISCOVERY; SANCTIONS.

(A) Motion for Order Compelling Disclosure or Discovery. A party, on reasonable notice to other parties and all persons affected, may apply for an order compelling disclosure or discovery as follows:

(1) Appropriate Court. A motion for an order under this rule may be made to the court in which the action is pending, or, as to a matter relating to a deposition in, or non-party subpoena served outside of, the county where the action is pending, to a court in ~~the~~ that county ~~or district where the deposition is being taken~~.

(2) Motion.

(a) To Compel Disclosure. If a party fails to serve a disclosure required by MCR 2.302(A), another party may move to compel disclosure and for appropriate sanctions.

(b) To Compel Discovery. If

(i~~a~~) a deponent fails to answer a question propounded or submitted under MCR 2.306 or 2.307,

(iib) a corporation or other entity fails to make a designation under MCR 2.306(B)(35) or 2.307(A)(1),

(iiic) a party fails to answer an interrogatory submitted under MCR 2.309(A) and (B), or

(ivd) in response to a request for inspection submitted under MCR 2.310, a person fails to respond that inspection will be permitted as requested, or

(v) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(3) or 2.307(A)(1) to testify on behalf of a party fails to appear before the person who is to take his or her deposition, after being served with a proper notice, the party seeking discovery may move for an order compelling an answer, a designation, or inspection in accordance with the resquestcompliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) To compel compliance with a non-party discovery subpoena. If a recipient of a non-party discovery subpoena under MCR 2.305 fails to comply, the issuing party may move to compel compliance. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order. The motion must include a copy of the subpoena and proof of service of the subpoena. The movant must serve the motion on the person from whom discovery is sought as provided in MCR 2.105.

(3) [Unchanged.]

(4) Evasive or Incomplete Disclosure, Answer, or Response. For purposes of this subrule an evasive or incomplete disclosure, answer, or response is tomust be treated as a failure to disclose, answer, or respond.

(5) Award of Expenses of Motion.

(a) If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—, the court ~~shall~~may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct, or both, to pay to the moving party the reasonable expenses incurred as a result of the conduct and in ~~obtaining the order~~making the motion, including attorney fees, unless the court finds that the moving party filed the motion before attempting in good faith to obtain the disclosure or discovery without court action, the opposition to the motion was substantially justified, or ~~that~~ other circumstances make an award ~~of expenses~~ unjust.

(b) If the motion is denied, the court ~~shall~~may, after opportunity for hearing, require the moving party or the attorney advising the motion, or both, to pay to the person who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(c) If the motion is granted in part and denied in part, the court may, after opportunity for hearing, apportion the reasonable expenses incurred in relation to the motion among the parties and other persons in a just manner.

(6) Additional Sanctions. The court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).

(B) Failure to Comply With Order.

(1) [Unchanged.]

(2) Sanctions by Court in Which Action is Pending.

(a)-(e) [Unchanged.]

In lieu of or in addition to the foregoing orders, the court ~~shall~~may require the party failing to obey the order or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(C) ~~Expenses on~~ Failure to Disclose, Supplement, or Admit.

(1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by MCR 2.302(A) or (E), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(a) may order payment of the reasonable expenses, including attorney fees, caused by the failure;

(b) may inform the jury of the party's failure; and

(c) may impose other appropriate sanctions, including any of the orders listed in MCR 2.313(B)(2)(a)-(c).

(2) Failure to Admit. If a party denies the genuineness of a document, or the truth of a matter as requested under MCR 2.312, and if the party requesting the admission later proves the genuineness of the document or the truth of the matter, the requesting party may move for an order requiring the other party to pay the expenses incurred in making that proof, including attorney fees. The court shall enter the order unless it finds that

(1)-(4) [Relettered (a)-(d) but otherwise unchanged.]

~~(D) Failure of Party to Attend at Own Deposition, to Serve Answers to Interrogatories, or to Respond to Request for Inspection.~~

~~(1) If a party; an officer, director, or managing agent of a party; or a person designated under MCR 2.306(B)(5) or 2.307(A)(1) to testify on behalf of a party fails~~

~~(a) to appear before the person who is to take his or her deposition, after being served with a proper notice;~~

~~(b) to serve answers or objections to interrogatories submitted under MCR 2.309, after proper service of the interrogatories; or~~

~~(c) to serve a written response to a request for inspection submitted under MCR 2.310, after proper service of the request, on motion, the court in which the action is pending may order such sanctions as are just. Among others, it may take an action authorized under subrule (B)(2)(a), (b), and (c).~~

~~(2) In lieu of or in addition to an order, the court shall require the party failing to act or the attorney advising the party, or both, to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.~~

~~(3) A failure to act described in this subrule may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has moved for a protective order as provided by MCR 2.302(C).~~

(D~~E~~) Failure to Preserve ESI. ~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information sys-~~

~~tem.~~ If ESI that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice or

(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation, may order appropriate remedies, including:

(a) a presumption that the lost information was unfavorable to the party;

(b) a jury instruction directing that the jury may or must presume the information was unfavorable to the party; or

(c) dismissal of the action or entry of a default judgment.

RULE 2.314. DISCOVERY OF MEDICAL INFORMATION CONCERNING PARTY.

(A) [Unchanged.]

(B) Privilege; Assertion; Waiver; Effects.

(1) A party who has a valid privilege may assert the privilege and prevent discovery of medical information relating to his or her mental or physical condition. The privilege must be asserted in the party's disclosure under 2.302(A), in written response to a request for production of documents under MCR 2.310, in answers to interrogatories under MCR 2.309(B), before or during the taking of a deposition, or by moving for a protective order under MCR 2.302(C). A privilege not

timely asserted is waived in that action, but is not waived for the purposes of any other action.

(2) Unless the court orders otherwise, if a party asserts that the medical information is subject to a privilege and the assertion has the effect of preventing discovery of medical information that must be disclosed or is otherwise discoverable under MCR 2.302(B), the party may not thereafter present or introduce any physical, documentary, or testimonial evidence relating to the party's medical history or mental or physical condition.

(C)-(E) [Unchanged.]

RULE 2.316. REMOVAL OF DISCLOSURE AND DISCOVERY MATERIALS FROM FILE.

(A) Definition. For the purpose of this rule, "disclosure material" means disclosures under MCR 2.302(A) and "discovery material" means deposition transcripts, audio or video recordings of depositions, interrogatories, documents produced during discovery and made a part of the court file, and answers to interrogatories and requests to admit.

(B) Removal from File. In civil actions, disclosure and discovery materials may be removed from files and destroyed in the manner provided in this rule.

(1) By Stipulation. If the parties stipulate to the removal of disclosure and discovery materials from the file, the clerk may remove the materials and dispose of them in the manner provided in the stipulation.

(2) By the Clerk.

(a) The clerk may initiate the removal of disclosure and discovery materials from the file in the following circumstances.

(i)-(ii) [Unchanged.]

(b) The clerk shall notify the parties and counsel of record, when possible, that disclosure and discovery materials will be removed from the file of the action and destroyed on a specified date at least 28 days after the notice is served unless within that time

(i) the party who filed the disclosure or discovery materials retrieves them from the clerk's office or

(ii) a party files a written objection to removal of disclosure or discovery materials from the file.

If an objection to removal of disclosure or discovery materials is filed, the ~~discovery~~ materials may not be removed unless the court so orders after notice and opportunity for the objecting party to be heard. The clerk shall schedule a hearing and give notice to the parties. The rules governing motion practice apply.

(3) By Order. On motion of a party, or on its own initiative after notice and hearing, the court may order disclosure and discovery materials removed at any other time on a finding that the materials are no longer necessary. However, no disclosure or discovery materials may be destroyed by court personnel or the clerk until the periods set forth in subrule (2)(a)(i) or (2)(a)(ii) have passed.

RULE 2.401. PRETRIAL PROCEDURES; CONFERENCES; SCHEDULING ORDERS.

(A) [Unchanged.]

(B) Early Scheduling Conference and Order.

(1) Early Scheduling Conference. The court may direct that an early scheduling conference be held. ~~In addition to those considerations enumerated in subrule (C)(1), d~~During this conference the court should consider any matters that will facilitate the fair and expeditious disposition of the action, including:

(a) whether jurisdiction and venue are proper or whether the case is frivolous;~~,~~

(b) whether to refer the case to an alternative dispute resolution procedure under MCR 2.410;~~,~~

(c) the complexity of a particular case and enter a scheduling order setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case;~~, and~~

(d) disclosure, discovery, preservation, and claims of privilege of ~~electronically stored information.~~ESI;

(e) the simplification of the issues;

(f) the amount of time necessary for discovery, staging of discovery, and any modification to the extent of discovery;

(g) the necessity or desirability of amendments to the pleadings;

(h) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;

(i) the form and content of the pretrial order;

(j) the timing of disclosures under MCR 2.302(A);

(k) the limitation of the number of expert witnesses, whether to have a separate discovery period for experts, whether to require preparation and disclosure of testifying expert reports, and whether to specify expert disclosure deadlines;

(l) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;

(m) the possibility of settlement;

(n) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;

(o) the identity of the witnesses to testify at trial;

(p) the estimated length of trial;

(q) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A); and

(r) other matters that may aid in the disposition of the action.

(2) Scheduling Order.

(a) At an early scheduling conference under subrule (B)(1)~~, a pretrial conference under subrule (C)~~, or at such other time as the court concludes that such an order would facilitate the progress of the case, the court shall establish times for events and adopt other provisions the court deems appropriate, including

(i)-(ii) [Unchanged.]

(iii) what, if any, changes should be made in the timing, form, or requirement for disclosures under MCR 2.302(A),

(iv) what, if any, changes should be made to the limitations on discovery imposed under these rules and whether other presumptive limitations should be established,

(v~~iii~~) the completion of discovery,

(vi~~iv~~) the exchange of witness lists under subrule ~~(I)~~ (H)(2)(h), and

(vii~~v~~) the scheduling of a pretrial conference, a settlement conference, or trial.

More than one such order may be entered in a case.

(b) [Unchanged.]

(c) The scheduling order also may include provisions concerning initial disclosure, discovery of ~~electronically stored information~~ESI, any agreements the parties reach for asserting claims of privilege or for

protection as trial-preparation material after production, preserving discoverable information, and the form in which ~~electronically stored information~~ESI shall be produced.

(d) [Unchanged.]

(C) Discovery Planning.

(1) Upon court order or written request by another party, the parties must confer among themselves and prepare a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared are jointly responsible for arranging the conference and for attempting in good faith to agree on a proposed discovery plan.

(2) A proposed discovery plan must address all disclosure and discovery matters, including the matters set forth in subrule (B), and propose deadlines for completion of disclosure and discovery. The parties must show good cause to request a change in deadlines set by a scheduling order.

(3) A discovery plan, noting any disagreements between the parties, may be submitted to the court as part of a stipulation or motion. The court may enter an order governing disclosure, discovery, and any other case management matter the court deems appropriate.

(4) If a party or attorney fails to participate in good faith in developing and submitting a proposed discovery plan, the court may enter an appropriate sanction, including payment of attorney fees and costs caused by the failure.

~~(C) Pretrial Conference; Scope.~~

~~(1) At a conference under this subrule, in addition to the matters listed in subrule (B)(1), the court and the attorneys for the parties may consider any matters that will facilitate the fair and expeditious disposition of the action, including:~~

~~(a) the simplification of the issues;~~

~~(b) the amount of time necessary for discovery;~~

~~(c) the necessity or desirability of amendments to the pleadings;~~

~~(d) the possibility of obtaining admissions of fact and of documents to avoid unnecessary proof;~~

~~(e) the limitation of the number of expert witnesses;~~

~~(f) the consolidation of actions for trial, the separation of issues, and the order of trial when some issues are to be tried by a jury and some by the court;~~

~~(g) the possibility of settlement;~~

~~(h) whether mediation, case evaluation, or some other form of alternative dispute resolution would be appropriate for the case, and what mechanisms are available to provide such services;~~

~~(i) the identity of the witnesses to testify at trial;~~

~~(j) the estimated length of trial;~~

~~(k) whether all claims arising out of the transaction or occurrence that is the subject matter of the action have been joined as required by MCR 2.203(A);~~

~~(l) other matters that may aid in the disposition of the action.~~

~~(2) Conference order. If appropriate, the court shall enter an order incorporating agreements reached and decisions made at the conference.~~

(D)-(G) [Unchanged.]

(H) ~~Conference After Discovery~~ Final Pretrial Conference and Order.

(1) If the court finds at a final pretrial conference ~~held after the completion of discovery~~ that due to a lack of reasonable diligence by a party the action is not ready for trial, the court may enter an appropriate

order to facilitate preparation of the action for trial and may require the offending party to pay the reasonable expenses, including attorney fees, caused by the lack of diligence.

(2) The court may hold a final pretrial conference to facilitate preparation of the action for trial and to formulate a trial plan. The conference may be combined with a settlement conference. At least one lead attorney who will conduct the trial for each party and any unrepresented party shall attend the conference. At the conference the parties may discuss the following, and the court may order the parties to prepare, either before or after the conference, a joint final pretrial order that may provide for:

(a) scheduling motions in limine;

(b) a concise statement of plaintiff's claims, including legal theories;

(c) a concise statement of defendant's defenses and claims, including crossclaims and claims of third-party plaintiffs, and defenses of cross defendants or third-party defendants, including legal theories;

(d) a statement of any stipulated facts or other matters;

(e) issues of fact to be litigated;

(f) issues of law to be litigated;

(g) evidence problems likely to arise at trial;

(h) a list of witnesses to be called unless reasonable notice is given that they will not be called, and a list of witnesses that may be called, listed by category as follows:

(i) live lay witnesses;

(ii) lay deposition transcripts or videos including resolving objections and identifying portions to be read or played;

(iii) live expert witnesses; and

(iv) expert deposition transcripts or videos including resolving objections and identifying portions to be read or played.

(i) a list of exhibits with stipulations or objections to admissibility;

(j) an itemized statement of damages and stipulations to those items not in dispute;

(k) estimated length of trial:

(i) time for plaintiff's proofs;

(ii) time for defendant's proofs; and

(iii) whether it is a jury or nonjury trial.

(l) trial date and schedule;

(m) whether the parties will agree to arbitration;

(n) a statement that counsel have met, conferred and considered the possibility of settlement and alternative dispute resolution, giving place, time and date and the current status of these negotiations as well as plans for further negotiations;

(o) rules governing conduct of trial;

(p) jury instructions;

(q) trial briefs;

(r) voir dire; and

(s) any other appropriate matter.

(I) [Unchanged.]

(J) ESI Conference, Plan and Order.

(1) ESI Conference. Where a case is reasonably likely to include the discovery of ESI, parties may agree to an ESI Conference, the judge may order the parties to hold an ESI Conference, or a party may file a motion requesting an ESI Conference. At the ESI Conference, the parties shall consider:

(a) any issues relating to preservation of discoverable information, including adoption of a preservation plan for potentially relevant ESI;

(b) identification of potentially relevant types, categories, and time frames of ESI;

(c) identification of potentially relevant sources of ESI and whether the ESI is reasonably accessible;

(d) disclosure of the manner in which ESI is maintained;

(e) implementation of a preservation plan for potentially relevant ESI;

(f) the form in which each type of ESI will be produced;

(g) what metadata, if any, will be produced;

(h) the time to produce ESI;

(i) the method for asserting or preserving claims of privilege or protection of trial preparation materials, including whether such claims may be asserted after production;

(j) privilege log format and related issues;

(k) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(l) whether allocation among the parties of the expense of production is appropriate; and

(m) any other issue related to the discovery of ESI.

(2) ESI Discovery Plan. Within 14 days after an ESI Conference, the parties shall file with the court an ESI discovery plan and a statement concerning any issues upon which the parties cannot agree. Unless the parties agree otherwise, the attorney for the plaintiff shall be responsible for submitting the ESI discovery plan to the court. The ESI discovery plan may include:

(a) a statement of the issues in the case and a brief factual outline;

(b) a schedule of discovery including discovery of ESI;

(c) a defined scope of preservation of information and appropriate conditions for terminating the duty to preserve prior to the final resolution of the case;

(d) the forms in which ESI will be produced; and

(e) the sources of any ESI that are not reasonably accessible because of undue burden or cost.

(3) ESI Competence. Attorneys who participate in an ESI Conference or who appear at a conference addressing ESI issues must be sufficiently versed in matters relating to their clients' technological systems to competently address ESI issues; counsel may bring a client representative or outside expert to assist in such discussions.

(4) ESI Order. The court may enter an order governing the discovery of ESI pursuant to the parties' ESI discovery plan, upon motion of a party, by stipulation of the parties, or on its own.

RULE 2.411. MEDIATION.

(A)-(G) [Unchanged.]

(H) Mediation of Discovery Disputes. The parties may stipulate to or the court may order the mediation of discovery disputes (unless precluded by MCR 3.216[C][3]). The discovery mediator may by agreement of the parties be the same mediator otherwise selected under subrule (B). All other provisions of this rule shall apply to a discovery mediator except:

(1) The order under subrule (C)(1) will specify the scope of issues or motions referred to the discovery mediator, or whether the mediator is appointed on an ongoing basis.

(2) The mediation sessions will be conducted as determined by the mediator, with or without parties, in any manner deemed reasonable and consistent with these rules and any court order.

(3) The court may specify that discovery disputes must first be submitted to the mediator before being filed as a motion unless there is a need for expedited attention by the court. In such cases, the moving party shall certify in the motion that it is filed only after failure to resolve the dispute through mediation or due to a need for immediate attention by the court.

(4) In cases involving complex issues of ESI, the court may appoint an expert under MRE 706. By stipulation of the parties, the court may also designate the expert as a discovery mediator of ESI issues under this rule, in which case the parties should address in the order appointing the mediator whether the restrictions of MCR 2.411(C)(3) and 2.412(D) should be modified to expand the scope of permissible communications with the court.

RULE 2.506. SUBPOENA; ORDER TO ATTEND.

(A) Attendance of Party or Witness.

(1) The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and/or to produce ~~notes, records,~~ documents, ~~photographs,~~ or other portable tangible things ~~as specified~~. A request for documents or tangible things under this rule must comply with MCR 2.302(B) and any scheduling order. A person or entity subpoenaed under this rule may file written objections to the request for documents before the designated time for appearance; such objections

shall be adjudicated under subrule (H). This subrule does not apply to discovery subpoenas (MCR 2.305) or requests for documents to a party where discovery is available (MCR 2.310). A copy of any subpoena for documents or tangible things shall be provided to the opposing party or his/her counsel.

(2) A subpoena may specify the form or forms in which ~~electronically stored information~~ESI is to be produced, subject to objection. If the subpoena does not so specify, the person responding to the subpoena must produce the information in a form or forms in which the person ordinarily maintains it, or in a form or forms that are reasonably usable. A person producing ~~electronically stored information~~ESI need only produce the same information in one form.

(3) A person responding to a subpoena need not provide discovery of ~~electronically stored information~~ESI from sources that the person identifies as not reasonably accessible because of undue burden or cost. In a hearing or submission under subrule (H), the person responding to the subpoena must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of MCR 2.302(C). The court may specify conditions for such discovery, including who bears the cost.

(4)-(5) [Unchanged.]

(B) [Unchanged.]

(C) Notice to Witness of Required Attendance.

(1) The signer of a subpoena must issue it for service on the witness sufficiently in advance of the trial or hearing to give the witness reasonable notice of the

date and time the witness is to appear. Unless the court orders otherwise, the subpoena must be served at least 2 days before the ~~witness is to~~ appearance or 14 days before the appearance when documents are requested.

(2)-(3) [Unchanged.]

(D) Form of Subpoena. A subpoena must:

(1)-(5) [Unchanged.]

(6) state the file number~~designation~~ assigned by the court; and

(7) [Unchanged.]

The state court administrator shall develop and approve a subpoena form for statewide use.

(E) [Unchanged.]

(F) Failure of Party to Attend. If a party or an officer, director, or managing agent of a party fails to attend or produce documents or other tangible evidence pursuant to a subpoena or an order to attend without having served written objections, the court may:

(1)-(6) [Unchanged.]

(G) [Unchanged.]

(H) Hearing on Subpoena or Order to Attend.

(1) A person served with a subpoena or order to attend under this rule may appear before the court in person or by writing to explain why the person should not be compelled to comply with the subpoena, order to attend, or directions of the party having it issued.

(2)-(3) [Unchanged.]

(4) A person must comply with the command of a subpoena unless relieved by order of the court or written direction of the person who had the subpoena issued except that any obligation to produce docu-

ments, if timely written objections are served, is stayed pending resolution under this subrule.

(5) Any party may move to quash or modify a subpoena by motion under MCR 2.302(C) filed before the time specified in the subpoena, and serve same upon the nonparty, in which case the non-party's obligation to respond is stayed until the motion is resolved.

(I) [Unchanged.]

RULE 3.201. APPLICABILITY OF RULES.

(A)-(B) [Unchanged.]

(C) Except as otherwise provided in this subchapter, practice and procedure in domestic relations actions is governed by other applicable provisions of the Michigan Court Rules, except the number of interrogatories set forth in MCR 2.309(A)(2) shall be thirty-five.

(D) [Unchanged.]

RULE 3.206. INITIATING A CASE.

(A)-(B) [Unchanged.]

(C) Verified Statement and Disclosure Form.

(1) [Unchanged.]

(2) Verified Financial Information Form. Unless waived in writing by the parties, or unless a settlement agreement or consent judgment of divorce or other final order disposing of the case has been signed by both parties at the time of filing, and except as set forth below, each party must serve a Verified Financial Information Form (as provided by SCAO) within 28 days following the date of service of defendant's initial responsive pleading. If a party is self-represented and his or her address is not disclosed due to domestic violence, the parties' disclosure forms will be ex-

changed at the first scheduled matter involving the parties or in another manner as specified by the court or stipulated to by the parties. A party who is a victim of domestic violence, sexual assault or stalking by another party to the case, may omit any information which might lead to the location of where the victim lives or works, or where a minor child may be found. Failing to provide this disclosure may be addressed by the court or by motion consistent with MCR 2.313. The disclosure form does not preclude other discovery. A proof of service must be filed when disclosure forms are served.

(32) The information in the ~~verified~~ statements and disclosure forms is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement or disclosure forms that is served on the other party.

(43) If any of the information required to be in the ~~verified~~ statements or disclosure forms is omitted, the party seeking relief must explain the reasons for the omission in a sworn affidavit, to be filed with the court by the due date of the statement or disclosure form.

(5) A party who has served a disclosure form must supplement or correct its disclosure as ordered by the court or otherwise in a timely manner if the party learns that in some material respect the disclosure form is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the action or in writing.

(D) Attorney Fees and Expenses.

(1) [Unchanged.]

(2) A party who requests attorney fees and expenses must allege facts sufficient to show that:

(a) the party is unable to bear the expense of the action, including the expense of engaging in discovery appropriate for the matter, and that the other party is able to pay, or

(b) the attorney fees and expenses were incurred because the other party refused to comply with a previous court order, despite having the ability to comply, or engaged in discovery practices in violation of these rules.

RULE 3.229. FILING CONFIDENTIAL MATERIALS.

(A) If a party or interested party files any of the following items with the court, the items shall be served on the other parties in the case and maintained in a nonpublic file in accordance with subrule (B):

(1) verified statements and disclosure forms under MCR 3.206(B);

(2) child protective services reports;

(3) psychological evaluations;

(4) custody evaluations;

(5) medical, mental health, and academic records of a minor;

(6) any part of a confidential file under MCR 3.903(A)(3);

(7) any item designated as confidential or nonpublic by statute or court rule; and

(8) any other document which, in the court's discretion, should not be part of the public record.

(B) Any item filed under subrule (A) is nonpublic and must be maintained separately from the legal file. The nonpublic file must be made available for any appellate review.

RULE 3.922. PRETRIAL PROCEDURES IN DELINQUENCY AND CHILD PROTECTION PROCEEDINGS.

(A) Discovery.

(1) The following materials are discoverable as of right in all proceedings and shall be produced no less than 21 days before trial, even without a discovery request~~provided they are requested no later than 21 days before trial unless the interests of justice otherwise dictate~~:

(a) [Unchanged.]

(b) all written or recorded ~~nonconfidential~~ statements made by any person with knowledge of the events in possession or control of petitioner or a law enforcement agency, including, but not limited to, police reports, allegations of neglect and/or abuse included on a complaint submitted to Child Protective Services, and Child Protective Services investigation reports, except that the identity of the reporting person shall be protected in accordance with MCL 722.625;

(c) the names of all prospective witnesses;

(d)-(e) [Unchanged.]

(f) the results of all scientific, medical, psychiatric, psychological, or other expert tests, ~~or~~ experiments, or evaluations, including the reports or findings of all experts, that are relevant to the subject matter of the petition;

(g) the results of any lineups or showups, including written reports or lineup sheets; ~~and~~

(h) all search warrants issued in connection with the matter, including applications for such warrants, affidavits, and returns or inventories.;

(i) any written, video, or recorded statement that pertains to the case and made by a witness whom the party may call at trial;

(j) the curriculum vitae of an expert the party may call at trial and either a report prepared by the expert containing, or a written description of, the substance of the proposed testimony of the expert, the expert's opinion, and the underlying bases of that opinion; and

(k) any criminal record that the party may use at trial to impeach a witness.

(2)-(3) [Unchanged.]

(4) Failure to comply with subrules (A)(1) and (A)(2) may result in such sanctions~~, as applicable, as set forth in~~ in keeping with those assessable under MCR 2.313.

(B) Discovery and Disclosure in Delinquency Matters.

(1) In delinquency matters, in addition to disclosures required by provisions of law and as required or allowed by subrule (A)(1)-(3), a party shall provide all other parties the following, which are discoverable as of right and, even without a discovery request, shall be produced no less than 21 days before trial:

(a) a description or list of criminal convictions, known to the respondent's attorney or prosecuting attorney, of any witness whom the party may call at trial;

(b) any exculpatory information or evidence known to the prosecuting attorney;

(c) any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case even if that person is not a prospective witness at trial; and

(d) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

(2) In delinquency matters, notwithstanding any other provision of this rule, there is no right to have

disclosed or to discover information or evidence that is protected by constitution, statute, or privilege, including information or evidence protected by a respondent's right against self-incrimination, except as provided in subrule (B)(3).

(3) In delinquency matters, if a respondent demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the court shall conduct an in camera inspection of the records.

(a) If the privilege is absolute, and the privilege holder refuses to waive the privilege to permit an in camera inspection, the court shall suppress or strike the privilege holder's testimony.

(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to respondent's counsel. If the privilege is absolute and the privilege holder refuses to waive the privilege to permit disclosure, the court shall suppress or strike the privilege holder's testimony.

(c) Regardless of whether the court determines that the records should be made available to the respondent, the court shall make findings sufficient to facilitate meaningful appellate review.

(d) The court shall seal and preserve the records for review in the event of an appeal:

(i) by the respondent, on an interlocutory basis or following conviction, if the court determines that the records should not be made available to the defense or

(ii) by the prosecution, on an interlocutory basis, if the court determines that the records should be made available to the defense.

(e) Records disclosed under this rule shall remain in the exclusive custody of counsel for the parties, shall be used only for the limited purpose approved by the court, and shall be subject to such other terms and conditions as the court may provide.

(f) Excision. When some parts of material or information are discoverable and other parts are not discoverable, the party must disclose the discoverable parts and may excise the remainder. The party must inform the other party that nondiscoverable information has been excised and withheld. On motion, the court must conduct a hearing in camera to determine whether the reasons for excision are justifiable. If the court upholds the excision, it must seal and preserve the record of the hearing for review in the event of an appeal.

(4) At delinquency dispositions, reviews, designation hearings, hearings on alleged violation of court orders or probation, and detention hearings, the following shall be provided to the respondent, respondent's counsel, and the prosecuting attorney no less than seven (7) days before the hearing:

(a) assessments and evaluations to be considered by the court during the hearing;

(b) documents including but not limited to police reports, witnesses statements, reports prepared by probation officers, reports prepared by intake officers, and reports prepared by placement/detention staff to be considered by the court during the hearing; and

(c) predisposition reports and documentation regarding recommendations in the report including but not limited to documents regarding restitution.

(5) Failure to comply with subrules (B)(1) and (B)(4) may result in sanctions in keeping with those assessable under MCR 2.313.

(B)-(E) [Relettered (C)-(F) but otherwise unchanged.]

RULE 3.973. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Evidence; Reports.

(1)-(4) [Unchanged.]

(5) Reports in the Agency's case file, including but not limited to case services plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screening results, contracted service provider reports, and parenting time logs shall be provided to the court and parties no less than seven (7) days before the hearing.

(6~~5~~) [Renumbered but otherwise unchanged.]

(F)-(J) [Unchanged.]

RULE 3.975. POST-DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(D) [Unchanged.]

(E) Procedure. Dispositional review hearings must be conducted in accordance with the procedures and rules of evidence applicable to the initial dispositional hearing. The Agency shall provide to all parties all reports in its case file, including but not limited to initial and updated case service plans, treatment plans, psychological evaluations, psychiatric evaluations, substance abuse evaluations, drug and alcohol screens, therapists' reports, contracted service provider reports, and parenting time logs. The reports shall be provided to the parties at least seven (7) days before the hearing. The reports that are filed with the court must be offered into evidence. ~~The report of the agency that is filed with the court must be accessible to~~

~~the parties and offered into evidence.~~ The court shall consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing. The court, on request of a party or on its own motion, may accelerate the hearing to consider any element of a case service plan. The court, upon receipt of a local foster care review board's report, shall include the report in the court's confidential social file. The court shall ensure that all parties have had the opportunity to review the report and file objections before a dispositional order, dispositional review order, or permanency planning order is entered. The court may at its discretion include recommendations from the report in its orders.

(F)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1)-(3) [Unchanged.]

(4) Written reports in the Agency case file, including but not limited to case service plans, treatment plans, substance abuse evaluations, psychological evaluations, therapists' reports, drug and alcohol screens, contracted service provider reports, and parenting time logs, shall be provided to the court and parties no less than seven (7) days before the hearing.

(E) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(E) [Unchanged.]

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) [Unchanged.]

(2) Discovery and Time for Disclosures and Hearing on Petition. Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(G) [Unchanged.]

(H) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

(1) [Unchanged.]

(2) Discovery, Prehearing Disclosures, and Evidence. Parties shall make disclosures as detailed in MCR 3.922(A) at least 21 days prior to the termination hearing and have rights to discovery consistent with that rule. The Michigan Rules of Evidence do not apply at the hearing, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(3) [Unchanged.]

(I)-(K) [Unchanged.]

RULE 5.131. DISCOVERY GENERALLY.

(A) Civil Actions. ~~The general discovery rules apply in probate proceedings.~~

~~(B) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.~~ Discovery for civil actions in probate court is governed by subchapter 2.300.

(B) Proceedings.

(1) Discovery in General. With the exception of mandatory initial disclosures under MCR 2.302(A), the discovery rules in subchapter 2.300 apply in probate proceedings, and, except as otherwise ordered by the court, any interested person in a probate proceeding is considered a party for the purpose of applying discovery rules.

(2) Mandatory Initial Disclosure.

(a) Demand or Objection. Mandatory disclosures under MCR 2.302(A) are required in probate proceedings if, by the time of the first hearing on the petition initiating the proceeding:

(i) an interested person other than the petitioner files a demand for mandatory initial disclosure and properly serves the demand on all interested persons or

(ii) an interested person objects to or otherwise contests the petition, in writing or orally, properly serves any written objection or response on all interested persons, and the judge determines mandatory initial disclosure is appropriate.

When mandatory initial disclosures are required through demand or objection, and except as otherwise ordered by the court, such disclosures must be made by the petitioner and any demandant or objecting interested person.

(b) Court Order. At any time, on its own motion or on a motion filed by an interested person, the court may require:

(i) mandatory disclosures and designate those interested persons who must make disclosures or

(ii) in a proceeding with some parties already making disclosures, an additional interested person or persons to make disclosures.

(c) Time for Initial Disclosures.

(i) The petitioner must serve initial disclosures within 14 days after the first hearing on the petition subject to a demand or objection.

(ii) The demandant or objecting interested person must serve initial disclosures within the later of 14

days after the petitioner's disclosures are due or 28 days after the demand or objection is filed.

(iii) When mandatory disclosures are ordered pursuant to MCR 5.131(B)(2)(b)(ii), an interested person's disclosures are due within 21 days after the court's order.

(3) Scope of Discovery in Probate Proceedings. Discovery in a probate proceeding is limited to matters raised in any petitions or objections pending before the court.

Staff Comment: These amendments are based on a proposal created by a special committee of the State Bar of Michigan and approved for submission to the Court by the Bar's Representative Assembly. The rules require mandatory discovery disclosure in many cases, adopt a presumptive limit on interrogatories (20 in most cases, but 35 in domestic relations proceedings) and limit a deposition to 7 hours. The amendments also update the rules to more specifically address issues related to electronically stored information, and encourage early action on discovery issues during the discovery period.

The amendment of MCR 2.309(A)(2) sets a presumptive limit of twenty interrogatories for each separately represented party. Several commenters suggested that the term "discrete subpart" be more explicitly defined. But the rule's reference to "a discrete subpart" is intended to draw guidance from federal courts construing FR Civ P 30(a)(1). Generally, subparts are not separately counted if they are logically or factually subsumed within and necessarily related to the primary question. In upholding the limit, parties and courts should also pragmatically balance the overall goals of discovery and the admonition of MCR 1.105. Further, the intent of the provision at MCR 2.301(B)(4) is to ensure that parties responding to discovery requests have the full time period to do so as provided for under these rules prior to the expiration of the discovery period.

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

Adopted July 24, 2019, effective January 1, 2020 (File No. 2018-13) —REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following addition of Rule 3.224 of the Michigan Court Rules is adopted, effective January 1, 2020.

RULE 3.224. FRIEND OF THE COURT ALTERNATIVE DISPUTE RESOLUTION.

(A) Friend of the Court Alternative Dispute Resolution Plan. The chief judge of each circuit court shall submit a friend of the court alternative dispute resolution (ADR) plan to the State Court Administrative Office (SCAO) for approval as a local administrative order. The plan shall:

(1) Require the use of the domestic violence screening protocol provided by the SCAO to identify domestic violence, the existence of a protection order as defined in MCL 552.513 between the parties or other protective order, child abuse or neglect, and other safety concerns. The plan shall provide a method to address those concerns.

(2) State the circumstances under which the friend of the court may exclude a case from friend of the court ADR under subrule (D)(2).

(3) Designate the matters each friend of the court ADR process will address, subject to subrule (C)(1).

(4) Designate which friend of the court ADR processes are used in prejudgment or postjudgment friend of the court domestic relations cases.

(5) Designate the manner in which the friend of the court will conduct each process.

(6) Specify how cases are referred to friend of the court ADR.

(7) Address how the court complies with the training, qualifications, and confidentiality provisions for friend of the court ADR processes established by the SCAO pursuant to subrule (J).

(8) Provide that attorneys of record will be allowed to attend, and participate in, all friend of the court ADR processes, or elect not to attend upon mutual agreement with opposing counsel and their client.

(9) Set forth any additional procedures, standards, training, qualifications, and confidentiality requirements of any other friend of the court ADR process the court uses other than those processes set forth in this rule.

(10) Provide that participants in a friend of the court ADR process may not record the proceeding.

(B) Definitions. When used in this rule, unless the context indicates otherwise:

(1) "Domestic violence" means the presence of coercion or violence that would make friend of the court ADR physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues.

(2) "Friend of the court ADR" means a process established under MCL 552.513 by which the parties are assisted to voluntarily agree to resolve a dispute concerning child custody, parenting time, or support that arises from a domestic relations matter. Friend of the court ADR includes friend of the court mediation, and may include facilitative and information-gathering conferences, joint meetings, and other friend of the court alternative dispute resolution services.

(3) "Friend of the court facilitative and information-gathering conference" is a process in which a facilitator assists the parties in reaching an agreement. If the

parties fail to reach an agreement, the facilitator may prepare a report and/or recommended order.

(4) "Friend of the court domestic relations mediation" means a process in which a neutral third party facilitates confidential communication between parties to explore solutions to settle custody and parenting time or support issues for friend of the court cases. Friend of the court domestic relations mediation is not governed by MCR 3.216, which relates to domestic relations mediation conducted without participation or supervision of the friend of the court.

(5) "Joint meeting" means a process in which a person discusses proposed solutions with the parties to a custody or parenting time complaint or an objection to a friend of the court support recommendation.

(6) "Protected party" means a person who has a personal protection order or other protective order against another party to the case or a person who, due to the presence of coercion or violence in a relationship with another party to the case, could be physically or emotionally unsafe.

(C) Friend of the Court ADR Referral.

(1) On written stipulation of the parties, on written motion of a party, or on the court's initiative, the court may order any contested custody, parenting time, or support issue in a domestic relations case, including postjudgment matters to the friend of the court mediation by written order.

(2) The court may, by an order or through its friend of the court ADR plan, provide that the parties are to meet with a person conducting ADR other than friend of the court domestic relations mediation concerning custody, parenting time, and support issues, unless otherwise provided by statute or court rule.

(D) Cases Exempt from Friend of the Court ADR.

(1) Parties who are, or have been, subject to a personal protection order or other protective order or who are involved in a past or present child abuse and neglect proceeding may not be referred to friend of the court ADR without a hearing to determine whether friend of the court ADR is appropriate. The court may order ADR if a protected party requests it without holding a hearing.

(2) The friend of the court may exempt cases from ADR by the friend of the court on the basis of the following:

(a) child abuse or neglect;

(b) domestic abuse, unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff;

(c) inability of one or both parties to negotiate for themselves at the ADR, unless attorneys for both parties will be present at the ADR session;

(d) reason to believe that one or both parties' health or safety would be endangered by ADR; or

(e) for other good cause shown.

(3) The friend of the court shall notify the court when a friend of the court case has been exempted from friend of the court ADR.

(4) If the friend of the court exempts a case from ADR, a party may file a motion and schedule a hearing to request the court to order friend of the court ADR.

(E) Objections to Friend of the Court ADR.

(1) A party may object to ADR under this rule. An objection must be based on one or more of the factors in subrule (D)(2), and must allege facts in support of the objection.

(2) Objection to Mediation:

(a) To object to friend of the court domestic relations mediation, a party must file a written motion to remove the case from friend of the court mediation and a notice of hearing of the motion, and serve a copy on all parties or their attorneys of record within 14 days after receiving notice of the order. The motion must be set for hearing within 14 days after it is filed, unless the hearing is adjourned by agreement of counsel or the court orders otherwise.

(b) A timely motion must be heard before the case is mediated.

(3) Objection to Friend of the Court Facilitative Information-Gathering Conference:

(a) To object to a friend of the court facilitative and information-gathering conference, a party must include the objection within the pleading or postjudgment motion initiating the action, a responsive pleading or answer, or file the objection within 14 days of the date that the notice is sent to the party. All objections must be filed with the court.

(b) The objecting party must schedule the hearing, and serve a copy of the objection and notice of hearing on all parties and/or attorneys of record.

(c) If a party timely objects, the friend of the court shall not hold a facilitative and information-gathering conference unless the court orders a conference after motion and hearing or the objecting party withdraws the objection.

(4) Objection to Joint Meetings:

(a) To object to a joint meeting, the party must file a written objection with the friend of the court and provide a copy to all parties and their attorneys of record before the time scheduled for the joint meeting.

(b) If a party files an objection, the friend of the court shall not hold a joint meeting unless the court orders a joint meeting following a hearing on motion of a party or the objecting party withdraws the objection.

(F) Friend of the Court Facilitative and Information-Gathering Conference Procedure.

(1) A friend of the court facilitative and information-gathering conference shall use the following procedure:

(a) The conference may not begin until the friend of the court case has been screened for domestic violence using a screening protocol provided by the State Court Administrative Office as directed by the Supreme Court.

(b) If domestic violence is identified or suspected, the conference may not proceed unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of court staff and the protected party. Throughout the facilitative and information-gathering conference process, the facilitator must make reasonable efforts to screen domestic violence that would make the conference physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(c) At the beginning of the conference, the facilitator will advise the parties and their attorneys, if applicable, of the following:

(i) the purpose of the conference and how the facilitator will conduct the conference and submit an order or recommendation to the court under (F)(2)(a);

(ii) how information gathered during the conference will be used;

(iii) that statements made during the conference are not confidential and can be used in other court proceedings, and shall not be recorded; and

(iv) that the parties are expected to provide information as required by MCL 552.603 to the friend of the court and the consequences of not doing so.

(2) If the parties resolve all contested issues, the facilitator shall submit a report to the court as provided in subrule (I) and may provide a proposed order to the court setting forth the parties' agreements.

(a) If the parties do not resolve all contested issues at the conference or the parties agree to resolve all or some contested issues but do not sign the proposed order, the facilitator shall submit a report as provided in subrule (I) and may do one of the following:

(i) Prepare and forward a recommended order to the court within seven days from the date of the conference. The court may enter the recommended order if it approves the order and must serve it on all parties and attorneys of record within seven days after the date the court enters the order. Accompanying the order must be a notice that a party may object to the order by filing a written objection to the court within 21 days after the date of service, and by scheduling a hearing on the objection. If there is a timely objection, the hearing must be held within 21 days after the objection is filed. If a party objects, the order remains in effect pending a hearing on a party's objection unless the court orders otherwise.

(ii) Prepare and serve a recommended order on the parties within seven days from the date of the conference along with a notice that the recommended order

will be presented to the court for entry unless a party objects by filing a written objection within 21 days after the date of service, and by scheduling a hearing on the objection. If neither party files a timely objection, the court may enter the order if it approves.

(iii) Submit a recommendation to the court for further action the court might take to help the parties resolve the remaining contested issues in the case, or alert the court there are contested issues that might require the court's immediate attention.

(b) A party may consent to entry of a recommended order by signing a copy of the order at the time of the conference or after receiving the recommended order. A party who consents to entry of the order waives the right to object to the order and must file a motion to set the order aside once it enters.

(c) Except for communications made during domestic violence screening under subrule (A)(1), (F)(1)(a), and (H)(1)(a), communications made during a friend of the court facilitative and information-gathering conference are not confidential and may be used in court proceedings.

(G) Friend of the Court Domestic Relations Mediation Procedure.

(1) Domestic relations mediation will be conducted by a mediator selected by the friend of the court.

(a) The mediation may not begin until the friend of the court case has been screened for domestic violence using a screening protocol provided by the State Court Administrative Office as directed by the Supreme Court.

(b) If domestic violence is identified or suspected, the mediation process may not continue unless the protected party submits a written consent and the friend

of the court takes additional precautions to ensure the safety of the protected party and court staff. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(c) At the beginning of the mediation, the mediator will advise the parties and their attorneys, if applicable, of the following:

(i) the purpose of mediation;

(ii) how the mediator will conduct mediation;

(iii) except as provided for in MCR 2.412(D)(8), statements made during the mediation process are confidential and cannot be used in court proceedings.

(d) If the parties reach an agreement, the mediator shall submit a proposed order and a report pursuant to subrule (I) within seven days.

(e) If the parties do not reach an agreement within seven days of the completion of mediation, the mediator shall so advise the court stating only the date of completion of the process, who participated in the mediation, whether settlement was reached, and whether additional friend of the court ADR proceedings are contemplated.

(2) With the exceptions provided for in MCR 2.412(D), communications during friend of the court domestic relations mediation process are confidential and cannot be used in court proceedings and cannot be recorded.

(H) Joint Meeting Procedure.

(1) Joint meetings shall be conducted as provided in this subrule:

(a) The joint meeting may not begin until the friend of the court case has been screened for domestic violence using a screening protocol provided by the State Court Administrative Office as directed by the Supreme Court.

(b) If domestic violence is identified or suspected, the meeting may not proceed unless the protected party submits a written consent and the friend of the court takes additional precautions to ensure the safety of the protected party and court staff. Throughout the joint meeting, the person conducting the joint meeting must make reasonable efforts to screen for the presence of coercion or violence that would make the joint meeting physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues.

(c) At the beginning of a joint meeting, the person conducting the meeting shall do the following:

(i) advise the parties that statements made during the joint meeting are not confidential and can be used in other court proceedings;

(ii) advise the parties that the purpose of the meeting is for the parties to reach an accommodation and how the person will conduct the meeting;

(iii) advise the parties that the person may recommend an order to the court to resolve the dispute; and

(iv) explain to the parties the information provided for in subrules (H)(1)(d)-(e).

(d) At the conclusion of a joint meeting, the person conducting the meeting shall submit a report within seven days pursuant to subrule (I) and may do one of the following:

(i) If the parties reach an accommodation, record the accommodation in writing and provide a copy to the

parties and attorneys of record. If the accommodation modifies an order, the person must submit a proposed order to the court. If the court approves the order, the court shall enter it; or

(ii) Submit an order to the court stating the person's recommendation for resolving the dispute. The parties may consent by signing the recommended order and waiving the objection period in accordance with (H)(1)(e)(iii). If the court approves the order, the court shall enter it.

(e) If the person conducting the joint meeting submits a recommended order within seven days to the court, the friend of the court must serve the parties and attorneys of record a copy of the order and a notice that provides the following information:

(i) that the court may enter the recommended order resolving the dispute unless a party objects to the order within 21 days after the notice is sent;

(ii) when and where a written objection must be submitted;

(iii) that a party may waive the 21-day objection period by returning a signed copy of the recommended order; and

(iv) if a party files a written objection within the 21-day limit, the friend of the court office shall set a court hearing before a judge or referee to resolve the dispute. If a party fails to file a written objection within the 21-day limit, the office shall submit the proposed order to the court for entry if the court approves it.

(2) Except for communications made during domestic violence screening, communications made during a joint meeting are not confidential and may be used in other court proceedings and cannot be recorded.

(I) The SCAO shall develop forms for reports and orders that the friend of the court shall use in the ADR processes under this court rule.

(1) A report form for a proposed consent order shall contain sufficient information to allow the court to make an independent determination that the proposed order is in the child's best interest.

(2) When the parties do not resolve some or all of the issues in a facilitative and information-gathering conference or when the friend of the court submits a proposed order following a joint meeting, the report shall contain the parties' agreed-upon and disputed facts and issues.

(3) A report under this subrule is not a friend of the court report entitled to consideration under MRE 1101(b)(9). In any contested hearing, the court may use the report to:

(a) decide the contested matter to the extent the parties do not dispute the issues or facts in the report or to the extent that the contested issues and facts are not material to the court's decision; or

(b) if the parties dispute any issues or facts in the report, the court must make an independent determination based on evidence and testimony presented at the hearing or a subsequent hearing.

(4) The court may, on its own motion, order the friend of the court to conduct an investigation and provide a report under MCL 552.505(1)(G).

(J) Qualification of ADR Providers.

(1) The SCAO shall establish training and qualification requirements for persons conducting each type of ADR under this court rule.

(2) The SCAO shall also provide a process for waiving training and qualification requirements when:

(a) the trial court demonstrates a person who meets the requirements is not reasonably available and the court's proposed candidate has suitable qualifications equivalent to those established by the SCAO; or

(b) the person will complete the requirements within a reasonable time determined by the SCAO.

Staff Comment: This proposal was developed by a workgroup facilitated by SCAO's Friend of the Court division to make more uniform the ADR processes used by Friend of the Court offices.

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

CLEMENT, J. (*concurring in part and dissenting in part*). I would not adopt the provisions in MCR 3.224(F)(2) that allow a facilitator to prepare and submit a recommended order to the trial court for entry when contested issues remain between the parties. I am concerned that this procedure, in practice, may improperly permit trial judges to delegate their judicial authority to third parties.

Adopted August 14, 2019, effective immediately (File No. 2018-15) —REPORTER.

On order of the Court, the following amendments are adopted, effective immediately.

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

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(F) [Unchanged.]

(G) Electronic Filing and Service.

(1) Definitions. For purposes of this subrule:

(a)-(d) [Unchanged.]

(e) "Electronic service" or "e-service" means the electronic service of information by means of the electronic-filing system under this rule. It does not include service by alternative electronic service~~e-mail~~ under MCR 2.107(C)(4).

(f) [Unchanged.]

(2)-(7) [Unchanged.]

RULE 2.113. FORM, CAPTIONING, SIGNING, AND VERIFYING OF DOCUMENTS.

(A)-(B) [Unchanged.]

(C) Exhibits; Written Instruments.

(1) [Unchanged.]

(2) An exhibit attached or referred to under subrule (C~~F~~)(1)(a) or (b) is a part of the pleading for all purposes.

(D) [Unchanged.]

RULE 2.412. MEDIATION COMMUNICATIONS; CONFIDENTIALITY AND DISCLOSURE.

(A) [Unchanged.]

(B) Definitions.

(1)-(4) [Unchanged.]

(5) "Protected individual" is used as defined in the Estates and Protected Individuals Code, MCL 700.1106(x~~v~~).

(6) [Unchanged.]

(C)-(E) [Unchanged.]

RULE 3.203. SERVICE OF NOTICE AND COURT DOCUMENTS IN DOMESTIC RELATIONS CASES.

(A) Manner of Service. Unless otherwise required by court rule or statute, the summons and complaint must be served pursuant to MCR 2.105. In cases in which the court retains jurisdiction

(1)-(2) [Unchanged.]

(3) Alternative Electronic Service.

~~(a)~~ A party or an attorney may file an agreement with the friend of the court to authorize the friend of the court to serve notices and court papers on the party or attorney in accordance with MCR 2.107(C)(4).

(B)-(J) [Unchanged.]

RULE 3.222. UNIFORM COLLABORATIVE LAW ACT PROCESS AND AGREEMENTS.

(A)-(B) [Unchanged.]

(C) Establishing Jurisdiction and Starting the Statutory Waiting Period. At any time after a collaborative law participation agreement is signed, if the parties are not already under the court's jurisdiction, the parties may commence an action to submit to the court's jurisdiction.

(1) When the parties have concluded a collaborative law process and are requesting entry of a final judgment or final order, the parties shall file a petition to submit to court jurisdiction and request for entry of a final judgment or final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and the subject matter of the collaborative law agreement using the case type codes under MCR 8.117. The petition shall:

(i) [Unchanged.]

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A) and (B);

(iii)-(iv) [Unchanged.]

(v) be accompanied by a verified statement if required by MCR 3.206(CB) and judgment information form if required by MCR 3.211(F); and

(vi) [Unchanged.]

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b) On the filing of the petition and request for entry of final judgment or final order and payment of the filing fees, the court clerk shall assign a case number and judge. The requirement to issue a summons under MCR 2.102(A) is not applicable. Unless requested by the parties on filing of a motion, the court clerk shall not schedule the matter until ~~either the lifting of a stay granted under subrule (B)(2) or~~ the conclusion of the statutory waiting period~~, whichever occurs first~~. The petition under this subrule serves as a complaint and answer and as an appearance of both attorneys, and starts the statutory waiting period(s) under MCL 552.9f.

(2) To commence an action at any time before the conclusion of the collaborative law process, the parties shall file a petition for court jurisdiction and declaration of intent to file a proposed final judgment or proposed final order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and shall state the type of action corresponding to the assigned case type code in MCR 8.117 (listed under Case File Management Standard [~~A~~][~~6~~]). The petition shall:

(i) [Unchanged.]

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A) and (B);

(iii) [Unchanged.]

(iv) be accompanied by a verified statement if required by MCR 3.206(CB), and

(v) [Unchanged.]

The petition may also contain a request to waive the six-month statutory waiting period under MCL 552.9f.

(b)-(e) [Unchanged.]

(D) Entry of Final Judgment or Final Order.

(1) [Unchanged.]

(2) The final judgment or final order shall be served in accordance with MCR 2.602(ED).

(3) [Unchanged.]

(E) Dismissal.

(1) Lack of Progress. The clerk shall provide notice of intent to dismiss the case for lack of progress if:

(a) the parties have not filed a notice that a collaborative law process has concluded or terminated before the expiration of a stay under subrule (B)(2)(ca), or

(b) [Unchanged.]

(2)-(3) [Unchanged.]

(F) [Unchanged.]

RULE 3.223. SUMMARY PROCEEDING FOR ENTRY OF CONSENT JUDGMENT OR ORDER.

(A)-(B) [Unchanged.]

(C) Commencing an Action.

(1) The parties shall file a petition to submit to court jurisdiction and request for entry of a proposed consent judgment or proposed consent order on a form approved by the State Court Administrative Office.

(a) The petition shall be brought "In the Matter of" the names of Party A and Party B and the subject matter of the proposed consent judgment or proposed consent order using the case type codes under MCR 8.117. The petition shall:

(i) [Unchanged.]

(ii) comply with the provisions of MCR 2.113 and MCR 3.206(A) and (B);

(iii)-(iv) [Unchanged.]

(v) be accompanied by a verified statement if required by MCR 3.206(C~~B~~) and a judgment information form if required by MCR 3.211(F); and

(vi) [Unchanged.]

(b) [Unchanged.]

(2)-(6) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) Generally. Except as modified by ~~MCR 3.801-3.807~~the rules in this chapter, adoption proceedings are governed by Michigan Court Rules.

(B) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2) [Unchanged.]

(3) "Confidential file" means

(a) that part of a file made confidential by statute or court rule, including, but not limited to,

(i)-(iv) [Unchanged.]

(v) biometric data~~fingerprinting material~~ required to be maintained pursuant to MCL 28.243;

(vi)-(vii) [Unchanged.]

(b) [Unchanged.]

(4)-(27) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) Delinquency Proceedings.

(1) General. In a delinquency proceeding, the court shall direct that the following persons be notified of each hearing except as provided in subrule (A)(3):

(a)-(d) [Unchanged.]

(e) the attorney retained or appointed to represent the juvenile,~~ and~~

(f) the prosecuting attorney, and

(g) [Unchanged.]

(2)-(3) [Unchanged.]

(B) Protective Proceedings.

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a)-(e) [Unchanged.]

(f) a party's guardian ad litem appointed pursuant to these rules,~~ and~~

(g) the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state,~~ and~~

(h)-(i) [Unchanged.]

(2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hear-

ing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(a)-(j) [Unchanged.]

(k) the foster parents, preadoptive parents, and relative caregivers of a child in foster care under the responsibility of the state, ~~and~~

(l)-(m) [Unchanged.]

(3) [Unchanged.]

(C) Juvenile Guardianships. In a juvenile guardianship, the following persons shall be entitled to notice:

(1)-(8) [Unchanged.]

(9) the Michigan Children's Institute superintendent; and

(10) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 3.923. MISCELLANEOUS PROCEDURES.

(A)-(B) [Unchanged.]

(C) Biometric Data~~Fingerprinting~~ and Photographing. A juvenile must have biometric data collected~~be fingerprinted~~ when required by law. The court may permit the collection of biometric data~~fingerprinting~~ or photographing, or both, of a minor concerning whom a petition has been filed. Biometric data~~Fingerprints~~ and photographs must be placed in the confidential files, capable of being located and destroyed on court order.

(D)-(G) [Unchanged.]

RULE 3.932. SUMMARY INITIAL PROCEEDINGS.

(A) [Unchanged.]

(B) Offenses Listed in the Crime Victim's Rights Act. A case involving the alleged commission of an offense listed in the Crime Victim's Rights Act, MCL 780.781(1)(~~g~~f), may only be removed from the adjudicative process upon compliance with the procedures set forth in that act. See MCL 780.786b.

(C) Consent Calendar.

(1)-(2) [Unchanged.]

(3) Biometric Data~~Fingerprinting~~. Except as otherwise required by law, a juvenile shall not have biometric data collected~~be fingerprinted~~ unless the court has authorized the petition. If the court authorizes the petition and the juvenile is alleged to have committed an offense that requires the juvenile to have biometric data collected~~be fingerprinted~~ according to law, the court shall ensure the juvenile has biometric data collected~~is fingerprinted~~ before placing the case on consent calendar under subrule (C)(1).

(4)-(11) [Unchanged.]

(D) [Unchanged.]

RULE 3.935. PRELIMINARY HEARING.

(A) [Unchanged.]

(B) Procedure.

(1)-(6) [Unchanged.]

(7) Unless the preliminary hearing is adjourned, the court must decide whether to authorize the petition to be filed pursuant to MCR 3.932(D). If it authorizes the filing of the petition, the court must:

(a) determine if biometric data~~fingerprints~~ must be taken as provided by MCL 712A.11(5) and MCR 3.936; and

(b) [Unchanged.]

(8) [Unchanged.]

(C)-(F) [Unchanged.]

RULE 3.936. BIOMETRIC DATA~~FINGERPRINTING~~.

(A) General. The court must permit the collection of biometric data~~fingerprinting~~ of a juvenile pursuant to MCL 712A.11(5) and 712A.18(10), and as provided in this rule. Notice of biometric data collection~~fingerprinting~~ retained by the court is confidential.

(B) Order for Biometric Data~~Fingerprints~~. At the time that the court authorizes the filing of a petition alleging a juvenile offense and before the court enters an order of disposition on a juvenile offense or places the case on consent calendar, the court shall examine the confidential files and verify that the juvenile has had biometric data collected~~been fingerprinted~~. If it appears to the court that the juvenile has not had biometric data collected~~been fingerprinted~~, the court must:

(1) direct the juvenile to go to the law enforcement agency involved in the apprehension of the juvenile, or to the sheriff's department, so biometric data~~fingerprints~~ may be taken; or

(2) issue an order to the sheriff's department to apprehend the juvenile and to take the biometric data~~fingerprints~~ of the juvenile.

(C) Notice of Disposition. The court shall notify the Department of State Police in writing:

(1) of any juvenile who had had biometric data collected~~been fingerprinted~~ for a juvenile offense and who was found not to be within the jurisdiction of the court under MCL 712A.2(a)(1); or

(2) that the court took jurisdiction of a juvenile under MCL 712A.2(a)(1), who had biometric data col-

lectedwas fingerprinted for a juvenile offense, specifying the offense, the method of adjudication, and the disposition ordered.

(D) Order for Destruction of Biometric DataFingerprints. The court, on motion filed pursuant to MCL 28.243(8), shall issue an order directing the Department of State Police, or other official holding the information, to destroy the biometric datafingerprints and arrest card of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12), when a juvenile has had biometric data collectedbeen fingerprinted for a juvenile offense and no petition on the offense is submitted to the court, the court does not authorize the petition, or the court has neither placed the case on consent calendar nor taken jurisdiction of the juvenile under MCL 712A.2(a)(1).

RULE 3.943. DISPOSITIONAL HEARING.

(A)-(D) [Unchanged.]

(E) Dispositions.

(1)-(3) [Unchanged.]

(4) The court shall not enter an order of disposition for a juvenile offense until the court verifies that the juvenile has had biometric data collectedbeen fingerprinted. If the juvenile has not been fingerprinted, the court shall proceed as provided by MCR 3.936.

(5)-(7) [Unchanged.]

RULE 3.951. INITIATING DESIGNATED PROCEEDINGS.

(A) Prosecutor-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition designating the case for trial in the same manner as an adult.

(1) [Unchanged.]

(2) Procedure.

(a)-(b) [Unchanged.]

(c) Unless the arraignment is adjourned, the court must decide whether to authorize the petition to be filed. If it authorizes the filing of the petition, the court must:

(i) determine if biometric data~~fingerprints~~ must be taken as provided by MCR 3.936;

(ii)-(iii) [Unchanged.]

(d) [Unchanged.]

(3) [Unchanged.]

(B) Court-Designated Cases. The procedures in this subrule apply if the prosecuting attorney submits a petition charging an offense other than a specified juvenile violation and requests the court to designate the case for trial in the same manner as an adult.

(1) [Unchanged.]

(2) Procedure.

(a)-(b) [Unchanged.]

(c) Unless the arraignment is adjourned, the court must decide whether to authorize the petition to be filed. If it authorizes the filing of the petition, the court must:

(i) determine if biometric data~~fingerprints~~ must be taken as provided by MCR 3.936;

(ii)-(iii) [Unchanged.]

(d) [Unchanged.]

(3) [Unchanged.]

RULE 3.963. ACQUIRING PHYSICAL CUSTODY OF CHILD.

(A) [Unchanged.]

(B) Court-Ordered Custody.

(1)-(2) [Unchanged.]

(3) The court shall inquire whether a member of the child's immediate or extended family is available to take custody of the child pending a preliminary hearing, or an emergency removal hearing if the court already has jurisdiction over the child under MCR 3.971 or MCR 3.972, whether there has been a central registry clearance, and whether a criminal history check has been initiated.

(4) [Unchanged.]

(C)-(D) [Unchanged.]

RULE 3.972. TRIAL.

(A)-(B) [Unchanged.]

(C) Evidentiary Matters.

(1) [Unchanged.]

(2) Child's Statement. Any statement made by a child under 10 years of age or an incapacitated individual under 18 years of age with a developmental disability as defined in MCL 330.1100a(25) regarding an act of child abuse, child neglect, sexual abuse, or sexual exploitation, as defined in MCL 722.622 (gf), (kj), (zw), or (aax), performed with or on the child by another person may be admitted into evidence through the testimony of a person who heard the child make the statement as provided in this subrule.

(a)-(c) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(D) [Unchanged.]

(E) Termination of Parental Rights at the Initial Disposition. The court shall order termination of the

parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1)-(2) [Unchanged.]

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) [Unchanged.]

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), or (m)~~, or (n)~~;

(4) [Unchanged.]

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if

(a) [Unchanged.]

(b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:

(i) [Unchanged.]

(ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (l), or (m)~~, or (n)~~; and

(c) [Unchanged.]

(G)-(K) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(5) [Unchanged.]

(6) The persons interested in a proceeding for examination or approval of an account of a fiduciary are:

(a)-(e) [Unchanged.]

(f) for a revocable trust, the settlor (and if the petitioner has a reasonable basis to believe the settlor is an incapacitated individual, those persons who are entitled to be reasonably informed, as referred to in MCL 700.7603[2]), the current trustee, and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust director~~protector~~,

(g) for an irrevocable trust, the current trustee, the qualified trust beneficiaries, as defined in MCL 700.7103(g), and any other person named in the terms of the trust to receive either an account or a notice of such a proceeding, including a trust director~~protector~~,

(h) [Unchanged.]

(7)-(31) [Unchanged.]

(32) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the

persons interested in the modification or termination of a noncharitable irrevocable trust are:

(a)-(c) [Unchanged.]

(d) the trust director~~protector~~, if any, as referred to in MCL 700.7103(m~~n~~),

(e)-(f) [Unchanged.]

(33) Subject to the provisions of Part 3 of Article VII of the Estates and Protected Individuals Code, the persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6), (C)(28), and (C)(32) are:

(a)-(d) [Unchanged.]

(e) the trust director~~protector~~, if any, as referred to in MCL 700.7103(m~~n~~),

(f)-(g) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.402. COMMON PROVISIONS.

(A)-(D) [Unchanged.]

(E) Indian Child; Definitions, Jurisdiction, Notice, Transfer, Intervention.

(1)-(2) [Unchanged.]

(3) If an Indian child is the subject of a petition to establish guardianship of a minor and an Indian tribe does not have exclusive jurisdiction as defined in MCR 3.002(6), the court shall ensure that the petitioner has given notice of the proceedings to the persons prescribed in MCR 5.125(A)(8) and (C)(20~~1~~9) in accordance with MCR 5.109(1).

(a)-(d) [Unchanged.]

(4) [Unchanged.]

(5) If the court discovers a child may be an Indian child after a guardianship is ordered, the court shall do all of the following:

(a) [Unchanged.]

(b) enter an order for an investigation in accordance with MCR 5.404(A)(2). The order shall be on a form approved by the State Court Administrative Office and shall require the guardian to cooperate in the investigation. The court shall mail a copy of the order to the persons prescribed in MCR 5.125(A)(8), (C)(20~~19~~), and (C)(26~~5~~) by first-class mail.

(c) provide notice of the guardianship and the hearing scheduled in subrule (5)(a) and the potential applicability of the Indian Child Welfare Act and the Michigan Indian Family Preservation Act on a form approved by the State Court Administrative Office to the persons prescribed in MCR 5.125(A)(8), (C)(20~~19~~), and (C)(26~~5~~) in accordance with MCR 5.109(1). A copy of the notice shall be served on the guardian.

RULE 5.404. GUARDIANSHIP OF MINOR.

(A) [Unchanged.]

(B) Voluntary Consent to Guardianship of an Indian Child. A voluntary consent to guardianship of an Indian child must be executed by both parents or the Indian custodian.

(1) [Unchanged.]

(2) Hearing. The court must conduct a hearing on a petition for voluntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing on the petition must be sent to the persons prescribed

in MCR 5.125(A)(8) and (C)(20~~1~~9) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a)-(d) [Unchanged.]

(3) [Unchanged.]

(C) Involuntary Guardianship of an Indian Child.

(1) Hearing. The court must conduct a hearing on a petition for involuntary guardianship of an Indian child in accordance with this rule before the court may enter an order appointing a guardian. Notice of the hearing must be sent to the persons prescribed in MCR 5.125(A)(8) and (C)(20~~1~~9) in compliance with MCR 5.109(1). At the hearing on the petition, the court shall determine:

(a)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(D)-(H) [Unchanged.]

RULE 5.801. APPEALS TO COURT OF APPEALS.

(A) Appeal of Right. A party or an interested person aggrieved by a final order of the probate court may appeal as a matter of right as provided by this rule.

Orders appealable of right to the Court of Appeals are defined as and limited to the following:

(1) [Unchanged.]

(2) a final order affecting the rights or interests of an interested person in a proceeding involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an inter vivos trust or a trust created under a will. These are defined as and limited to orders resolving the following matters:

(a) appointing or removing a fiduciary or trust directorprotector as defined in MCL 700.7103(mn), or denying such an appointment or removal;

(b)-(x) [Unchanged.]

(y) surcharging or refusing to surcharge a fiduciary or trust directorprotector as referred to in MCL 700.7103(mn);

(z)-(ff) [Unchanged.]

(3)-(6) [Unchanged.]

(B) [Unchanged.]

RULE 6.104. ARRAIGNMENT ON THE WARRANT OR COMPLAINT.

(A)-(D) [Unchanged.]

(E) Arraignment Procedure; Judicial Responsibilities. The court at the arraignment must

(1)-(5) [Unchanged.]

(6) ensure that the accused has had biometric data collectedbeen fingerprinted as required by law.

The court may not question the accused about the alleged offense or request that the accused enter a plea.

(F)-(G) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1)-(2) [Unchanged.]

(3) Duties of Court Reporter or Recorder.

(a)-(c) [Unchanged.]

(d) Form of Transcript. The transcript must be filed in one or more volumes under a hard-surfaced or other suitable cover, stating the title of the action, and

prefaced by a table of contents showing the subject matter of the transcript with page references to the significant parts of the trial or proceedings, including the testimony of each witness by name, the arguments of the attorneys, and the jury instructions. The pages of the transcript must be consecutively numbered on the bottom of each page. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page~~Transcripts with more than one page, reduced in size, printed on a single page are permitted and encouraged, but a page in that format may not contain more than four reduced pages of transcript~~.

(e)-(g) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.215. OPINIONS, ORDERS, JUDGMENTS, AND FINAL PROCESS FOR COURT OF APPEALS.

(A)-(C) [Unchanged.]

(D) Requesting Publication.

(1) Any party may request publication of an authored or per curiam opinion not designated for publication by

(a) [Unchanged.]

(b) mailing a copy to each party to the appeal not joining in the request~~, and to the clerk of the Supreme Court~~.

Such a request must be filed within 21 days after release of the unpublished opinion or, if a timely motion for rehearing is filed, within 21 days after the denial of the motion.

(2)-(3) [Unchanged.]

(4) The Court of Appeals shall not direct publication if the Supreme Court has denied an application for leave to appeal under MCR 7.305~~2~~.

(E)-(J) [Unchanged.]

RULE 7.305. APPLICATION FOR LEAVE TO APPEAL.

(A)-(B) [Unchanged.]

(C) When to file.

(1)-(6) [Unchanged.]

(7) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(~~6~~5)(a), the following provisions apply:

(a)-(b) [Unchanged.]

(8) [Unchanged.]

(D)-(I) [Unchanged.]

RULE 7.308. CERTIFIED QUESTIONS AND ADVISORY OPINIONS.

(A) [Unchanged.]

(B) Advisory Opinion.

(1) Form of Request. A request for an advisory opinion by either house of the legislature or the governor pursuant to Const 1963, art 3, § 8 may be in the form of a letter that includes a copy or verbatim statement of the enacted legislation and identifies the specific questions to be answered by the Court. One signed copy of the request and one~~1~~ set of supporting documents are to be filed with the Court.

(2)-(4) [Unchanged.]

RULE 8.111. ASSIGNMENT OF CASES.

(A)-(C) [Unchanged.]

(D) Actions Arising out of Same Transaction or Occurrence. Subject to subrule 8.11~~0~~(C),

(1)-(4) [Unchanged.]

IOP 9.203(A). [New Language]

Upon request, the Commission and the Commission staff may, in their discretion, respond formally or informally to an inquiry by a judge or judicial candidate regarding past or prospective conduct.

If the response is informal, the person doing the responding should take care to ensure:

1. The response has taken into account applicable provisions of MCR 9.205, the Michigan Code of Judicial Conduct, the Michigan Rules of Professional Conduct, and if appropriate, the ethics opinions published by the State Bar.

2. The response communicates any uncertainty in the above authorities with respect to the question presented.

3. The response includes the qualification that it is an informal opinion that rests on the accuracy and completeness of the facts that have been presented, and it does not represent the opinion of the full Judicial Tenure Commission or the Supreme Court.

4. The essence of the response is circulated to the Commission and staff attorneys, both to give an opportunity to offer input concerning the response, and to keep all interested parties informed about questions asked and responses provided. The person doing the responding may, but need not, circulate a proposed response to the Commission before providing it to the judge or judicial candidate.

The Commission, in its sole discretion, may instead choose to provide a formal response to any inquiry. A

formal response requires the vote of five Commissioners. The formal response shall include the qualification that it rests on the accuracy and completeness of the facts that have been presented, and it does not represent the opinion of the Supreme Court.

Upon receiving an inquiry by a judge or judicial candidate, the Commission and the Commission staff may, in their discretion, decline to respond to the inquiry and instead to refer the inquirer to the appropriate State Bar of Michigan ethics committee.

IOP 9.207(A)-9 — CASE STATUS. [New Language]

Monthly, or at such other times as the Commission may direct, the executive director shall inform the Commission of the status of all open matters for which the Commission has authorized an investigation. The status report shall include the respondent's name and court, the date the grievance was received by the staff, the identity of the grievant(s), a summary of the principle allegations being investigated, and the status of the investigation including anticipated next steps, plus any other information requested by the Commission.

IOP 9.207(B)-12 — PROMPT RESOLUTION OF COMPLAINTS. [New Language]

The Commission recognizes that the public and judiciary have a strong interest in prompt resolution of complaints alleging a judge has committed misconduct. The Commission's goal is to

- review all complaints expeditiously;
- thoroughly investigate those that warrant further examination;
- accurately determine the merits of each complaint; and

• arrive at a just resolution as quickly as practicable.

IOP 9.219 — INTERIM SUSPENSION. [New Language]

The Commission shall consider whether to seek interim suspension, with or without pay, under MCR 9.219: a) in every case in which a formal complaint is issued, at the time of issuing the complaint or at any subsequent time before resolution of the complaint; and b) in any case still under investigation, in which a formal complaint has not yet issued, in which the respondent has been accused or convicted of a crime or other extraordinary circumstances are present.

The Commission shall evaluate the following in its determination:

1. Whether the issuance of the formal complaint is likely to call into serious question the propriety of the respondent hearing cases until the complaint is resolved;

2. Whether the misconduct, if established, is likely to result in the Commission recommending removal or suspension;

3. Whether the evidence of serious misconduct is sufficiently strong to justify suspension, with or without pay, before the proceedings are concluded.

4. The impact on the credibility of the judiciary if the respondent is or is not suspended, with or without pay, pending the outcome of the formal complaint;

5. Any hardship either interim suspension or the absence of interim suspension, with or without pay, would cause to the people of the jurisdiction in which the respondent sits;

6. Any other facts of the case that militate in favor of, or against, interim suspension with or without pay.

After considering all relevant facts, including the respondent's interests, the Commission may seek interim suspension if it determines that doing so is in the best interest of the public and the judiciary. When it can do so without compromising an investigation or other important interests, the Commission will notify the respondent of its intention to seek interim suspension, whether with or without pay, as soon as practicable.

Staff Comment: These amendments update cross-references and make other nonsubstantive revisions to clarify the rules.

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

Adopted September 11, 2019, effective immediately (File No. 2019-12)—REPORTER.

On order of the Court, this is to advise that the amendments of Rules 1.109, 3.206, 3.931, and 3.961 of the Michigan Court Rules are adopted, effectively immediately, and are also the subject of comment during a public comment period. This notice is given to afford interested persons the opportunity to comment on the form or the merits of the amendments. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [https://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

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

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) [Unchanged.]

(2) Case Initiation Information. A party filing a case initiating document and a party filing any response or answer to a case initiating document shall provide specified case information in the form and manner established by the State Court Administrative Office and as specified in other applicable rules. At a minimum, specified case information shall include the name, an address for service, an e-mail address, and a telephone number of every party, and:

(a) [Unchanged.]

(b) in proceedings governed by chapters 3.200 and 3.900, except for outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq.* and the Uniform Interstate Family Support Act, MCL 552.2101 *et seq*., either of the following statements, if known:

(i) [Unchanged.]

(ii) There is one or more pending or resolved cases within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition. I have filed~~Attached is~~ a completed case inventory listing those cases.

(3)-(8) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 3.206. INITIATING A CASE.

(A) Information in Case Initiating Document.

(1)-(2) [Unchanged.]

(3) When any pending or resolved family division case exists that involves family members of the person(s) named in the case initiation document filed under subrule (2), the filing party must complete and fileattach a completed case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office. This does not apply to outgoing requests to other states and incoming registration actions filed under the Revised Uniform Reciprocal Enforcement of Support Act, MCL 780.151 *et seq*. and the Uniform Interstate Family Support Act, MCL 552.2101 *et seq*.

(4)-(6) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must complete and fileattach to the petition a completed case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party

that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office.

(B)-(D) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must complete and file~~attach to the petition~~ a ~~completed~~ case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office.

(B)-(C) [Unchanged.]

Staff Comment: The amendments of MCR 1.109, 3.206, 3.931, and 3.961 enable family division courts to use the required case inventory form to administer cases while keeping the information confidential. This change is intended to prevent providing information that could affect the safety of domestic violence victims and their children.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the amendment may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to

ADM File No. 2019-12. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Adopted September 18, 2019, effective January 1, 2020 (File No. 2002-37)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.109, 2.107, 2.113, 2.116, 2.119, 2.222, 2.223, 2.225, 2.227, 3.206, 3.211, 3.212, 3.214, 3.303, 3.903, 3.921, 3.925, 3.926, 3.931, 3.933, 3.942, 3.950, 3.961, 3.971, 3.972, 4.002, 4.101, 4.201, 4.202, 4.302, 5.128, 5.302, 5.731, 6.101, 6.615, 8.105, and 8.119 and rescission of Rules 2.226 and 8.125 of the Michigan Court Rules are adopted, effective January 1, 2020.

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

RULE 1.109. COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; ELECTRONIC FILING AND SERVICE; ACCESS.

(A)-(C) [Unchanged.]

(D) Filing Standards.

(1) Form and Captions of Documents.

(a) All documents prepared for filing in the courts of this state and all documents prepared by the court for placement in a case file must be legible and in the English language, comply with standards established by the State Court Administrative Office, and be on good quality 8½ by 11 inch paper or transmitted

through an approved electronic means and maintained as a digital image. The ~~print must be no smaller than 10 characters per inch (nonproportional) or 12-point (proportional)~~font size must be 12 or 13 point for body text and no less than 10 point for footnotes, except with regard to forms approved by the State Court Administrative Office. Transcripts filed with the court must contain only a single transcript page per document page, not multiple pages combined on a single document page.

(b)-(g) [Unchanged.]

(2)-(8) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS.

(A)-(C) [Unchanged.]

(D) Proof of Service. Except as otherwise provided by MCR 2.104, 2.105, or 2.106, proof of service of documents required or permitted to be served ~~may~~must be by written acknowledgment of service, or a written statement by the individual who served the documents verified under MCR 1.109(D(3). The proof of service may be included at the end of the document as filed. Proof of service must be filed promptly and at least at or before a hearing to which the document relates.

(E)-(F) [Unchanged.]

RULE 2.113. FORM, CAPTIONING, SIGNING, AND VERIFYING OF DOCUMENTS.

(A) Applicability. The form, captioning, signing, and verifying of all documents are prescribed in MCR 1.109(D) and (E).

(B) [Unchanged.]

(C) ~~Exhibits;~~ Written Instruments.

(1) If a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading ~~as an exhibit~~and labeled according to standards established by the State Court Administrative Office unless the instrument is

(a)-(d) [Unchanged.]

(2) An ~~exhibit attached or referred~~attachment or reference to an attachment under subrule (~~F~~C)(1)(a) or (b) is a part of the pleading for all purposes.

(D) [Unchanged.]

RULE 2.116. SUMMARY DISPOSITION.

(A)-(F) [Unchanged.]

(G) Affidavits; Hearing.

(1) Except as otherwise provided in this subrule, MCR 2.119 applies to motions brought under this rule.

(a)-(b) [Unchanged.]

(c) Except where electronic filing has been implemented, a~~A~~ copy of a motion, response (including brief and any affidavits), or reply brief filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten. Where electronic filing has been implemented, a judge's copy shall not be required.

(2)-(6) [Unchanged.]

(H)-(J) [Unchanged.]

RULE 2.119. MOTION PRACTICE.

(A) Form of Motions.

(1) [Unchanged.]

(2) A motion or response to a motion that presents an issue of law must be accompanied by a brief citing the authority on which it is based, and must comply with the provisions of MCR 7.215(C) regarding citation of unpublished Court of Appeals opinions.

(a)-(c) [Unchanged.]

(d) Except where electronic filing has been implemented, a~~A~~ copy of a motion or response (including brief) filed under this rule must be provided by counsel to the office of the judge hearing the motion. The judge's copy must be clearly marked JUDGE'S COPY on the cover sheet; that notation may be handwritten. Where electronic filing has been implemented, a judge's copy shall not be required.

(B)-(G) [Unchanged.]

RULE 2.222. CHANGE OF VENUE; VENUE PROPER.

(A)-(C) [Unchanged.]

(D) Order for Change of Venue; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the party that moved for change of venue to pay the applicable statutory filing fee to the receiving court, unless fees have been waived in accordance with MCR 2.002.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the transferring court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court must temporarily suspend payment of the filing fee and open a case pending payment of the filing fee as ordered by the transferring court. The receiving court must notify the party that moved for change of venue of the new case number in the receiving court, the amount due, and the due date.

(~~D~~E) Payment of Filing and Jury Fees ~~After Change of Venue~~.

(1) ~~At or before the time the order changing venue is entered, t~~The party that moved for change of venue ~~shall tender a negotiable instrument in the amount of the applicable filing fee, payable to the court to which the case is to be transferred. The transferring court shall send the negotiable instrument with the case documents to the transferee court~~must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee as ordered by the transferring court. No further action may be had in the case until payment is made. If the fee is not paid to the receiving court within 28 days of the date of the order, the receiving court must order the case transferred back to the transferring court.

(2) If ~~the~~a jury fee has been paid, the clerk of the transferring court ~~shall~~must forward it to the clerk of the receiving court ~~to which the action is transferred~~as soon as possible after the case records have been transferred.

~~(E) In tort actions filed between October 1, 1986, and March 28, 1996, if venue is changed because of hardship or inconvenience, the action may be transferred only to the county in which the moving party resides.~~

RULE 2.223. CHANGE OF VENUE; VENUE IMPROPER.

(A) [Unchanged.]

(B) Order for Change of Venue; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the plaintiff to pay the applicable statutory filing fee directly to the receiving court, unless fees have been waived in accordance with MCR 2.002. The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant if the case was filed in the wrong court.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the transferring court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(~~B~~C) ~~Costs; Fees~~Payment of Filing and Jury Fees After Change of Venue.

(1) ~~The court shall order the change at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.~~

(~~2~~) The plaintiff must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee, costs, and expenses as ordered by

the transferring court or the receiving court will dismiss the action. ~~After transfer, n~~No further proceedings may be had in the action until ~~the costs and expenses allowed under this rule~~payment has been made~~have been paid. If they are not paid within 56 days from the date of the order changing venue, the action must be dismissed by the court to which it was transferred.~~

(2~~3~~) If ~~the~~a jury fee has been paid, the clerk of the transferring court ~~shall~~must forward it to the clerk of the receiving court as soon as possible after the case records have been~~to which the action is~~ transferred.

(3~~4~~) [Renumbered but otherwise unchanged.]

RULE 2.225. JOINDER OF PARTY TO CONTROL VENUE.

(A) [Unchanged.]

(B) Order for Change of Venue; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the plaintiff to pay the applicable statutory filing fee directly to the receiving court, unless fees have been waived in accordance with MCR 2.002. The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant when necessary to accomplish the transfer.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(~~B~~C) Payment of Filing and Jury Fees After Transfer ~~Costs. A transfer under this rule must be made at the plaintiff's cost, which shall include the statutory filing fee applicable to the court to which the action is transferred, and which may include reasonable compensation for the defendant's expense, including reasonable attorney fees, necessary to accomplish the transfer.~~

(1) The plaintiff must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee and any expenses or attorney fees as ordered by the transferring court or the receiving court will dismiss the action.

(2) If a jury fee has been paid, the clerk of the transferring court must forward it to the clerk of the receiving court as soon as possible after the case records have been transferred.

~~(C) Jury Fee. If the jury fee has been paid, the clerk of the transferring court shall forward it to the clerk of the court to which the action is transferred.~~

~~RULE 2.226. CHANGE OF VENUE; ORDERS.~~

~~The court ordering a change of venue shall enter all necessary orders pertaining to the certification and transfer of the action to the court to which the action is transferred.~~

RULE 2.227. TRANSFER OF ACTIONS ON FINDING OF LACK OF JURISDICTION.

(A) Transfer to Court Which Has Jurisdiction.

~~(1)~~ When the court in which a civil action is pending determines that it lacks jurisdiction of the subject matter of the action, but that some other Michigan court would have jurisdiction of the action, the court may order the action transferred to the other court in a place where venue would be proper. If the question of jurisdiction is raised by the court on its own initiative, the action may not be transferred until the parties are given notice and an opportunity to be heard on the jurisdictional issue.

~~(2) As a condition of transfer, the court shall require the plaintiff to pay the statutory filing fee applicable to the court to which the action is to be transferred, and to pay reasonable compensation for the defendant's expense, including reasonable attorney fees, in attending in the wrong court.~~

~~(3) If the plaintiff does not pay the filing fee to the clerk of the court transferring the action and submit proof to the clerk of the payment of any other costs imposed within 28 days after entry of the order of transfer, the clerk shall notify the judge who entered the order, and the judge shall dismiss the action for lack of jurisdiction. The clerk shall notify the parties of the entry of the dismissal.~~

~~(4) After the plaintiff pays the fee and costs, the clerk of the court transferring the action shall promptly forward to the clerk of the court to which the action is transferred the original papers filed in the action and the filing fee and shall send written notice of this action to the parties. If part of the action remains~~

~~pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.~~

(B) Order Transferring Jurisdiction; Case Records.

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. The court must order the plaintiff to pay the applicable statutory filing fee directly to the receiving court, unless fees have been waived in accordance with MCR 2.002. The court may also order the plaintiff to pay reasonable compensation and attorney fees to the defendant for filing the case in the wrong court.

(2) The transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the transferring court. The receiving court must notify the plaintiff of the new case number in the receiving court, the amount due, and the due date.

(C) Payment of Filing and Jury Fees After Transfer.

(1) The plaintiff must pay to the receiving court within 28 days of the date of the transfer order the applicable filing fee and must submit proof of the payment of any expenses as ordered by the transferring court or the receiving court will dismiss the action.

(2) If a jury fee has been paid, the clerk of the transferring court must forward it to the clerk of the

receiving court as soon as possible after the case records have been transferred.

(~~B~~D) Procedure After Transfer.

(1) The action proceeds in the receiving court ~~to which it is transferred~~ as if it had been originally filed there. If further pleadings are required or allowed, the time for filing them runs from the date the ~~clerk sends notice that the file has been forwarded under subrule (A)(4)~~filing fee is paid under subrule (C)(1). The receiving court ~~to which the action is transferred~~ may order the filing of new or amended pleadings. If part of the action remains pending in the transferring court, certified copies of the papers filed may be forwarded, with the cost to be paid by the plaintiff.

(2) If a defendant had not been served with process at the time the action was transferred, the plaintiff must obtain the issuance of a new summons ~~by~~from the receiving court ~~to which the action is transferred~~.

(3) A waiver of jury trial in the court in which the action was originally filed is ineffective after transfer. A party who had waived trial by jury may demand a jury trial after transfer by filing a demand and paying the applicable jury fee within 28 days after the ~~clerk sends the notice that the file has been forwarded under subrule (A)(4)~~filing fee is paid under subrule (C)(1). A demand for a jury trial in the court in which the action was originally filed is preserved after transfer. ~~If the jury fee had been paid, the clerk shall forward it with the file to the clerk of the court to which the action is transferred.~~

(~~C~~E) [Relettered but otherwise unchanged.]

RULE 3.206. INITIATING A CASE.

(A) Information in Case Initiating Document.

(1) The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E).

(2)-(6) [Unchanged.]

(B) [Unchanged.]

(C) Verified Statement.

(1) In an action involving a minor, or if child support or spousal support is requested, the party seeking relief must provide to the friend of the court~~attach~~ a verified statement containing, at a minimum, personal identifying, financial, and health care coverage information of the parties and minor children. A copy of the verified statement must be~~to the copies of the papers~~ served on the other party~~ and provided to the friend of the court~~. The verified statement must be completed on a form approved by the State Court Administrative Office.~~, stating~~

~~(a) the last known telephone number, post office address, residence address, and business address of each party;~~

~~(b) the social security number and occupation of each party;~~

~~(c) the name and address of each party's employer;~~

~~(d) the estimated weekly gross income of each party;~~

~~(e) the driver's license number and physical description of each party, including eye color, hair color, height, weight, race, gender, and identifying marks;~~

~~(f) any other names by which the parties are or have been known;~~

~~(g) the name, age, birth date, social security number, and residence address of each minor involved in the action, as well as of any other minor child of either party;~~

~~(h) the name and address of any person, other than the parties, who may have custody of a minor during the pendency of the action;~~

~~(i) the kind of public assistance, if any, that has been applied for or is being received by either party or on behalf of a minor, and the AFDC and recipient identification numbers; if public assistance has not been requested or received, that fact must be stated; and~~

~~(j) the health care coverage, if any, that is available for each minor child; the name of the policyholder; the name of the insurance company, health care organization, or health maintenance organization; and the policy, certificate, or contract number.~~

(2) The information in the verified statement is confidential, and is not to be released other than to the court, the parties, or the attorneys for the parties, except on court order. For good cause, the addresses of a party and minors may be omitted from the copy of the statement that is served on the other party. If a party excludes his or her address for good cause, that party shall either:

(a) submit to electronic filing and electronic service under MCR 1.109(G), or

(b) provide an alternate address where mail can be received.

(3) If any of the information required to be in the verified statement is omitted, the party seeking relief must explain the omission in the verified statement or in a separate statement, verified under MCR 1.109(D)(3)(b)~~a sworn affidavit, to be filed with the court~~.

(4) When the action is to establish paternity or child support and the pleadings are generated from Michigan's automated child support enforcement system,

the party is not required to comply with subrule (C)(1). However, the party may comply with subrule (C)(1) to provide the other party an opportunity to supply any omissions or correct any inaccuracies.

(D) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(E) [Unchanged.]

(F) Entry of Judgment or Order

(1) [Unchanged.]

(2) The party submitting the first temporary order awarding child custody, parenting time, or support and the party submitting any final proposed judgment awarding child custody, parenting time, or support must:

(a) serve the friend of the court office and, unless the court orders otherwise, all other parties, with a completed copy of the latest version of the state court administrative office's Ddomestic Rrelations Judgment Information Fform, and

(b) file a proof of service with the court certifying that the Domestic Relations Judgment Information Fform has been provided to the friend of the court office and, unless the court orders otherwise, to all other parties.

(3) If the court modifies the proposed judgment or order before signing it, the party submitting the judgment or order must, within 7 days, submit a new Domestic Relations Judgment Information Fform to the friend of the court if any of the information previously submitted changes as a result of the modification.

(4) Before it signs a judgment or order awarding child support or spousal support, the court must determine that:

(a) the party submitting the judgment or order has certified that the Domestic Relations Judgment Information ~~F~~form in subrule (F)(2) has been submitted to the friend of the court, and

(b) [Unchanged.]

(5) The Domestic Relations Judgment Information ~~F~~form must be ~~filed~~submitted to the friend of the court in addition to the verified statement that is required by MCR 1.~~109(D)(3)~~3.206(C).

(G)-(H) [Unchanged.]

RULE 3.212. POSTJUDGMENT TRANSFER OF DOMESTIC RELATIONS CASES.

(A)-(C) [Unchanged.]

(D) ~~Transfer~~ Order for Transfer; Case Records.

(1) The transferring court ~~ordering a postjudgment transfer~~ must enter all necessary orders pertaining to the certification and postjudgment transfer of the action to the receiving court. ~~The transferring court must send to the receiving court all court files and friend of the court files, ledgers, records, and documents that pertain to the action. Such materials may be used in the receiving jurisdiction in the same manner as in the transferring jurisdiction.~~

(a) The court may not enter an order transferring until all pending matters in the case have been resolved.

(b) The court must order the party who moved for the transfer to pay the applicable statutory filing fee directly to the receiving court unless fees have been waived in accordance with MCR 2.002.

(c) If the parties stipulate to the transfer of a case, they must share equally the cost of transfer unless the court orders otherwise.

(d) The court may also order one or both of the parties or the court-ordered custodian to pay past-due fees and costs under subrule (D)(4). Until all filing fees and court-ordered past-due fees and costs are paid, no further action in the case shall occur in the transferring court unless the moving party first demonstrates good cause and that substantial harm will occur absent the transferring court's immediate consideration.

(e) If the court or the friend of the court initiates the transfer, the statutory filing fee is waived.

(2) Except as otherwise ordered under subrule (D)(4), the transferring court must serve the order on the parties and send a copy to the receiving court. The clerk of the court and the friend of the court each must prepare the court's case records and the friend of the court's case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(3) The receiving court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee as ordered by the transferring court. The receiving court must notify the party of the new case number in the receiving court, the amount due, and the due date.

(~~2~~4) The court may order that any past-due fees and costs be paid to the transferring friend of the court office at the time of transfer. If the court orders payment of past-due fees and costs, the order must state that the court will not send the order to the receiving court under subrule (1) and the records will not be transferred under subrule (2) until the past-due

fees and costs are paid. If the past-due fees and costs are not paid within 28 days of entry, the transfer order becomes void.

~~(3) The court may order that one or both of the parties or court-ordered custodian pay the cost of the transfer.~~

(E) Payment of Filing Fee After Transfer. ~~An order transferring a case under this rule must provide that the party who moved for the transfer pay the statutory filing fee applicable to the court to which the action is transferred, except where MCR 2.002 applies. If the parties stipulate to the transfer of a case, they must share equally the cost of transfer unless the court orders otherwise. In either event, the transferring court must submit the filing fee to the court to which the action is transferred, at the time of transfer. If the court or the friend of the court initiates the transfer, the statutory filing fee is waived.~~ The party that moved for transfer must pay to the receiving court within 28 days of the due date provided under subrule (D)(3) the applicable filing fee as ordered by the transferring court. No further action in the case shall occur in the receiving court until the filing fee is paid unless the moving party first demonstrates good cause and that substantial harm will occur absent the receiving court's immediate consideration. If the fee is not paid to the receiving court within 28 days of the due date, the receiving court must order the case transferred back to the transferring court.

~~(F) Physical Transfer of Files. Court and friend of the court files must be transferred by registered or certified mail, return receipt requested or by another a secure method of transfer.~~

(~~G~~F) [Relettered but otherwise unchanged.]

RULE 3.214. ACTION UNDER UNIFORM ACTS.

(A) [Unchanged.]

(B) RURESA Actions.

(1) [Unchanged.]

(2) Transfer; Initiating and Responding RURESA Cases.

(a)-(b) [Unchanged.]

(c) A court ordering a transfer must send to the court that issued the prior valid support order all pertinent ~~papers, including all court files and friend of the court files, ledgers,~~ records~~, and documents~~. The clerk of the court and the friend of the court office must prepare the court and friend of the court records for transfer in accordance with the transfer order and the Michigan Trial Court Records Management Standards. The records must be sent to the court that issued the prior valid support order by a secure method within one business day of the date of the transfer order.

~~(d) Court files and friend of the court files must be transferred by registered or certified mail, return receipt requested or by other a secure method.~~

(~~e~~d) [Relettered but otherwise unchanged.]

(C)-(D) [Unchanged.]

RULE 3.303. HABEAS CORPUS TO INQUIRE INTO CAUSE OF DETENTION.

(A)-(M) [Unchanged.]

(N) Answer.

(1) [Unchanged.]

(2) ~~Exhibits~~Attachments. If the prisoner is detained because of a writ, warrant, or other written authority, a copy must be attached to the answer ~~as an exhibit~~, and the original must be produced at the hearing. If an

order under subrule (E) requires it, the answer must be accompanied by the certified transcript of the record and proceedings.

(3) [Unchanged.]

(O)-(Q) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(20) [Unchanged.]

(21) "Petition authorized to be filed" refers to written permission given by the court to file ~~the petition containing the formal allegations against the juvenile or respondent with the clerk of the court~~the petition among the court's public records as permitted by MCR 3.925. Until a petition is authorized, it must be filed with the clerk and maintained as a nonpublic record, accessible only by the court and parties. After authorization, a petition and any associated records may be made nonpublic only as permitted by rule or statute.

(22)-(27) [Unchanged.]

(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1) [Unchanged.]

(2) "Amended petition" means a petition filed to correct or add information to an original petition as defined in subrule (A)(21)~~, after it has been authorized, but~~ before it is adjudicated.

(3)-(13) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) Delinquency Proceedings.

(1) General. In a delinquency proceeding, the court ~~shall direct that~~must notify the following persons ~~be notified~~ of each hearing except as provided in subrule (A)(3):

(a)-(g) [Unchanged.]

(2)-(3) [Unchanged.]

(B)-(E) [Unchanged.]

RULE 3.925. OPEN PROCEEDINGS; JUDGMENTS AND ORDERS; RECORDS CONFIDENTIALITY; DESTRUCTION OF COURT RECORDS; SETTING ASIDE ADJUDICATIONS.

(A)-(B) [Unchanged.]

(C) Judgments and Orders. The form and signing of judgments are governed by MCR 2.602(A)(1) and (2). Judgments and orders may be served on a person by first-class mail to the person's last known address, by e-mail under MCR 2.107(C)(4), or electronic service under MCR 1.109(G)(6)(a).

(D) Public Access to Case File Records; Confidential File.

(1) General. Except as otherwise required by MCR 3.903(A)(21), c~~C~~ase file records maintained under Chapter XIIA of the Probate Code, MCL 712A.1 *et seq*., other than confidential files, must be open to the general public.

(2) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 3.926. TRANSFER OF JURISDICTION; CHANGE OF VENUE.

(A) [Unchanged.]

(B) Transfer to County of Residence. When a minor is brought before the family division of the circuit court in a county other than that in which the minor resides, the court may request transfer of the case to the court in the county of residence before trial. The court shall not order transfer of the case until the court to which the case is to be transferred has granted the request to accept the transfer.

(1)-(3) [Unchanged.]

(C)-(E) [Unchanged.]

(F) Transfer of Records. ~~The court entering an order of transfer or change of venue shall send the original pleadings and documents, or certified copies of the pleadings and documents, to the receiving court without charge.~~

(1) The transferring court must enter all necessary orders pertaining to the certification and transfer of the action to the receiving court. Where the courts have agreed to bifurcate the proceedings, the court adjudicating the case shall send any supplemented pleadings and other records ~~or certified copies of the supplemented pleadings and records~~ to the court entering the disposition in the case.

(2) The clerk of the court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(G) [Unchanged.]

RULE 3.931. INITIATING DELINQUENCY PROCEEDINGS.

(A) Commencement of Proceeding. Any request for court action against a juvenile must be by written petition. The form, captioning, signing, and verifying of

documents are prescribed in MCR 1.109(D) and (E). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the petitioner must complete and file a case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office.

(B) [Unchanged.]

(C) Citation or Appearance Ticket.

(1) A citation or appearance ticket may be used to initiate a delinquency proceeding if the charges against the juvenile are limited to:

~~(a)~~ violations of the Michigan Vehicle Code, or of a provision of an ordinance substantially corresponding to any provision of that law, as provided by MCL 712A.2b.

~~(b) offenses that, if committed by an adult, would be appropriate for use of an appearance ticket under MCL 764.9c.~~

(2) [Unchanged.]

(D) [Unchanged.]

RULE 3.933. ACQUIRING PHYSICAL CONTROL OF JUVENILE.

(A) Custody Without Court Order. When an officer apprehends a juvenile for an offense without a court order and does not warn and release the juvenile, does not refer the juvenile to a diversion program, and does not have authorization from the prosecuting attorney

to file a complaint and warrant charging the juvenile with an offense as though an adult pursuant to MCL 764.1f, the officer may:

(1)-(2) [Unchanged.]

(3) take the juvenile into custody and request the prosecutor to file~~submit~~ a petition, if:

(a)-(b) [Unchanged.]

(B)-(D) [Unchanged.]

RULE 3.942. TRIAL.

(A) Time. In all cases the trial must be held within 6 months after the ~~filing~~authorization of the petition, unless adjourned for good cause. If the juvenile is detained, the trial has not started within 63 days after the juvenile is taken into custody, and the delay in starting the trial is not attributable to the defense, the court ~~shall forthwith~~must immediately order the juvenile released pending trial without requiring that bail be posted, unless the juvenile is being detained on another matter.

(B)-(D) [Unchanged.]

RULE 3.950. WAIVER OF JURISDICTION.

(A)-(C) [Unchanged.]

(D) Hearing Procedure. The waiver hearing consists of two phases. Notice of the date, time, and place of the hearings may be given either on the record directly to the juvenile or to the attorney for the juvenile, the prosecuting attorney, and all other parties, or in writing, served on each individual.

(1) First Phase. The first-phase hearing is to determine whether there is probable cause to believe that an offense has been committed that if committed by an adult would be a felony, and that there is probable

cause to believe that the juvenile who is 14 years of age or older committed the offense.

(a) The probable cause hearing ~~shall~~must be commenced within 28 days after the ~~filing~~authorization of the petition unless adjourned for good cause.

(b)-(c) [Unchanged.]

(2) Second Phase. If the court finds the requisite probable cause at the first-phase hearing, or if there is no hearing pursuant to subrule (D)(1)(c), the second-phase hearing shall be held to determine whether the interests of the juvenile and the public would best be served by granting the motion. However, if the juvenile has been previously subject to the general criminal jurisdiction of the circuit court under MCL 712A.4 or 600.606, the court shall waive jurisdiction of the juvenile to the court of general criminal jurisdiction without holding the second-phase hearing.

(a) The second-phase hearing ~~shall~~must be commenced within 28 days after the conclusion of the first phase, or within 35 days after the ~~filing~~authorization of the petition if there was no hearing ~~pursuant to~~under subrule (D)(1)(c), unless adjourned for good cause.

(b)-(e) [Unchanged.]

(E)-(G) [Unchanged.]

RULE 3.961. INITIATING CHILD PROTECTIVE PROCEEDINGS.

(A) Form. Absent exigent circumstances, a request for court action to protect a child must be in the form of a petition. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E). When any pending or resolved family division case exists that involves family members of the person(s) named in the petition filed under subrule (B), the

petitioner must complete and file a case inventory listing those cases, if known. The case inventory is confidential, not subject to service requirements in MCR 3.203, and is available only to the party that filed it, the filing party's attorney, the court, and the friend of the court. The case inventory must be on a form approved by the State Court Administrative Office.

(B)-(C) [Unchanged.]

RULE 3.971. PLEAS OF ADMISSION OR NO CONTEST.

(A) General. A respondent may make a plea of admission or of no contest to the original allegations in the petition. The court has discretion to allow a respondent to enter a plea of admission or a plea of no contest to an amended petition. The plea may be taken at any time after the ~~filing~~authorization of the petition, provided that the petitioner and the attorney for the child have been notified of a plea offer to an amended petition and have been given the opportunity to object before the plea is accepted.

(B)-(C) [Unchanged.]

RULE 3.972. TRIAL.

(A) Time. If the child is not in placement, the trial must be held within 6 months after the ~~filing~~authorization of the petition unless adjourned for good cause under MCR 3.923(G). If the child is in placement, the trial must commence as soon as possible, but not later than 63 days after the child is removed from the home unless the trial is postponed:

(1)-(3) [Unchanged.]

When trial is postponed pursuant to subrule (2) or (3), the court shall release the child to the parent, guardian, or legal custodian unless the court finds that releasing the child to the custody of the parent, guard-

ian, or legal custodian will likely result in physical harm or serious emotional damage to the child.

If the child has been removed from the home, a review hearing must be held within 182 days of the date of the child's removal from the home, even if the trial has not been completed before the expiration of that 182-day period.

(B)-(E) [Unchanged.]

RULE 4.002. TRANSFER OF ACTIONS FROM DISTRICT COURT TO CIRCUIT COURT.

(A) Counterclaim or Cross-Claim in Excess of Jurisdiction.

(1) If a defendant asserts a counterclaim or cross-claim seeking relief of an amount or nature beyond the jurisdiction or power of the district court in which the action is pending, and accompanies the notice of the claim with a~~n affidavit~~ statement verified in the manner prescribed by MCR 1.109(D)(3) ~~stating~~indicating that the defendant is justly entitled to the relief demanded, the clerk shall record the pleadings ~~and affidavit~~ and present them to the judge to whom the action is assigned. The judge shall either order the action transferred to the circuit court to which appeal of the action would ordinarily lie or inform the defendant that transfer will not be ordered without a motion and notice to the other parties.

(2) ~~MCR 4.201(G)(2) and 4.202(I)(4) govern t~~Transfer of summary proceedings to recover possession of premises are governed under MCR 4.201(G)(2) and 4.202(I)(4) and subrules (C) and (D) of this rule.

(B) Change in Conditions.

(1) A party may, at any time, file a motion with the district court in which an action is pending, requesting

that the action be transferred to circuit court. The motion must be supported by a~~n~~ statement verified in the manner prescribed by MCR 1.109(D)(3)~~affidavit stating~~ indicating that

(a)-(b) [Unchanged.]

(2) [Unchanged.]

~~(C) Conditions Precedent to Transfer. The action may not be transferred under this rule until the party seeking transfer pays to the opposing parties the costs they have reasonably incurred up to that time that would not have been incurred if the action had originally been brought in circuit court, and pays the statutory circuit court filing fee to the clerk of the court from which the action is to be transferred. If a case is entirely transferred from district court to circuit court and the jury fee was paid in the district court, the district court clerk shall forward the fee to the circuit court with the papers and filing fee under subrule (D). If the amount paid to the district court for the jury fee is less than the circuit court jury fee, then the party requesting the jury shall pay the difference to the circuit court.~~

~~(D) Filing in Circuit Court. After the court has ordered transfer and the costs and fees required by subrule (C) have been paid, the clerk of the court from which the action is transferred shall forward to the clerk of the circuit court the original papers in the action and the circuit court filing fee.~~

~~(E) Procedure After Transfer. After transfer no further proceedings may be conducted in the district court, and the action shall proceed in the circuit court. The circuit court may order further pleadings and set the time when they must be filed.~~

(C) Order for Transfer; Case Records.

(1) The district court must enter all necessary orders pertaining to the certification and transfer of the action to the circuit court. The district court must order the moving party to pay the applicable statutory filing fee directly to the circuit court, unless fees have been waived in accordance with MCR 2.002.

(2) The district court may also order the party seeking transfer to pay the opposing parties the costs they have reasonably incurred up to that time that would not have been incurred if the action had originally been brought in circuit court.

(3) The district court must serve the order on the parties and send a copy to the circuit court. The clerk of the district court must prepare the case records for transfer in accordance with the orders entered under subrule (1) and the Michigan Trial Court Records Management Standards and send them to the receiving court by a secure method.

(4) The circuit court shall temporarily suspend payment of the filing fee and open a case pending payment of the filing fee and costs as ordered by the district court. The circuit court must notify the moving party of the new case number in the circuit court, the amount due, and the due date.

(5) After transfer, no further proceedings may be conducted in the district court, and the action shall proceed in the circuit court. The circuit court may order further pleadings and set the time when they must be filed.

(D) Payment of Filing and Jury Fees After Transfer; Payment of Costs.

(1) The party that moved for transfer must pay to the circuit court within 28 days of the date of the transfer order the applicable filing fee as ordered by

the district court. No further action may be had in the case until payment is made. If the fee is not paid to the circuit court within 28 days of the date of the transfer order, the circuit court will either dismiss the counterclaim or cross-claim or order the case transferred back to the district court.

(2) If the jury fee has been paid, the clerk of the district court must forward it to the clerk of the circuit court to which the action is transferred as soon as possible after the case records have been transferred. If the amount paid to the district court for the jury fee is less than the circuit court jury fee, then the party requesting the jury shall pay the difference to the circuit court.

(3) If the court ordered payment of costs, the moving party must pay them to the opposing parties within 28 days of the date of the transfer order. If the costs are not paid within 28 days of the date of entry, the circuit court will either dismiss the counterclaim or cross-claim and/or order the case transferred back to the district court to proceed on the original claim.

RULE 4.101. CIVIL INFRACTION ACTIONS.

(A) Citation; Complaint; Summons; Warrant.

(1) Except as otherwise provided by court rule or statute, a civil infraction action may be initiated by a law enforcement officer serving a written citation on the alleged violator, and filing the citation in the district court. The citation serves as the complaint in a civil infraction action and may be prepared electronically or on paper. The citation must be signed by the officer in accordance with MCR 1.109(E)(4); if a citation is prepared electronically and filed with a court as data, the name of the officer that is associated with issuance of the citation satisfies this requirement.

(a) If the infraction is a parking violation, the action may be initiated by an authorized person placing a citation securely on the vehicle or mailing a citation to the registered owner of the vehicle. ~~In either event, the citation must be filed in the district court.~~

(b) [Unchanged.]

~~The citation serves as the complaint in a civil infraction action, and may be filed either on paper or electronically.~~

(2)-(4) [Unchanged.]

(B)-(E) [Unchanged.]

(F) Contested Actions; Notice; Defaults.

~~(1) A contested action may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, may be dismissed with prejudice.~~

(1~~2~~)-(4~~5~~) [Renumbered but otherwise unchanged.]

(G)-(H) [Unchanged.]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A) [Unchanged.]

(B) Complaint.

(1) In General. The complaint must

(a)-(c) [Unchanged.]

(d) describe the premises or the defendant's holding if it is less than the entire premises; and

(e) show the plaintiff's right to possession and indicate why the defendant's possession is improper or unauthorized.~~; and~~

~~(f) demand a jury trial, if the plaintiff wishes one. The jury trial fee must be paid when the demand is made.~~

(2) Jury Demand. If the plaintiff wants a jury trial, the demand must be made on a form approved by the State Court Administrative Office and filed along with the complaint. The jury trial fee must be paid when the demand is filed.

(~~2~~3) Specific Requirements.

(a)-(e) [Unchanged.]

(C)-(F) [Unchanged.]

(G) Claims and Counterclaims.

(1) [Unchanged.]

(2) Removal.

(a) [Unchanged.]

(b) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order, in accordance with the procedures in MCR 4.002, removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(H)-(O) [Unchanged.]

RULE 4.202. SUMMARY PROCEEDINGS; LAND CONTRACT FORFEITURE.

(A)-(H) [Unchanged.]

(I) Joinder; Removal.

(1)-(3) [Unchanged.]

(4) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order, in accordance with the procedures in MCR 4.002, removal

of that portion of the action, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(J)-(L) [Unchanged.]

RULE 4.302. STATEMENT OF CLAIM.

(A) Contents. The statement of the claim must be in an affidavit in substantially the form approved by the state court administrator. Affidavit forms shall be available at the clerk's office. The nature and amount of the claim must be stated in concise, nontechnical language, and the affidavit must state the date or dates when the claim arose. The form, captioning, signing, and verifying of documents are prescribed in MCR 1.109(D) and (E).

(B)-(D) [Unchanged.]

RULE 5.128. CHANGE OF VENUE.

~~(A)~~ Reasons for Change. On petition by an interested person or on the court's own initiative, the venue of a proceeding may be changed to another county by court order for the convenience of the parties and witnesses, for convenience of the attorneys, or if an impartial trial cannot be had in the county where the action is pending. Procedure for change of venue is governed by MCR 2.222 and MCR 2.223 except that a court must also transfer the original of an unadmitted will or a certified copy of an admitted will.

~~(B) Procedure. If venue is changed~~

~~(1) the court must send to the transferee court, without charge, copies of necessary documents on file as requested by the parties or the transferee court and the original of an unadmitted will or a certified copy of an admitted will; and~~

~~(2) except as provided in MCR 5.208(A) or unless the court directs otherwise, notices required to be published must be published in the county to which venue was changed.~~

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) Methods of Commencement. A decedent estate may be commenced by filing an application for an informal proceeding or a petition for a formal testacy proceeding. A request for supervised administration may be made in a petition for a formal testacy proceeding.

(1) When filing either an application or petition to commence a decedent estate, a copy of the death certificate must be attached. If the death certificate is not available, the petitioner may provide alternative documentation of the decedent's death.

(2) Where electronic filing is implemented, if the application or petition to commence a decedent estate indicates that there is a will, it is available, and that it is not already in the court's possession, an exact copy of the will and any codicils must be attached to the application or petition. Within 14 days of the filing of the application or petition, the original will and any codicils must be filed with the court or the case will be dismissed without notice and hearing. Notice of a dismissal for failure to file the original will and any codicils shall be served on the petitioner and any interested persons in a manner provided under MCR 5.105(B).

(3) The court is prohibited from r~~R~~equiring additional documentation, such as information about the proposed or appointed personal representative~~, is prohibited~~.

(B)-(D) [Unchanged.]

RULE 5.731.~~CONFIDENTIAL~~ ACCESS TO RECORDS.

Case r~~R~~ecords filed with the court under the mental health code are public except as otherwise indicated in court rule or statute.

RULE 6.101.~~THE~~ COMPLAINT.

(A) [Unchanged.]

(B) Signature and Oath. The complaint must be signed ~~and sworn to before a judicial officer or court clerk~~and verified under MCR 1.109(D)(3). Any requirement of law that a complaint filed with the court must be sworn is met by this verification.

(C) [Unchanged.]

RULE 6.615. MISDEMEANOR TRAFFIC CASES.

(A) Citation; Complaint, Summons; Warrant.

(1) A misdemeanor traffic case may be ~~begun~~initiated by one of the following procedures:

(a) Service of a written citation by a law enforcement officer on the defendant, and the filing of the citation in the district court. The citation may be prepared electronically or on paper. The citation must be signed by the officer in accordance with MCR 1.109(E)(4); if a citation is prepared electronically and filed with a court as data, the name of the officer that is associated with issuance of the citation satisfies this requirement.

(b)-(c) [Unchanged.]

(2) [Unchanged.]

(B)-(C) [Unchanged.]

(D) Contested Cases.

~~(1) A contested case may not be heard until a citation is filed with the court. If the citation is filed electronically, the court may decline to hear the matter until the~~

~~citation is signed by the officer or official who issued it, and is filed on paper. A citation that is not signed and filed on paper, when required by the court, may be dismissed with prejudice.~~

~~(2)~~ A misdemeanor traffic case must be conducted in compliance with the constitutional and statutory procedures and safeguards applicable to misdemeanors cognizable by the district court.

RULE 8.105. GENERAL DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Notice of Judgments, Orders, and Opinions. ~~Notice of a judgment, final order, written opinion or findings filed or entered in a civil action in a court of record must be given forthwith in writing by t~~The court clerk must deliver, in the manner provided in MCR 2.107, a copy of the judgment, final order, written opinion, or findings entered in a civil action to the attorney~~s~~ or party who sought the order, judgment, opinion or findings. Except where e-Filing is implemented, if the attorney or party does not provide at least one copy when filing a proposed order or judgment, the clerk, when complying with this subrule, may charge the reproduction fee authorized by the court's local administrative order under MCR 8.119(H)(2).~~of record in the case, in the manner provided in MCR 2.107.~~

(D) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(H) [Unchanged.]

(I) Sealed Records.

(1)-(3) [Unchanged.]

(4) Materials that are subject to a motion to seal a record in whole or in part ~~shall~~must be ~~held under seal~~made nonpublic temporarily pending the court's disposition of the motion.

(5)-(9) [Unchanged.]

(J)-(L) [Unchanged.]

~~RULE 8.125. ELECTRONIC FILING OF CITATION.~~

~~(A) Applicability. This rule applies to all civil infraction and misdemeanor actions initiated by a Michigan Uniform Law Citation or a Michigan Uniform Municipal Civil Infraction Citation.~~

~~(B) Citation; Complaint; Filing. A citation may be filed with the court either on paper or electronically. The filing of a citation constitutes the filing of a complaint. An electronic citation must contain all the information that would be required if the citation were filed on paper. A citation that contains the full name of the police officer or authorized local official who issued it will be deemed to have been signed pursuant to MCL 257.727c(3), 600.8705(3), or 600.8805(3).~~

~~(C) Contested Actions. If an electronic citation is contested, the court may decline to hear the matter until the citation is signed and filed on paper. A citation that is not signed and filed on paper, when required by the court, will be dismissed with prejudice.~~

Staff comment: The amendments of MCR 1.109, 2.107, 2.113, 2.116, 2.119, 2.222, 2.223, 2.225, 2.227, 3.206, 3.211, 3.212, 3.214, 3.303, 3.903, 3.921, 3.925, 3.926, 3.931, 3.933, 3.942, 3.950, 3.961, 3.971, 3.972, 4.002, 4.101, 4.201, 4.202, 4.302, 5.128, 5.302, 5.731, 6.101, 6.615, 8.105, and 8.119 and rescission of MCR 2.226 and 8.125 continue the process for design and implementation of the statewide electronic-filing system.

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

Adopted September 18, 2019, effective January 1, 2020 (File No. 2017-02)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 6.508 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 6.508. PROCEDURE; EVIDENTIARY HEARING; DETERMINATION.

(A)-(C) [Unchanged.]

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1)-(2) [Unchanged.]

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) [Unchanged.]

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial,

(A) but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; or

(B) where the defendant rejected a plea based on incorrect information from the trial court or ineffective assistance of counsel, it is reasonably likely that

(1) the prosecutor would not have withdrawn any plea offer;

(2) the defendant and the trial court would have accepted the plea but for the improper advice; and

(3) the conviction or sentence, or both, under the plea's terms would have been less severe than under the judgment and sentence that in fact were imposed.

(ii)-(iv) [Unchanged.]

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

(E) [Unchanged.]

Staff Comment: The amendment of MCR 6.508 enables a defendant to show actual prejudice in a motion for relief from judgment where defendant rejected a plea based on incorrect information from the trial court or ineffective assistance of counsel, and it was reasonably likely the defendant and court would have accepted the plea (which would have been less severe than the judgment or sentence issued after trial) but for the improper advice.

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

Adopted September 18, 2019, effective January 1, 2020 (File No. 2018-11)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendments of Rules 1.1 and 1.6

of the Michigan Rules of Professional Conduct are adopted, effective January 1, 2020.

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

RULE 1.1. COMPETENCE.

[Rule unchanged.]

Comments:

Legal Knowledge and Skill. [Unchanged.]

Thoroughness and Preparation. [Unchanged.]

Maintaining Competence. To maintain the requisite knowledge and skill, a lawyer should engage in continuing study and education, including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter. If a system of peer review has been established, the lawyer should consider making use of it in appropriate circumstances.

RULE 1.6. CONFIDENTIALITY OF INFORMATION.

[Rule unchanged.]

Comments: [Current language unchanged; proposed new language would be a new comment at the end of the comments section.]

Confidentiality of Information. When transmitting a communication that contains confidential and/or privileged information relating to the representation of a client, the lawyer should take reasonable measures and act competently so that the confidential and/or privileged client information will not be revealed to unintended third parties.

Staff comment: The amendments of the comments of MRPC 1.1 and MRPC 1.6 address a lawyer's obligation to maintain reasonable competence in relevant technology and ensure reasonable efforts to maintain confidentiality of documents.

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

Adopted September 18, 2019, effective January 1, 2020 (File No. 2018-12)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 2.612 of the Michigan Court Rules is adopted, effective January 1, 2020.

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

RULE 2.612. RELIEF FROM JUDGMENT OR ORDER.

(A)-(B) [Unchanged.]

(C) Grounds for Relief From Judgment.

(1)-(3) [Unchanged.]

(4) The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action. Relief may not be sought or obtained by the writs of coram nobis, coram vobis, audita querela, bills of review, or bills in the nature of a bill of review.

Staff comment: The amendment of MCR 2.612 clarifies that writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review may not be used to seek relief.

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

Adopted September 18, 2019, effective January 1, 2020 (File No. 2018-16)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.201 and addition of Rule 3.230 of the Michigan Court Rules are adopted, effective January 1, 2020.

[Rule 3.230 is a new rule and no underlining is included; otherwise, additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 3.201. APPLICABILITY OF RULES.

(A) Subchapter 3.200 applies to

(1) actions for divorce, separate maintenance, the annulment of marriage, the affirmation of marriage, paternity, ~~family~~ support under MCL 552.451 *et seq*., or MCL 722.1 *et seq*., the custody of minors or parenting time under MCL 722.21 *et seq*. or MCL 722.1101 *et seq*., ~~and visitation with minors under MCL 722.27b, and to~~

(2) an expedited proceeding to determine paternity or child support under MCL 722.1491 *et seq*., or to register a foreign judgment or order under MCL 552.2101 *et seq*. or MCL 722.1101 *et seq*., and to

(~~2~~3) proceedings that are ancillary or subsequent to the actions listed in subrules (A)(1) and (A)(2) and that relate to

(a) [Unchanged.]

(b) ~~visitation~~parenting time with minors, or

(c) [Unchanged.]

(B)-(C) [Unchanged.]

(D) When used in this subchapter, unless the context otherwise indicates:

(1) "Case" means an action ~~initiated~~commenced in the family division of the circuit court by filing one of the following case initiating documents:

(a) ~~filing~~ an original complaint;

(b) ~~accepting~~ transfer of an action from another court or tribunal;

(c) ~~filing or registering~~ a foreign judgment or order;

(d) ~~filing~~ a petition under MCR 3.222(C); ~~or~~

(e) filing a consent judgment under MCR 3.223~~.~~;

(f) a complaint and notice under MCR 3.230; or

(g) a request for entry of a consent agreement and a consent judgment or order under MCR 3.230.

(2)-(3) [Unchanged.]

(4) "Case initiating document" includes a statement, letter, or other document filed in lieu of a complaint to open a case and request relief under the Summary Support and Paternity Act, MCL 722.1491 *et seq.*, or to register a foreign judgment or order under the Uniform Interstate Family Support Act, MCL 552.2101 *et seq.* or the Uniform Child Custody Jurisdiction Enforcement Act, MCL 722.1101 *et seq*.

RULE 3.230. ACTIONS UNDER THE SUMMARY SUPPORT AND PATERNITY ACT.

(A) Scope and Applicability of Rules; Definitions.

(1) Procedure in actions under the Summary Support and Paternity Act, MCL 722.1491 *et seq*., is governed by the rules applicable to other domestic relations actions, except as otherwise provided in this rule and the act.

(2) Definitions. For purposes of this rule

(a) "IV-D agency" means the agency in a county that provides support and paternity establishment services under MCL 722.1501.

(b) "Plaintiff" means

(i) The child's mother, father, or alleged father on whose behalf the IV-D agency files the action, or

(ii) The Michigan Department of Health and Human Services when the IV-D agency files an action on behalf of a child.

(c) "Expedited paternity action" means an action commenced to establish either paternity or paternity and support under MCL 722.1491 *et seq*.

(d) "Expedited support action" means an action commenced to establish a parent's support obligation under MCL 722.1499.

(B) Commencing an Action.

(1) A IV-D agency commences an expedited paternity or expedited support action by filing one of the following with the court:

(a) A complaint and notice, or

(b) A request to enter a consent agreement, and a consent judgment or order signed by the parties.

(2) Upon filing an action, the court clerk shall assign a case number and judge. The court clerk shall not issue a summons under MCR 2.102.

(3) A complaint, notice, and request for entry of a consent agreement used to initiate an action or set

child support must be completed on forms approved by the State Court Administrative Office.

(4) Complaint. A complaint filed in an expedited action shall:

(a) comply with MCR 1.109, MCR 2.113, and MCR 3.206(A),

(b) be verified and signed by the mother or alleged father, or signed "on information and belief" by the IV-D agency,

(c) comply with MCR 2.201(E) if the plaintiff is a minor,

(d) state the relief being requested, and either

(i) comply with MCL 722.1495 and other applicable laws and rules if filed in an expedited paternity action, or

(ii) comply with MCL 722.1499 and other applicable laws and rules if filed in an expedited support action.

(5) Notice. A notice to initiate an expedited paternity or expedited support action shall be titled "In the name of the people of the state of Michigan," and shall be signed by the IV-D agency. The notice must be directed to the defendant and:

(a) comply with MCR 1.109(D);

(b) include the name, address, and phone number of the IV-D agency filing the action;

(c) state that written responses, agreements, and other actions must be filed with the court within 21 days after being served, and if the defendant fails to file a written response pursuant to statute or take other action within 21 days, an order or a judgment may be entered granting the relief requested in the complaint without further notice or hearing; and

(d) include an expiration date, which does not exceed 126 days after the date the action is filed.

(6) Request to Enter Consent Agreement. A request for entry of a consent judgment or order to initiate an expedited paternity or expedited support action shall:

(a) comply with MCR 1.109(D)(1),

(b) contain the grounds for jurisdiction, the statutory grounds to enter the judgment or order, and a request for entry of the judgment or order without further notice; and

(c) be signed by the parties and the IV-D agency.

(7) The requirement to submit a verified statement or disclosure form required under MCR 3.206(C) does not apply to an expedited paternity or expedited support action, unless otherwise directed by the court.

(C) Service.

(1) A complaint and notice filed under subrule (B)(1)(a) must be served on the parties by the IV-D agency in accordance with MCR 2.105, or in the alternative, may be served by mail in accordance with MCL 722.1495(4).

(2) Pursuant to MCL 722.1501(4)(c), a request to enter a consent judgment or order filed under subrule (B)(1)(b) is considered served at the time of filing, and a party's signature on the request to enter a consent agreement, judgment, or order acknowledges service.

(3) After a party has been served under subrule (C)(1) or (2), other court papers, orders, and notices shall be served in accordance with MCR 3.203.

(D) Dismissal as to Defendant Not Served.

(1) Upon expiration of the notice under subrule (B)(5)(d), the action is deemed dismissed without

prejudice if the defendant has not been served with notice of the action unless the defendant has responded.

(2) A court shall set aside a dismissal of an action under this subrule without hearing upon showing by the IV-D agency within 28 days of the expiration of the notice that the defendant did in fact receive timely notice or had submitted to the court's jurisdiction before the dismissal.

(E) Setting Child Support.

(1) At the time that a complaint is filed, or any time after establishing paternity or a duty to support a child, the IV-D agency may provide notice setting a proposed support amount. The proposed support obligation shall be calculated by application of the Michigan Child Support Formula or a properly documented deviation from the amount calculated using the formula. The notice or an accompanying calculation results report must state the amounts calculated for support, the proposed effective date, and the facts and assumptions upon which the calculation is based.

(2) A notice and calculation report setting a child support amount shall be filed with the court and provided to the parties. The notice shall contain statements notifying the parties of all of the following:

(a) that objections and responses to the notice must be filed within 21 days from:

(i) the date of service, if the notice setting child support is served at the same time as the complaint and notice; or

(ii) the date of mailing or service, if the notice is served under MCR 3.203.

(b) a party may object to the proposed child support amount based on either a mistake in the facts or

assumptions used to calculate support, or on an error in the calculation by filing an answer requesting a hearing on the proposed obligation;

(c) if no objection is filed, an order will be submitted to the court in the proposed amounts for entry without further notice or hearing;

(d) if an objection is filed, a hearing will be scheduled, unless the IV-D agency recalculates the amount and sends a new notice.

(3) If the IV-D agency receives information from a party after filing a notice setting a child support amount and before a support order is submitted for entry, the agency may recalculate support and issue a new notice and calculation report under this subrule proposing a corrected child support amount.

(F) Response.

(1) Within 21 days after being served with a notice under subrule (B) or a notice under subrule (E), a party must file a response with the court or take another action permitted by law or these rules. The party must serve copies of the response on the IV-D agency and the other party in accordance with MCR 3.203.

(2) The IV-D agency shall immediately forward to the court any response it receives from a party who has not filed the response with the court.

(3) A request to enter a consent agreement, or a consent judgment or order filed under subrule (B)(1)(b) does not require a response. A party may file an additional response or motion regarding issues not resolved by the agreement, consent judgment or order, or the other party filing an additional response.

(4) Within 14 days after the time permitted for responses under subrule (F)(1), if a party has filed a

response, or pursuant to any matter left unresolved, the IV-D agency shall take one or more of the following actions:

(a) schedule genetic testing, if a party in an expedited paternity action requests genetic testing;

(b) schedule a hearing on any matters or relief proposed in a complaint or notice that are contested, and the IV-D agency may submit a proposed order or judgment that incorporates any proposed relief that was not contested; or

(c) submit a proposed judgment or order that incorporates any proposed relief that a party agrees to or that was not contested.

(G) Failure to Respond.

(1) Subrule MCR 3.210(B) does not apply to proceedings under this rule.

(2) If neither party in an action to establish paternity brought against an alleged father requests genetic tests and the defendant does not otherwise defend within 21 days after receiving notice, the IV-D agency may request entry of a judgment establishing defendant as the child's legal father by submitting a proposed judgment for entry.

(3) In an action to establish paternity brought by an alleged father against the child's mother, if the mother does not admit the alleged father's paternity, the court shall not determine paternity unless based on genetic test results.

(4) When a defendant does not respond or otherwise defend, the IV-D agency shall submit a proposed order that establishes the duty to support the child.

(5) If neither party files an objection to a notice setting a support amount within 21 days, the IV-D

agency shall submit a support order in the recommended amounts to the court.

(6) Nonmilitary affidavits required by law must be filed before a judgment is entered in cases in which the defendant has failed to respond or appear.

(7) A judgment may not be entered against a minor or an incompetent person who has failed to respond or appear unless the person is assisted in the action by a conservator or other representative, except as otherwise provided by law.

(H) Judgments and Orders.

(1) The court may consider the complaints and other documents filed with the court, relevant and material affidavits, or other evidence when entering an order in an expedited paternity or support action.

(2) Entering Orders. The court may enter a proposed judgment or order submitted by the IV-D agency without hearing if the court is satisfied of all of the following:

(a) that the parties were given proper notice and opportunity to file a response,

(b) the statutory and rule requirements were met, and

(c) the terms of the judgment or order are in accordance with the law.

(3) The IV-D agency seeking entry of a proposed judgment or order must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment or orders upon the parties at least 14 days before the hearing, and promptly file a proof of service when:

(a) the proposed judgment involves a request for relief that is different from the relief requested in the complaint; or

(b) the IV-D agency does not have sufficient facts to complete the judgment or order without a judicial determination of the relief to which the party is entitled.

(4) If the court determines that a proposed judgment or order is not in accordance with the law or that the court needs additional information to decide the matter, the court may direct the IV-D agency or the parties to do any of the following within 14 days:

(a) submit a modified proposed judgment or order in conformity with the court's ruling;

(b) file additional affidavits or other documents and notices, or

(c) schedule a hearing to present evidence sufficient to satisfy the court or to meet statutory requirements.

(5) A party may waive a statutory waiting period or further notice prior to entry of a consent judgment or order.

(6) If paternity of a child has not been established and a party or IV-D agency requests genetic testing, the court may order the parties and child to submit to genetic testing without a hearing.

(7) Upon entry of a judgment or order and as provided by MCR 3.203, the IV-D agency must serve a copy as entered by the court on all parties within 7 days after entry, and promptly file a proof of service.

Staff comment: The amendment of MCR 3.201 and addition of MCR 3.230 provide procedural rules to incorporate the Summary Support and Paternity Act (366 PA 2014; MCL 722.1491, *et seq*.) to establish a parent's paternity or support obligation through a summary action.

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

Adopted September 18, 2019, effective January 1, 2020 (File No. 2018-18)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following amendment of Rule 3.106 of the Michigan Court rules is adopted, effective January 1, 2020.

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

RULE 3.106. PROCEDURES REGARDING ORDERS FOR THE SEIZURE OF PROPERTY AND ORDERS OF EVICTION.

(A) [Unchanged.]

(B) Persons Who May Seize Property or Conduct Evictions. The persons who may seize property or conduct evictions are those persons named in MCR 2.103(B), and they are subject to the provisions of this rule unless a provision or a statute specifies otherwise.

(1) [Unchanged.]

(2) Each court must post, in a public place at the court, a list of those persons who are serving as court officers or bailiffs. The court must provide the State Court Administrative Office with a copy of the list and a copy of each court officer's bond required under subsection (D)(1), and must notify the State Court Administrative Office of any changes.

(C)-(H) [Unchanged.]

Staff comment: The amendment of MCR 3.106 requires trial courts to provide a copy of each court officer's bond to SCAO along with the list of court officers.

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

Adopted September 18, 2019, effective immediately (File No. 2018-27)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, the following rescission of Rule 8.123 of the Michigan Court Rules is adopted, effective immediately.

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

~~RULE 8.123. COUNSEL APPOINTMENTS; PROCEDURE AND RECORDS.~~

~~(A) Applicability. This rule applies to all trial courts, which means all circuit courts, district courts, probate courts, and municipal courts.~~

~~(B) Plan for Appointment. Each trial court must adopt a local administrative order that describes the court's procedures for selecting, appointing, and compensating counsel who represent indigent parties in that court.~~

~~(C) Approval by State Court Administrator. The trial court must submit the local administrative order to the State Court Administrator for review pursuant to MCR~~

~~8.112(B)(3). The State Court Administrator shall approve a plan if its provisions will protect the integrity of the judiciary.~~

~~(D) Required Records. At the end of each calendar year, a trial court must compile an annual electronic report of the total public funds paid to each attorney for appointments by that court.~~

~~This subrule applies to appointments of attorneys in any capacity, regardless of the indigency status of the represented party. Trial courts that contract for services to be provided by an affiliated group of attorneys may treat the group as a single entity when compiling the required records.~~

~~The records required by this subrule must be retained for the period specified by the State Court Administrative Office's General Schedule 16.~~

~~(E) Public Access to Records. The records must be available at the trial court for inspection by the public, without charge. The court may adopt reasonable access rules, and may charge a reasonable fee for providing copies of the records.~~

~~(F) Reports to State Court Administrator. A trial court must submit its annual electronic report to the state court administrator in the form specified by the state court administrator. When requested by the state court administrator, a trial court must cooperate in providing additional data on an individual attorney, judge, or attorney group for a period specified by the request, including the number of appointments by each judge, the number of appointments received by an individual attorney or attorney group, and the public funds paid for appointments by each judge.~~

Staff Comment: Because counsel appointment plan review and data collection regarding payments for appointed counsel is now, by statute, a requirement of the Michigan Indigent Defense Commission under

MCL 780.989 and MCL 780.993, this order rescinds MCR 8.123, which requires certain data be collected from courts and plans for appointment be approved by SCAO.

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

Adopted October 23, 2019, effective immediately (File No. 2019-21) —REPORTER.

On order of the Court, Local Court Rule 3.211(B) of the 3rd Circuit Court is rescinded, effective immediately.

SUPREME COURT CASES

In re FERRANTI, Minor

Docket Nos. 157907 and 157908. Argued on application for leave to appeal October 10, 2018. Decided June 12, 2019.

The Department of Health and Human Services (the Department) petitioned the Otsego Circuit Court, Family Division, to remove JF, a minor, from the care of respondents, her parents. JF had spina bifida, a birth defect that affects the development of the spinal cord and that caused JF to require medical care and supervision for her entire life. In particular, JF had trouble ambulating without the aid of a mobility device and had to use a catheter to urinate. In 2015, the Department petitioned the court for JF's removal, alleging that respondents had failed to adequately attend to JF's medical needs by missing several medical appointments and by failing to regularly refill her prescription medications. The Department also alleged that the living conditions in respondents' home posed a health risk to JF because it was cluttered, dirty, and had a strong odor of animals and urine. The court held an emergency hearing and placed JF in foster care, but the court permitted her to have unsupervised visits at respondents' home. After several more hearings, the trial court found probable cause to authorize the petition and set an adjudication trial. At a preadjudication status conference, respondents admitted that they had not refilled several of JF's prescriptions, and the court exercised jurisdiction over JF. In taking respondents' pleas, the court did not advise them that they were waiving any rights nor did the court advise them of the consequences of their pleas, as required by MCR 3.971. In January 2016, the court adopted the Department's proposed family treatment plan, which, among other things, required that respondents maintain a clean home. The court concluded the final dispositional hearing in October 2016 by authorizing the Department to file a termination petition, but the court noted that its decision was limited to that procedural step. The parties disputed the home's suitability for JF, and the court stated that it wanted to see the home for itself. The court visited the home in February 2017 but did not document its observations or factual findings. Additionally, during the termination hearing, the court conducted an *in camera* interview with JF but made no record of the conversation. The court, Michael K. Cooper, J., ultimately terminated respon-

dents' parental rights. Respondents appealed. The Court of Appeals, SHAPIRO, P.J., and M. J. KELLY and O'BRIEN, JJ., affirmed the trial court's termination decision in an unpublished per curiam opinion issued on May 10, 2018 (Docket Nos. 340117 and 340118), concluding that *In re Hatcher*, 443 Mich 426 (1993), prohibited it from considering respondents' claim that the trial court violated their due-process rights by failing to advise them of the consequences of their pleas. The panel also held that any error from the court's visit to the family home did not violate respondents' due-process rights and that respondents had waived the claim that the court's *in camera* interview was erroneous. Respondents applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 502 Mich 906 (2018).

In an opinion by Chief Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

In re Hatcher, 443 Mich 426 (1993), which generally barred a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights, was overruled. An appeal of an adjudication error in an appeal from an order terminating parental rights is not a collateral attack because although a child protective proceeding has two distinct phases—the adjudication and the disposition—the proceeding itself is one action, not two separate actions. Therefore, the collateral-bar rule does not apply within one child protective case. Also, the use of unrecorded, *in camera* interviews of children in termination-of-parental-rights proceedings violates parents' due-process rights.

1. Under MCR 3.961(A), a proceeding to terminate parental rights begins when the Department petitions the family division of a circuit court to take jurisdiction over a child. The trial court then holds a preliminary hearing to determine whether the court may exercise jurisdiction over the child. If the court authorizes the petition, the adjudicative phase begins, in which the court determines whether it may exercise jurisdiction over the child and the respondents-parents under MCL 712A.2(b) so that it can enter dispositional orders. Once the court's jurisdiction is established, the case moves to the dispositional phase, in which the court holds review hearings to determine whether the petition should be dismissed or whether the parents' parental rights should be terminated. *Hatcher*, 443 Mich 426, generally barred a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or

her parental rights. *Hatcher* made a foundational mistake by erroneously applying the rule from *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538 (1935)—that a court's exercise of jurisdiction cannot be collaterally attacked in a second proceeding—to what is a single, continual proceeding. The "collateral bar" rule generally prohibits a litigant from indirectly attacking a prior judgment in a later, *separate* action, unless the court that issued the prior judgment lacked jurisdiction over the person or subject matter in the first instance. *Hatcher* applied that rule to conclude that a respondent who appeals a defect in the adjudicative phase at the end of the child protective proceeding (in an appeal from an order terminating parental rights) is "collaterally" attacking that very same child protective proceeding. But that holding failed to recognize that a child protective proceeding is a single, continual proceeding that begins with a petition, proceeds to an adjudication, and—unless the family has been reunified—ends with a determination of whether a respondent's parental rights will be terminated. Therefore, *Hatcher* was wrongly decided.

2. That a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate. Courts should review whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision. In this case, the Supreme Court's growing list of exceptions to *Hatcher* showed that its rule defied simple application, especially when a respondent's due-process rights were violated in the adjudication. *Hatcher* disrupted the careful balancing of interests in the juvenile code by preventing judicial review of meritorious claims of defects in the adjudication; a parent's only remedy under *Hatcher* was by way of an interlocutory appeal, which disincentivized a parent from timely cooperating with the Department and further delayed a final determination. With regard to reliance interests, *Hatcher* had scant application; it merely imposed procedural limitations on a respondent's ability to challenge errors in the adjudication. Therefore, overruling *Hatcher* simply causes readjustments in litigation as opposed to practical, real-world dislocations. Finally, when considering whether changes in the law or facts no longer justify the decision, the erosion of *Hatcher*'s rule through the many exceptions to it created uncertainty and thus justified overruling it. Accordingly, *Hatcher* was overruled.

3. Parents have a fundamental right to direct the care, custody, and control of their children. Under the Due Process Clause of the Fourteenth Amendment, for a plea to constitute an

effective waiver of a fundamental right, the plea must be voluntary and knowing. MCR 3.971(B)(3) and (4) require the trial court to advise a respondent on the record or in a writing that is made a part of the file of the allegations in the petition, the right to an attorney, the rights the respondent will be waiving by entering a plea, the consequences of that plea (including the possibility that the plea will be used as evidence in a proceeding to terminate parental rights), and to provide advice about the respondent's posttermination support obligations. Respondents argued that adjudication errors raised after the trial court has terminated parental rights should be reviewed for plain error. Under that standard, respondents must establish that (1) error occurred; (2) the error was "plain," i.e., clear or obvious; and (3) the plain error affected their substantial rights. Additionally, the error must have seriously affected the fairness, integrity, or public reputation of judicial proceedings. The Department agreed that plain-error review applied to respondents' claim of adjudication error, and the Department acknowledged that the first and second prongs were satisfied in this case because the court erred by failing to advise respondents of the consequences of their pleas and the rights they were giving up; those errors were plain. The third prong was satisfied because the constitutional deprivations of respondents' fundamental right to direct the care, custody, and control of JF affected the very framework within which respondents' case proceeded; therefore, the error affected respondents' substantial rights. Finally, the error seriously affected the fairness, integrity, or public reputation of judicial proceedings because the trial court did not advise respondents that they were waiving any of the rights identified in MCR 3.971(B)(3) and failed to advise the respondents of the consequences of entering their pleas as required by MCR 3.971(B)(4). The trial court's order of adjudication therefore had to be vacated.

4. The propriety of a trial court conducting an *in camera* interview of the subject child in the context of child protective proceedings was an issue of first impression in Michigan. In this case, respondents' agreement to the general idea of the court speaking to JF did not waive their right to have that interview comport with due process. Respondents endorsed only the court's initial proposal that the court speak with JF, but the court never sought—and respondents never gave—their agreement about how that conversation would take place. There was nothing in the juvenile code, caselaw, court rules, or otherwise that permitted a trial court presiding over a termination proceeding to conduct *in camera* interviews of children for purposes of determining their best interests. Therefore, the Court of Appeals

correctly held that the use of unrecorded, *in camera* interviews in termination proceedings violates parents' due-process rights. On remand, a different judge must preside.

Trial court order terminating respondents' parental rights vacated; trial court order of adjudication vacated; case remanded to the trial court for further proceedings with a different judge presiding on remand.

Justice MARKMAN, joined by Justice ZAHRA, dissenting, would not have overruled *Hatcher* because it was correctly decided and no sound reason to alter its common-law rule was presented. Justice MARKMAN would have affirmed the judgment of the Court of Appeals because the Court of Appeals correctly held that respondents cannot collaterally attack the instant adjudication after their parental rights have been terminated, that respondents waived the issue pertaining to the interview of the child, and that any error on the trial court's part in visiting respondents' home was harmless. In this case, although the trial court breached MCR 3.971 by failing to advise respondents of their rights, respondents failed to timely raise this issue. Respondents did not appeal the adjudication until after the trial court had terminated their parental rights, nearly two years after the adjudication. An adjudication cannot be collaterally attacked following an order terminating parental rights unless the termination occurred at the initial disposition; however, in this case, the adjudication and the termination were separated by a lengthy period of attempts at reunification and, therefore, respondents were barred from collaterally attacking the adjudication. The majority was incorrect in failing to recognize that although there is only one final order in a child protective case, there are at least two orders that are appealable by right, i.e., the initial dispositional order and the order terminating parental rights. The time to directly attack the adjudication is following the order of disposition placing a minor under supervision of the court. *Black's Law Dictionary* (6th ed) defines "collateral attack" as "[a]n attack on a judgment in any manner other than by action or proceeding, whose very purpose is to impeach or overturn the judgment; or, stated affirmatively, a collateral attack on a judgment is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment." An order terminating parental rights has an independent purpose other than overturning the adjudication—to attack the termination. Therefore, attacking the adjudication in the appeal of the termination order constitutes a collateral—rather than a direct—attack. The collateral-attack rule is a common-law rule, and

when it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change. The majority failed to set forth a reason, let alone a compelling reason, to justify its alteration of *Hatcher*'s common-law rule. Contrary to the majority's assertion, numerous "exceptions" to the *Hatcher* rule have not been carved out.

Furthermore, the court rules were recently amended to essentially incorporate *Hatcher*; specifically, the court rules now require the trial court to advise parents that they have an appeal of right from the initial dispositional order and that if they do not challenge the adjudication at that point, they will not be able to challenge it after their parental rights have been terminated, with two exceptions. Given that this Court just incorporated *Hatcher* into its court rules, Justice MARKMAN was not sure why the majority felt compelled to overrule it in its opinion. In addition, Justice MARKMAN would not overrule *Hatcher* because finality is critical with regard to child protective proceedings. Allowing a "do-over" is not fair to the children who will be required to endure this process again—or to prospective adoptive parents—and it further results in wasted time, money, and resources as well as disrupts whatever progress and rehabilitation the children might have made during that time. Just as the new court rules reasonably balance the rights of parents and children, and afford a clear opportunity for a fresh start for the abused or neglected child, so too did the prior court rules. It is not right that JF *alone* should be made subject to a *third* court rule regime, which does not reasonably balance the interests of parent and child and requires a lengthy re-do of an already lengthy and fair legal process only because of the failure of respondents—already deemed by a court of law to have acted neglectfully—to have abided by the law in pursuing a timely appeal. Thus, in a realm of the law in which reasonable expedition of decision-making has always been thought by the judiciary to be paramount, the majority imposes in this single case a process that is reflective of our legal system at its most unnecessarily drawn out and dilatory.

Justice CAVANAGH did not participate in the disposition of this case because the Court considered it before she assumed office.

1. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — APPEALS OF ADJUDICATION ERRORS.

The "collateral bar" rule generally prohibits a litigant from indirectly attacking a prior judgment in a later, separate action, unless the court that issued the prior judgment lacked jurisdic-

tion over the person or subject matter in the first instance; an appeal of an adjudication error in an appeal from an order terminating parental rights is not a collateral attack because although a child protective proceeding has two distinct phases—the adjudication and the disposition—the proceeding itself is one action, not two separate actions; therefore, the collateral-bar rule does not apply within one child protective case.

2. PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — *IN CAMERA* INTERVIEWS.

The use of unrecorded, *in camera* interviews of children in termination-of-parental-rights proceedings violates parents' due-process rights.

Brendan P. Curran, Prosecuting Attorney, and *Manda M. Breuker*, Chief Assistant Prosecuting Attorney, for the Department of Health and Human Services.

The Child Welfare Appellate Clinic (by *Vivek S. Sankaran*) for respondents.

David M. Delaney, PLC (by *David M. Delaney*) for the minor child.

Amici Curiae:

Dana Nessel, Attorney General, and *Fadwa A. Hammoud*, Solicitor General, for the Department of Attorney General.

Honigman Miller Schwartz and Cohn LLP (by *Sarah E. Waidelich* and *Rian C. Dawson*) for the Legal Services Association of Michigan and the Michigan State Planning Body for Legal Services.

William E. Ladd and *Paula A. Aylward* for the Children's Law Section of the State Bar of Michigan.

MCCORMACK, C.J. This Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), gener-

ally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The *Hatcher* rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. With that procedural (mis)understanding, we held that a posttermination appeal of a defect in the adjudicative phase is prohibited because it is a collateral attack. This foundational assumption was wrong; *Hatcher* was wrongly decided, and we overrule it.

The *Hatcher* rule prevented these respondents-parents from challenging the undisputed defects in their pleas—the pleas that supported the trial court's exercise of dispositional authority and the termination of the respondents' parental rights. We reverse the Court of Appeals, vacate the trial court's order of adjudication and order terminating the respondents' parental rights, and remand this case to the trial court for further proceedings. And because the trial court violated the respondents' due-process rights by conducting an unrecorded, *in camera* interview of the subject child before the court's resolution of the termination petition, a different judge must preside on remand.

I. FACTUAL AND PROCEDURAL HISTORY

The respondents have several children together. Their youngest, a daughter, JF, was born in 2003. JF has spina bifida, a birth defect relating to the gestational development of the spinal cord. As a result of her spina bifida, JF has trouble ambulating without the aid of a mobility device. Also related to spina bifida, JF has neurogenic bladder, and she must use a catheter to urinate. JF has required medical care and supervision for her entire life.

In October 2015, the petitioner, the Department of Health and Human Services (the Department), petitioned to remove JF from the respondents' care. The Department alleged that the respondents had failed to adequately attend to JF's medical needs by missing several medical appointments and failing to regularly refill her prescription medications. The Department also alleged that the living conditions in the respondents' home posed a health risk to JF. The petition described the respondents' home as having "clutter throughout," making it difficult to maneuver in a wheelchair. The petition also described JF's bathroom as "filthy" and the home as having "a strong odor of animals and urine."

The court held an emergency hearing on the petition and placed JF in foster care, but the court permitted her to have unsupervised visits at the respondents' home. After several more hearings, the trial court found probable cause to authorize the petition and set an adjudication trial.

At a preadjudication status conference in December 2015, the respondents admitted that JF had been prescribed medications for her health condition, that they had not refilled several of JF's prescriptions since January 2015, and that some of those prescriptions could have been refilled at no cost. These admissions allowed the trial court to exercise jurisdiction over JF. The respondents made no other admissions.

In taking the respondents' pleas, the court did not advise them that they were waiving any rights. Nor did the court advise them of the consequences of their pleas, as required by our court rules. See MCR 3.971.[1]

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[1] MCR 3.971 is to be amended on the date this opinion is issued. MCR 3.971 previously provided, in part:

And although it was not required to do so by our court rules, the court did not advise the respondents that they could appeal its decision to take jurisdiction over JF.

(B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:

(1) of the allegations in the petition;

(2) of the right to an attorney, if respondent is without an attorney;

(3) that, if the court accepts the plea, the respondent will give up the rights to

(a) trial by a judge or trial by a jury,

(b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,

(c) have witnesses against the respondent appear and testify under oath at the trial,

(d) cross-examine witnesses, and

(e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;

(4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

(5) if parental rights are subsequently terminated, the obligation to support the child will continue until a court of competent jurisdiction modifies or terminates the obligation, an order of adoption is entered, or the child is emancipated by operation of law. Failure to provide required notice under this subsection does not affect the obligation imposed by law or otherwise establish a remedy or cause of action on behalf of the parent.

(C) Voluntary, Accurate Plea.

(1) Voluntary Plea. The court shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understandingly, and voluntarily made.

(2) Accurate Plea. The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the

At the initial dispositional hearing held on January 12, 2016, the trial court adopted the family treatment plan proposed by the Department. That plan required the respondents to complete psychological examinations, maintain a clean home, and attend all of JF's scheduled medical appointments. The court's initial dispositional order maintained JF's placement in foster care and continued to allow JF to have unsupervised visits with the respondents at the family home.

As discussed, the Department's initial assessment of the home (as alleged in the petition) was that it posed a health risk unique to JF because her bladder catheterization was susceptible to infection. But at a preadjudication hearing held shortly after the Department filed its petition, JF's lawyer-guardian ad litem (LGAL) described the respondents' home as "habitable" and "suitable" for JF.[2] And although the respondents' treatment plan required them to maintain a clean home, neither the parties nor the court focused on this issue at the first two dispositional review hearings in April and July 2016.[3] But at the third and

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> offer is to plead no contest. If the plea is no contest, the court shall not question the respondent, but, by some other means, shall obtain support for a finding that one or more of the statutory grounds alleged in the petition are true. The court shall state why a plea of no contest is appropriate.

The amended rule does not alter this language. But the language that had appeared in MCR 3.971(C) will now appear in MCR 3.971(D), the revised rule contains new language at MCR 3.971(C), and MCR 3.971(B) will contain additional subparts. Further references in this opinion to MCR 3.971(C) are to the language quoted in this footnote.

[2] The trial court had instructed the LGAL to inspect the respondents' home at the initial emergency hearing on the petition.

[3] The respondents successfully completed other aspects of the treatment plan. The respondents underwent court-ordered psychological evaluations. Those evaluations determined that neither respondent posed a significant risk of physical or emotional abuse to JF. The

final dispositional hearing in October 2016, the parties disputed the home's suitability for JF.

The trial court concluded the October hearing by authorizing the Department to file a termination petition, but the court noted that its decision was limited to that procedural step. The court was troubled by the conflicting testimony about the condition of the home and stated that it wanted to see the home for itself. And the court did that in February 2017. While the record shows that the respondents' attorneys and the LGAL were present when the court visited the family home, the court did not document its observations and factual findings. The respondents' attorneys were prohibited from addressing the court during the visit.

The court conducted the termination hearing over three days in May, June, and July 2017. After the June hearing date, the court stated that it was "inclined to speak with [JF]" and invited objections from counsel. When the hearing resumed in July, the court announced that it had conducted an *in camera* interview with JF. The court made no record of its conversation with JF.

The court terminated the respondents' parental rights, citing two statutory grounds for termination: MCL 712A.19b(3)(c)(*i*)[4] and MCL 712A.19b(3)(g).[5] The

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psychologist reported that many of the alleged parenting failures were attributable to a lack of scheduling and organization. And the Department acknowledged at the permanency planning hearing that the respondents had attended all of JF's medical appointments, in accordance with the treatment plan.

[4] MCL 712A.19b(3)(c)(*i)* allows the court to terminate a parent's parental rights if "182 or more days have elapsed since the issuance of an initial dispositional order, and the court . . . finds [that] [t]he conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age."

[5] MCL 712A.19b(3)(g) allows the court to terminate a parent's parental rights if "[t]he parent . . . fails to provide proper care or custody for

court determined that both grounds were satisfied by clear and convincing evidence because of the "very unhygienic household circumstance, and a lack of or inability to create hygienic conditions . . . ." In its analysis of the child's best interests, the court explained that the home environment "is not as atrociously bad as it was, but even when the Court viewed the situation, it is not where a person with Spinal [sic] Bifida will thrive."

The respondents appealed. They challenged the trial court's jurisdiction to terminate their parental rights because of the defects in their pleas, and they challenged the trial court's ability to fairly decide the termination decision (and the respondents' ability to challenge that decision on appeal) as a result of the court's unrecorded visit to the family home and the *in camera* interview with JF. The Court of Appeals affirmed the trial court's termination decision in an unpublished opinion. *In re Ferranti*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2018 (Docket Nos. 340117 and 340118). The panel concluded that our holding in *Hatcher* prohibited it from considering the respondents' claim that the trial court violated their due-process rights by failing to advise them of the consequences of their pleas. *Ferranti*, unpub op at 6. The panel also held that any error from the visit to the family home did not violate the respondents' due-process rights, *id*. at 8, and that the respondents waived the claim that the court's *in camera* interview was error, *id*. at 9.

The respondents sought leave to appeal in this Court. We granted oral argument on the application and directed the parties to address these issues:

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the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."

(1) whether this Court's opinion in *In re Hatcher*, 443 Mich 426 (1993), correctly held that the collateral-attack rule applied to bar the respondent-parents from challenging the court's initial exercise of jurisdiction over the respondents on appeal from an order terminating parental rights in that same proceeding; (2) if not, (a) by what standard should courts review the respondents' challenge to the initial adjudication, in light of the respondents' failure to appeal the first dispositional order appealable of right, see MCR 3.993(A)(1), and (b) what must a respondent do to preserve for appeal any alleged errors in the adjudication, see, e.g., *In re Hudson*, 483 Mich 928 (2009); (3) if *Hatcher* was correctly decided, whether due-process concerns may override the collateral-bar rule, see *In re Sanders*, 495 Mich 394 (2014), and *In re Wangler*, 498 Mich 911 (2015); (4) whether a trial court is permitted to visit a respondent's home to observe its condition, and, if so, what parameters should apply to doing so; and (5) whether a trial court may interview a child who is the subject of child protective proceedings in chambers, and, if so, what parameters should apply to doing so. [*In re Ferranti*, 502 Mich 906, 906 (2018).]

II. LEGAL BACKGROUND

We review the interpretation and application of statutes and court rules de novo. *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014). Whether child protective proceedings complied with a parent's right to due process presents a question of constitutional law, which we also review de novo. *Id*. at 403-404. De novo review means we review this issue independently, with no required deference to the courts below.

A. CHILD PROTECTIVE PROCEEDINGS IN MICHIGAN

Child protective proceedings are governed by the juvenile code, MCL 712A.1 *et seq*., and Subchapter 3.900 of the Michigan Court Rules. Any person who

suspects child abuse or neglect may report their concerns to the Department. MCL 712A.11(1). The Department, after conducting a preliminary investigation, may then petition the Family Division of the circuit court to take jurisdiction over the child. MCR 3.961(A). That petition must contain, among other things, "[t]he essential facts" that, if proven, would allow the trial court to assume jurisdiction over the child. MCR 3.961(B)(3); see also MCL 712A.2(b). After receiving the petition, the trial court must hold a preliminary hearing and may authorize the filing of the petition upon a finding of probable cause that one or more of the allegations are true and could support the trial court's exercise of jurisdiction under MCL 712A.2(b). See MCR 3.965(B).[6]

If the court authorizes the petition, the adjudication phase follows. The question at adjudication is whether the trial court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights. See *Sanders*, 495 Mich at 405-406. The court can exercise jurisdiction if a respondent-parent enters a plea of admission or no contest to allegations in the petition, see MCR 3.971, or if the Department proves the allegations at a trial, see MCR 3.972. "If a trial is held, the respondent is entitled to a jury, the rules of evidence generally apply, and the petitioner has the burden of proving by a preponderance of the evidence one or more of the statutory grounds for jurisdiction alleged in the petition." *Sanders*, 495 Mich at 405 (citations omitted). And "[w]hile the adjudicative phase is only the first step

[6] If the child is not in protective custody and the petition does not request placement outside the family home, then a preliminary hearing is not required. Instead, the probable-cause determination (and the appropriate course of action) is made through a preliminary inquiry, a comparatively less formal process. See MCR 3.962.

in child protective proceedings, it is of critical importance because the procedures used in adjudicative hearings protect the parents from the risk of erroneous deprivation of their parental rights." *Id*. at 405-406 (quotation marks, citation, and brackets omitted). The adjudication divests the parent of her constitutional right to parent her child and gives the state that authority instead.

Once the trial court's jurisdiction is established, the case moves to the dispositional phase. In this phase, the trial court has "broad authority" to enter orders that are " 'appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained.' " *Id*. at 406, quoting MCL 712A.18(1). During the dispositional phase the court must hold review hearings "to permit court review of the progress made to comply with any order of disposition and with the case service plan [i.e., the family treatment plan] . . . and court evaluation of the continued need and appropriateness for the child to be in foster care." MCR 3.975(A). If the child is removed from the family home, the court must conduct a permanency planning hearing within 12 months from the date of removal. MCL 712A.19a(1); MCR 3.976(B)(2). This hearing results in either the dismissal of the petition and family reunification, or the court ordering the Department to petition for the termination of parental rights. MCL 712A.19a(4); MCR 3.976(A).

If the Department files a termination petition, the court holds a termination hearing. See MCR 3.977. The court acts as fact-finder, MCR 3.977(I), and the rules of evidence generally do not apply, MCR 3.977(H)(2). If the court determines that one or more statutory grounds for termination exist and that termination is in the child's best interests, the court must enter an order terminating the respondent's parental rights and order that additional efforts for reunification not be made. MCL 712A.19b(5).

B. *IN RE HATCHER*

In *Hatcher*, 443 Mich at 428, we considered whether a respondent-parent may challenge the trial court's "assumption of subject matter jurisdiction over a minor child . . . after a termination decision and, if so, whether the entire termination proceedings should be declared void ab initio." Or more simply: whether a parent could challenge errors in the adjudication when appealing the termination of his or her parental rights.

The *Hatcher* trial court authorized the filing of a petition and placement of the child with the grandmother after conducting a preliminary hearing that neither parent attended. *Id*. at 429. At the adjudication, both parents stipulated to the court's jurisdiction over their child, but they did not testify to or admit any facts that would support that jurisdiction. *Id*. at 430; see MCL 712A.2(b). The court held three dispositional hearings before the permanency planning hearing; neither parent challenged the court's jurisdiction at those hearings. *Id*. at 430-431. Following the permanency planning hearing, the trial court terminated both parents' rights. The father appealed, challenging the court's adjudication. He argued, and the Court of Appeals agreed, that "the termination proceedings were void ab initio, [and] that the [trial] court never assumed valid subject matter jurisdiction over the child," because neither parent ever admitted to facts supporting a statutory basis for jurisdiction. *Id*. at 432; see *In re Waite*, 188 Mich App 189, 208; 468 NW2d 912 (1991); *In re Nelson*; 190 Mich App 237, 241-242; 475 NW2d 448 (1991).

We reversed. We held that the father's claim of error (the adjudication-by-stipulation) did not deprive the court of subject-matter jurisdiction but "address[ed] the procedure by which the probate court proceeded

after it had established subject matter jurisdiction on the basis of a validly filed petition." *Hatcher*, 443 Mich at 438 (emphasis added). We explained:

> [T]he probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous. The valid exercise of the probate court's statutory jurisdiction is established by the contents of the petition after the probate judge or referee has found probable cause to believe that the allegations contained within the petitions are true. . . . When the referee considered the facts alleged in the petition and the testimony presented, he found probable cause that the allegations were true. Consequently, it was proper for the court to invoke its jurisdiction, assuming the court also had jurisdiction of the parties, a fact not here in dispute. Procedural errors that may have occurred did not affect the probate court's subject matter jurisdiction.
>
> Although neither the mother nor the father stipulated facts that supported the court's jurisdiction, this jurisdiction is initially established by pleadings, such as the petition, rather than by later trial proceedings that may establish by a preponderance of the evidence that a child is within the continued exercise of the probate court's subject matter jurisdiction. [*Id*. at 437-438.]

Again, more simply: *Hatcher* held that the trial court's error did not deprive it of subject-matter jurisdiction—it was simply an adjudicative error. And the father could not appeal that error; he should have either appealed the order authorizing the filing of the petition[7] or challenged the issue at a dispositional hearing. *Id*. at 438 ("The respondent could have ap-

[7] It is unclear why the *Hatcher* Court viewed a challenge to the sufficiency of the petition as a suitable means for redressing the father's claim of error in the adjudication—the trial court's failure to establish by plea or trial any of the statutory bases for jurisdiction set forth at MCL 712A.2(b). The error in the adjudication occurred *after* the pre-

pealed the court's exercise of its statutory jurisdiction by challenging the sufficiency of the petition . . . . Alternatively, he could have pursued a number of statutory proceedings designed to redress an erroneous exercise of jurisdiction."), citing MCL 712A.19; MCL 712A.21. Because he did neither, we prohibited his termination challenge, calling it a "collateral attack." *Id*. at 444 ("Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available."). That characterization was novel and inconsistent with our collateral-attack jurisprudence.[8]

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liminary hearing, when the probable-cause determination was made; the father could not have appealed an error that had yet to occur.

[8] *Hatcher* overturned this Court's decision in *Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958). *Fritts*, *id*. at 115, had permitted a challenge to a termination order in a writ of habeas corpus, a separate and collateral action from the child protective proceeding that resulted in termination. A brief detour about *Fritts* is in order, because it gives some context to *Hatcher*. While the *Fritts* Court found that the initial petition sufficiently alleged jurisdictional facts, and the trial court therefore "had jurisdiction . . . for purposes of hearing the neglect complaint," *id*. at 111, the Court still concluded that the trial court lacked (or had been divested of) jurisdiction to terminate the petitioners' parental rights because of insufficient factual support for the allegations in the complaint (petition), *id*. at 115; see MCL 712A.2(b)(1). And while *Fritts* was a collateral attack on the trial court's termination order, the Court acknowledged that the petitioners' challenge was not based on a lack of personal or subject-matter jurisdiction, *id*. at 120-121, but some other (and it seems, broader) concept of jurisdiction, *id*. at 122 ("We hold that the orders entered upon the record of this hearing . . . represented an erroneous concept of the power conveyed by statute upon the probate court sitting in juvenile division, and that, being based upon no evidence of permanent neglect, they represented a fundamental miscarriage of justice as to these petitioners and exceeded the statutory powers of the probate judge who entered them."). *Fritts* was a true collateral attack; the dissent recognized this and criticized the *Fritts* majority for allowing "the use of the writ of habeas corpus as a substitute for statutory appeal . . . ." *Id*. at 145 (BLACK, J., dissenting) (quotation marks and citation omitted).

Later decisions summarized the rule from *Hatcher* as barring a respondent-parent from challenging errors in the adjudicative phase in an appeal from an order terminating the respondent's parental rights, unless the termination of rights occurs at the initial dispositional hearing. See *In re SLH*, 277 Mich App 662, 668-669; 747 NW2d 547 (2008).[9]

III. ANALYSIS

A. RESPONDENTS' ADJUDICATORY PLEAS AND *IN RE HATCHER*

The respondents believe that their due-process rights were violated because their pleas were not knowingly and voluntarily made. They object to the trial court's failure to inform them that they had a right to a jury trial on the allegations in the petition, at which the Department would have to prove those allegations by a preponderance of the evidence and the respondents would be permitted to call their own witnesses and cross-examine those produced by the Department. The respondents also fault the trial court

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Here, as in *Hatcher*, there is no collateral proceeding—the respondents' arguments are on direct appeal from the order of termination. So while the *Hatcher* Court's desire to overrule *Fritts*'s procedurally anomalous holding—that a termination order can be (truly) collaterally attacked—is understandable, see *Hatcher*, 443 Mich at 444 ("Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available."), and its criticism of *Fritts*'s substantive jurisdictional holding is also sound, see *id*. at 440-443, *Hatcher* was *not* a collateral attack. It was a direct appeal of an (unpreserved) adjudicative error.

[9] In *SLH*, 277 Mich App at 668, the Court of Appeals explained that *Hatcher* has no application when termination is sought in a petition filed before the adjudication, because "an adjudication cannot be collaterally attacked . . . [unless] a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order." (Cleaned up.)

for its failure to advise them that their pleas could later be used as evidence to terminate their parental rights. And about *Hatcher*, the respondents argue that it was wrongly decided because it misunderstood child protective proceedings. We agree.

The respondents have a fundamental right to direct the care, custody, and control of JF. See *Sanders*, 495 Mich at 415. And the Due Process Clause of the Fourteenth Amendment requires that, for a plea to constitute an effective waiver of a fundamental right, the plea must be voluntary and knowing. See *In re Wangler*, 498 Mich 911, 911 (2015) (stating that "the manner in which the trial court assumed jurisdiction violated the respondent-mother's due process rights" because the trial court failed to follow MCR 3.971(C)(1) and (2) before accepting the respondent's adjudicatory plea); see also *People v Cole*, 491 Mich 325, 332-333; 817 NW2d 497 (2012) ("For a plea to constitute an effective waiver of . . . rights, the Due Process Clause of the Fourteenth Amendment requires that the plea be voluntary and knowing.").

Our court rules reflect this due-process guarantee. MCR 3.971(C)(1) demands that the trial court ensure that a respondent's plea be knowingly, understandingly, and voluntarily made before the court can accept it. And MCR 3.971(B) requires the trial court to advise the respondent, "on the record or in a writing that is made a part of the file," of the allegations in the petition, the right to an attorney, the rights the respondent will be waiving by entering a plea, the consequences of that plea (including the possibility that the plea will "be used as evidence in a proceeding to terminate parental rights," MCR 3.971(B)(4)), and to provide advice about the respondent's posttermination support obligations.

The Department concedes that the trial court did not comply with these rules, violating the respondents' due-process rights. *Wangler*, 498 Mich at 911. Recognizing that *Hatcher* would bar them from appealing this claim of error, the respondents ask us to revisit our decision in *Hatcher* and either overrule it or carve out (yet another) exception to its collateral-bar rule when application would prevent a respondent from vindicating a due-process violation.

Hatcher made a foundational mistake; it erroneously applied the rule from *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935)—that a court's exercise of jurisdiction cannot be collaterally attacked in a second proceeding—to what is a single, continual proceeding.

In *Jackson City Bank*, 271 Mich at 544-545, we explained that

> [w]hen there is a want of jurisdiction over the parties, or the subject-matter, no matter what formalities may have been taken by the trial court, the action thereof is void because of its want of jurisdiction, and consequently its proceedings may be questioned collaterally as well as directly. They are of no more value than as though they did not exist. But in cases where the court has undoubted jurisdiction of the subject matter, and of the parties, the action of the trial court, though involving an erroneous exercise of jurisdiction, which might be taken advantage of by direct appeal, or by direct attack, yet the judgment or decree is not void though it might be set aside for the irregular or erroneous exercise of jurisdiction if appealed from. It may not be called in question collaterally.

Put differently, the "collateral bar" rule generally prohibits a litigant from indirectly attacking a prior judgment in a later, *separate* action, unless the court that issued the prior judgment lacked jurisdiction over the person or subject matter in the first instance.

See *In re Ives*, 314 Mich 690, 696; 23 NW2d 131 (1946). Instead, the litigant must seek relief by reconsideration of the judgment from the issuing court or by direct appeal.[10]

Hatcher applied the collateral-bar rule to conclude that a respondent who appeals a defect in the adjudicative phase at the end of the child protective proceeding (in an appeal from an order terminating parental rights) is "collaterally" attacking that very same child protective proceeding. But that holding failed to recognize that "[a] child protective proceeding is 'a single continuous proceeding' " that begins with a petition, proceeds to an adjudication, and—unless the family has been reunified—ends with a determination of whether a respondent's parental rights will be terminated. *In re Hudson*, 483 Mich 928, 935 (2009) (CORRIGAN, J., concurring), quoting *In re LaFlure*, 48 Mich App 377, 391; 210 NW2d 482 (1973).

Collateral-bar jurisprudence makes the *Hatcher* Court's mistake obvious. The rule bars a litigant from challenging a ruling or judgment in a later and separate case. Thus, in *Jackson City Bank*, 271 Mich at 546, we held that the plaintiffs, heirs of the defendant's deceased second husband, were barred from asserting claims that challenged the validity of the defendant's divorce from her first. The other cases *Hatcher* cited agree. See *Life Ins Co of Detroit v Burton*, 306 Mich 81, 84-85; 10 NW2d 315 (1943) (defendant-surety barred

[10] *Jackson City Bank*'s general rule prohibiting collateral attacks on a court's final judgment is well settled and common across jurisdictions. See *Hazel-Atlas Glass Co v Hartford-Empire Co*, 322 US 238, 244; 64 S Ct 997; 88 L Ed 1250 (1944) ("Federal courts, both trial and appellate, long ago established the general rule that they would not alter or set aside their judgments after the expiration of the term at which the judgments were finally entered. . . . This salutary general rule springs from the belief that in most instances society is best served by putting an end to litigation after a case has been tried and judgment entered.").

from seeking reformation of a surety bond in a later collection action brought by the plaintiff-creditor); *Edwards v Meinberg*, 334 Mich 355; 54 NW2d 684 (1952) (error in venue did not divest the issuing court of subject-matter jurisdiction, so the plaintiff was barred from asserting that the earlier judgment against him was invalid). In all these cases, the party seeking to challenge the earlier ruling or judgment did so in a separate, later proceeding (and even in a different forum).

Nor did *Hatcher* explain its novel application of the rule. The *Hatcher* Court held that the trial court's error in the adjudication did not deprive the court of subject-matter jurisdiction, as the Court of Appeals thought, but merely affected "the procedure by which the probate court proceeded after it had established subject-matter jurisdiction on the basis of a validly filed petition." *Hatcher*, 443 Mich at 438. So far, so good. But *Hatcher*'s next step is unexplained; it went on to apply the collateral-bar rule from *Jackson City Bank* to bar appellate review of the error with no reasoning to make understandable why appealing the claim of error in the adjudication amounted to a collateral attack.

More confusing still, the Court's prescription for what the respondent-father should have done contradicts its conclusion. The Court reasoned that the father could have raised the adjudication error at one of the dispositional review hearings or even in a motion for rehearing from the order terminating parental rights. *Id*. at 436.[11] But this rationale conflicts with the Court's conclusion that his appeal raising that same

[11] The Court also reasoned that the father could have challenged the sufficiency of the petition or the probable-cause determination. *Hatcher*, 443 Mich at 438. But as discussed above at note 7, those procedural steps occurred well before the trial court's error.

claim amounted to a collateral attack. True, a party's failure to timely assert a right in the trial court generally means that any resulting error will be treated as "unpreserved" if challenged on appeal. See *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994). But issue preservation dictates the appellate standard of review; it does not transform direct review into collateral attack. See *Carines*, 460 Mich at 761-764 (discussing the plain-error doctrine).

Hatcher was wrongly decided.

But we don't disrupt precedent whenever that's the case. We have to consider whether *Hatcher*'s precedential value compels us to retain its rule of decision under the principles of stare decisis. *Coldwater v Consumers Energy Co*, 500 Mich 158, 172; 895 NW2d 154 (2017) (stating that the mere fact that "a case was wrongly decided, by itself, does not necessarily mean that overruling it is appropriate"). The stare decisis analysis should not be " 'applied mechanically,' " *id*. at 173 (citation omitted), but generally we consider these principles: "whether the decision defies practical workability, whether reliance interests would work an undue hardship were the decision to be overruled, and whether changes in the law or facts no longer justify the decision," *id*.

This Court's growing list of "exceptions" to *Hatcher* deserves emphasis at the front end of this analysis. See, e.g., *Sanders*, 495 Mich 394 (reversing a termination in which one parent was improperly adjudicated as unfit and holding that the one-parent doctrine is unconstitutional); *In re Mays*, 490 Mich 993 (2012) (reversing a termination after the trial court made an erroneous factual finding during the adjudication phase); *In re Mason*, 486 Mich 142; 782 NW2d 747

(2010) (reversing a termination based on the failure to facilitate the respondent's involvement and participation during the adjudication and dispositional phases); *In re Hudson*, 483 Mich 928 (remanding when the trial court failed to advise the respondent that her plea could be used to terminate her parental rights); *In re Mitchell*, 485 Mich 922 (2009) (same); *In re Jones*, 499 Mich 862 (2016) (reversing a parental termination order after the Court of Appeals held that the respondent's claims were barred by *Hatcher*); *Wangler*, 498 Mich at 911 (same). While we overrule *Hatcher* only now, if these exceptions haven't fully swallowed the rule, they are surely most of the way through the chewing process. The resulting disruption affects our analysis of each of the stare decisis principles. To those now.

First, a rule of decision defies practical workability if it has proved difficult to apply or implement. See, e.g., *Montejo v Louisiana*, 556 US 778, 792; 129 S Ct 2079; 173 L Ed 2d 955 (2009). On first blush, *Hatcher* might appear easy to apply—an appellate court reviewing a termination decision should simply reject any claims relating to the adjudication. But that has not been our experience. Instead, the number of exceptions to *Hatcher* is good evidence that its rule defies simple application, especially when a respondent's due-process rights are violated in the adjudication. And if history is our guide, trying to craft yet another exception to *Hatcher* here will not end the matter. This factor does not favor keeping *Hatcher*.

We also consider reliance interests, including "whether reliance interests would work an undue hardship were the decision to be overruled . . . ." *Coldwater*, 500 Mich at 173. The question is "whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it

would produce not just readjustments, but practical real-world dislocations." *Id*. (quotation marks and citation omitted). *Hatcher* has scant application; it just imposes procedural limitations on a respondent's ability to challenge errors in the adjudication. Given this, overruling *Hatcher* would not cause "practical, real-world dislocations" but simply "readjustments" in litigation.

The litigants and practitioners who had to decide whether to raise a claim of error within the procedural restrictions of *Hatcher* had little stability, given our growing exceptions to it. And lawyers and litigants are not similarly situated. Lawyers know both about trial court error and *Hatcher*'s rule (and its exceptions), but litigants are likely aware of neither. Take this case: the trial court's error meant that the respondents were never told what rights they were giving up, nor were they advised that they couldn't appeal the due-process violation that resulted from their defective plea unless they did so immediately.

Finally, we consider whether changes in the law or facts no longer justify the decision. See *Coldwater*, 500 Mich at 174. Our growing list of *Hatcher* cutouts favors overruling it. Continuing *Hatcher*'s death by a thousand cuts would leave litigants and courts unsure of whether they can appeal an adjudicative error in an appeal from an order terminating parental rights. The erosion of the rule by its exceptions has created uncertainty; we should be providing clarity.

Rather than create yet another exception to *Hatcher*, we overrule it. We are mindful of the finality concerns that motivated the Court's decision to adopt the rule. See *Hatcher*, 443 Mich at 444 (explaining that the Court's holding would "provide repose to [those]

who rely upon the finality of probate court decisions").[12] But we must balance the interest in finality against the Legislature's intent as expressed in the juvenile code to support children in their own homes, see MCL 712A.1(3) ("This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interest of the state."), and the protection of the constitutional rights of families. "The right to parent one's children is essential to the orderly pursuit of happiness by free men and is perhaps the oldest of the fundamental liberty interests[.]" *Sanders*, 495 Mich at 409, quoting *Meyer v Nebraska*, 262 US 390, 399-400; 43 S Ct 625; 67 L Ed 1042 (1923), and *Troxel v Granville*, 530 US 57, 65; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (opinion by O'Connor, J.) (cleaned up).

And "there will normally be no reason for the State to inject itself into the private realm of the family" because "there is a presumption that fit parents act in the best interests of their children." *Troxel*, 530 US at 68. Thus, "[w]hen a child is parented by a fit parent, the state's interest in the child's welfare is perfectly aligned with the parent's liberty interest." *Sanders*, 495 Mich at 416. For that reason, it is the "[a]djudication [that] protects the parents' fundamental right to direct the care, custody, and control of their children, while also ensuring that the state can protect the health and safety of the children." *Id*. at 422.

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[12] Although we overrule *Hatcher*, we agree with its criticism of *Fritts*. An error in the adjudication (the error in *Fritts*, *Hatcher*, and here) will not, as a general matter, provide a parent with grounds to collaterally attack the order of termination in a later, separate proceeding, as the Court permitted in *Fritts*. But *Hatcher*'s prescription of prohibiting direct appellate review was a misfire.

But *Hatcher* disrupts the careful balancing of interests in our juvenile code by preventing judicial review of meritorious claims of defects in the adjudication. That is, it prevents review of mistakes in the government process that permanently separates a parent from a child. A parent's only remedy under *Hatcher* is by way of an interlocutory appeal, disincentivizing him or her from timely cooperating with the Department and further delaying a final determination. *Hatcher* disserves parents, their children, and the state. It's time to disavow it.

On to the merits. The parties agree that adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error. See *Mitchell*, 485 Mich at 922 (reviewing for plain error the trial court's failure to timely appoint counsel for the respondent and failure to advise the respondent that his plea could later be used in a proceeding to terminate his parental rights); *Hudson*, 483 Mich at 928 (same). The respondents must establish that (1) error occurred; (2) the error was "plain," i.e., clear or obvious; and (3) the plain error affected their substantial rights. *Carines*, 460 Mich at 763. And the error must have "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings[] . . . ." *Id*. (citation and quotation marks omitted; alteration in original).[13]

[13] The final requirement of plain-error review is also satisfied "when the plain, forfeited error resulted in the conviction of an actually innocent defendant," *Carines*, 460 Mich at 763, which reflects plain error's origin as a rule of federal *criminal* procedure, see *United States v Olano*, 507 US 725; 113 S Ct 1770; 123 L Ed 2d 508 (1993); FR Crim P 52. We have applied *Carines*'s plain-error test in appeals from juvenile proceedings. See, e.g., *Mitchell*, 485 Mich at 922. The Court of Appeals has as well. See *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011). But we did so without explanation. We apply the test here because neither party has argued for a different standard for juvenile proceedings despite the differences between these cases and criminal cases.

The Department acknowledges that the first and second prongs are satisfied. Due process and our court rules require a trial court to advise respondents-parents of the rights that they will waive by their plea and the consequences that may flow from it. The court erred by failing to advise these respondents of the consequences of their pleas and the rights they were giving up; those errors were plain.

But the Department believes that the errors did not affect the respondents' substantial rights because it would have been able to prove the allegations had the case proceeded to an adjudication trial. This misses the point; the constitutional deficiencies here are not forgiven by what might have transpired at trial. The respondents' pleas were not knowingly, understandingly, and voluntarily made. *Wangler*, 498 Mich at 911 ("[W]e conclude that the trial court violated MCR 3.971(C)(1) by failing to satisfy itself that the respondent-mother's plea was knowingly, understandingly, and voluntarily made, and violated MCR 3.971(C)(2) by failing to establish support for a finding that one or more of the statutory grounds alleged in the petition were true. Therefore, the manner in which the trial court assumed jurisdiction violated the respondent-mother's due process rights.").

The respondents were deprived of their fundamental right to direct the care, custody, and control over JF based on those invalid pleas. And the invalid pleas relieved the Department of its burden to prove that the respondents were unfit at a jury trial, with all of its due-process protections. See *Sanders*, 495 Mich at 405 (explaining that in an adjudication trial the respondent "is entitled to a jury, . . . the rules of evidence generally apply, . . . and the petitioner has the burden of [proof]"). These constitutional deprivations affected

the very framework within which respondents' case proceeded. There was error, it was plain, and it affected the respondents' substantial rights. See *Mitchell*, 485 Mich at 922; *Hudson*, 483 Mich at 928.

Finally, we conclude that the error here seriously affected the fairness, integrity, or public reputation of judicial proceedings. The trial court did not advise the respondents that they were waiving any of the important rights identified in MCR 3.971(B)(3). And it failed to advise the respondents of the consequences of entering their pleas. MCR 3.971(B)(4). This failure resulted in the respondents' constitutionally defective pleas and undermined the foundation of the rest of the proceedings. The defective pleas allowed the state to interfere with and then terminate the respondents' fundamental right to parent their child. Due process requires more: either a plea hearing that comports with due process and the court rule or, if respondents choose, a trial. MCR 3.971; MCR 3.972. We thus vacate the trial court's order of adjudication.

B. THE TRIAL COURT'S *IN CAMERA* INTERVIEW

The respondents also believe that their due-process rights were violated by the trial court's *in camera* interview of JF. See *In re HRC*, 286 Mich App 444, 455-456; 781 NW2d 105 (2009). They have asked us to vacate the court's order terminating parental rights and remand the case to a different trial judge—the Court of Appeals' remedy in *HRC*, which held that "the use of unrecorded, in camera interviews in termination proceedings violates parents' due process rights." *Id*. at 455.

This Court has never addressed the propriety of a trial court conducting an *in camera* interview of the subject child in the context of a child protective pro-

ceeding. The *HRC* panel's holding reflected its concern that *in camera* interviews might unduly influence the trial court's factual findings and termination decision, and because the process provides no opportunity for cross-examination by respondents or their counsel, the practice also prejudices a respondent's ability to impeach the witness and forecloses meaningful appellate review. *Id*. at 455-456. The inability to un-ring the bell required a different judge on remand. *Id*. at 457 ("[B]ecause we do not know what information the trial court learned during those interviews, we cannot ascertain whether the trial court would be able to set aside any information obtained in making a new determination . . . .").

The Department does not argue that *HRC* was wrongly decided. It argues that the respondents waived this due-process claim when their counsel supported the trial court's suggestion.

On the second day of the termination hearing, the respondents' attorneys indicated that they had no further witnesses to call. This prompted the following exchange:

> *The Court*: I have a question for counsel. I'm inclined to speak with [JF]. I mean, I've heard a lot of description about it and the counsel who represent her parents may need to talk to the parents. It's not specifically provided for. In the statute where it is in the domestic relations when there is a divorce or custody matter, and I've done dozens, if not hundreds of those, and when I do it I have somebody in there with me, just because I think that's a better policy. Anyone has a right to object, so I'm just contemplating is that all right or is there an opposition to it?
>
> *Ms. Breuker* [counsel for the Department]: In this particular case, I don't necessarily have a problem with it.

The Court: All right. I wouldn't do it in most, but—Mr. Leonardson?

Mr. Leonardson [counsel for respondent-father]: Your Honor, I would actually request it. I think it's important in this particular case because there is such a strong bond with the family, and that bond, part of it is because of [JF's] needs through her entire life.

The Court: Sure. But you don't object to that?

Mr. Leonardson: No, I certainly don't.

The Court: Mr. Gelow?

Mr. Gelow [counsel for respondent-mother]: We don't object. We encourage the Court to talk with [JF].

The court then discussed the logistics of arranging to speak to JF. After reviewing its docket, the court indicated to its clerk that it would speak to JF immediately before one of the respondents' upcoming parenting-time visits[14] and that it might conduct the interview in chambers if there were "a lot of people" in the courtroom. This logistical discussion involved only the court, its clerk, and the Department; the respondents and their lawyers were not included. On the basis of this record, the Court of Appeals agreed with the Department that the respondents had waived any challenge relating to the interview. *Ferranti*, unpub op at 7.

We disagree. Waiver is "the intentional relinquishment or abandonment of a known right," as distinct from a litigant's failure to timely assert that right (forfeiture). *Carines*, 460 Mich at 762 n 7 (quotation

[14] Although the respondents and JF enjoyed unsupervised visits without incident throughout the adjudication and dispositional phase, the court modified its initial visitation order in January 2017, shortly after it allowed the Department to file the supplemental petition seeking termination of the respondents' parental rights. By the time of the termination hearing, the respondents' parenting time was limited to Department-supervised visits.

marks and citation omitted). Here, the respondents' agreement to the general idea of the court speaking to JF did not waive their right to have that interview comport with due process. The respondents endorsed only the court's initial statement that the court was "inclined to speak to [JF]." But the court never sought —and the respondents never gave—their agreement about how that conversation would take place.

Those details matter. It is not apparent from the record whether the respondents thought they were agreeing to an on-the-record interview with counsel and with the opportunity for their own examination of JF, or if the respondents knew that the court's process would entail none of that.[15] The record supports only that the respondents were consenting to a conversation between the judge and JF, with the specifics yet to be determined. Because the court could have conducted that interview in a way that would *not* have triggered due-process concerns,[16] we cannot conclude that the respondents' support of the court's general suggestion amounted to the "intentional relinquishment or abandonment of a known right." *Carines*, 460 Mich at 762 n 7 (quotation marks and citation omitted).

We agree with the Court of Appeals that "the use of unrecorded, in camera interviews in termination

[15] While the Department suggests in its briefing that the respondents were aware of the procedure the court intended to use, it cites no record support. And the record seems to contradict this claim. The court discussed its plans only *after* soliciting the respondents' support, and then only in vague terms. And at the final day of the termination hearing, counsel for the respondent-father, while presenting his closing argument, referred to the prospect of the court speaking with JF. The trial court promptly interjected to inform counsel that, much to his surprise, the trial court had already interviewed her.

[16] Most obviously, the court might have examined JF on the record, in the presence of the parties and counsel, and with the opportunity for examination of the witness.

proceedings violates parents' due process rights." *HRC*, 286 Mich App at 455.

As the *HRC* panel explained, there is "nothing in the juvenile code, the caselaw, the court rules, or otherwise [that] permits a trial court presiding over a termination of parental rights case to conduct in camera interviews of the children for purposes of determining their best interests." *Id*. at 454. And while we sympathize with the court's apparent concern that testifying on the record and in the presence of parties and counsel would have caused discomfort to JF, that interest does not outweigh the respondents' interest in having any testimony on the record, given "the fundamental parental rights involved in termination proceedings, the risk of an erroneous deprivation of those rights given the in camera procedure, and the fact that the information is otherwise easily obtained . . . ." *Id*. at 456; see also *Sanders*, 495 Mich at 410-411 (discussing the three-part balancing test used to determine the constitutional sufficiency of procedures when the state seeks to interfere with a parent's rights). On remand a different judge must preside.[17]

IV. CONCLUSION

We hold that an appeal of an adjudication error in an appeal from an order terminating parental rights is not a collateral attack. The collateral-bar rule does not apply within one child protective case, barring some issues from review. *Hatcher* was wrongly decided, and we overrule it.

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[17] The Department argues that the respondents waived this claim; it makes no argument about what standard should apply if the error wasn't waived. The Court of Appeals in *HRC* reviewed for plain error; the panel's analysis did not depend on the respondent-parent showing outcome-determinative error, presumably because the nature of the trial court's error makes that impossible. See *HRC*, 286 Mich App at 456-457.

The trial court violated the respondents' due-process rights when it accepted the respondents' pleas without advising them of their rights or ensuring that the respondents' pleas were knowingly, understandingly, and voluntarily made. *Wangler*, 498 Mich at 911; MCR 3.971. Because it was these legally erroneous pleas that gave the trial court the dispositional authority to terminate the respondents' parental rights, we vacate that order, and the court's order of adjudication, and remand this case to the trial court for further proceedings consistent with this opinion. And the trial court's improper *in camera* interview of JF requires that a different judge preside on remand.

VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with MCCORMACK, C.J.

MARKMAN, J. (*dissenting*). I respectfully dissent from the majority's reversal of the judgment of the Court of Appeals. The majority in the process overrules *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), which held that an adjudication cannot be collaterally attacked following an order terminating parental rights. I would not overrule *Hatcher* because I believe that it was correctly decided and that no sound reason to alter its common-law rule has been presented. Indeed, both parties and the amici agree that it makes sense to require a timely appeal of the adjudication, which is all that *Hatcher* does, and this Court has just recently adopted court rule amendments that essentially incorporate *Hatcher* into our court rules.[1] The

[1] The Court entered an order amending MCR 3.965, MCR 3.971, MCR 3.972, MCR 3.973, and MCR 3.993 immediately before the release of this opinion. Therefore, citations of court rules in this opinion refer to the court rules as amended on June 12, 2019. References to the court rules as they existed before adoption of these

majority nevertheless chooses in this case to overrule *Hatcher*, which would allow adjudication challenges to be brought years after the adjudication but for these same amendments. Because I believe the Court of Appeals correctly held that: (a) respondents cannot collaterally attack the instant adjudication after their parental rights have been terminated, (b) respondents waived the issue pertaining to the interview of the child, and (c) any error on the trial court's part in visiting respondents' home was harmless, I would affirm the judgment of the Court of Appeals.

I. BACKGROUND

The child whose future is at issue here, JF, was born in 2003 and has several serious medical issues, including spina bifida, stage three chronic kidney disease, and a neurogenic bladder (a dysfunction caused by neurological damage). As a result of a lack of innervation to the lower half of her body, she has a stoma in her umbilicus to catheterize her bladder and another stoma in the lower quadrant to flush her bowel. She is unable to walk independently and therefore is mobile exclusively by using a wheelchair or walker or by crawling. Respondents-parents live in a small mobile home with JF and three other children, and they have a dog and cats. Their home is cluttered, and the presence of animal fecal matter and urine on the floor is particularly problematic for JF because she is forced to crawl around the home given the small size of the home and the clutter. This exposes her to organisms that lead to frequent urinary tract infections, which, in

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amendments will be indicated using the term "former" preceding the court rule number. Given that the "former" court rules were the ones in existence at the time of the adjudication in this case, they are the ones applicable to this case.

turn, affects her kidneys and is likely to hasten the time at which she will require a kidney transplant.[2]

According to the 2015 petition to remove JF from her home and place her in foster care under the supervision of petitioner, the Department of Health and Human Services (the Department), as far back as 2013, there was substantiated medical neglect on the part of respondents, including missed medical appointments and the failure to appropriately care for JF's medical needs. Later in 2013, physical neglect due to filthy home conditions was substantiated. All the children were placed in foster care, but the case was terminated in late 2014 following respondents' eventual compliance with the trial court's requirements. In 2015, JF's school contacted Child Protective Services (CPS), reporting that JF often appeared at school with a foul smell of body odor and urine and that she often ran out of catheters. JF was therefore prevented from catheterizing herself on a consistent schedule, which is required to avoid urinary tract infections. A CPS caseworker went to the home, where she saw animal feces on the hallway carpet, dirty dishes on the kitchen counter and filling the sink, and random clutter throughout the home. There were pathways through the clutter to allow the family to move about, but the paths were insufficiently wide to allow navigation by a wheelchair or walker. The condition of the home required JF to crawl in order to get from room to room. The bathroom toilet had fecal matter both inside and outside of the toilet bowl, and the entire home reeked of human and animal urine. There was no way for JF

[2] When JF was removed from respondents' home, she had medical laboratory work performed that revealed that she had a urinary tract infection caused by two organisms that are typically found inside the mouths of cats and dogs.

to avoid dragging her legs and feet through dirt and animal feces. Respondents had missed JF's nephrology appointments for the prior three months, and medications for her kidneys had not been refilled for six months. She had not seen her orthopedic specialist for almost a year, even though she was supposed to participate in twice-weekly physical therapy sessions. Recommended six-month visits with a urologist had also been missed.

The petition to remove JF from her home in this case was filed on October 29, 2015. A probable-cause hearing was held on the same day, and the trial court authorized JF's removal. Preliminary hearings were then held on November 3, 2015, and November 17, 2015, and the trial court found probable cause to authorize the petition. On December 21, 2015, respondents admitted to failing to timely fill JF's prescriptions, and the trial court relied on these admissions to exercise jurisdiction. A dispositional hearing was held on January 12, 2016, at which time a treatment plan was adopted and support services were arranged. Review hearings were subsequently held on April 12, 2016, and on July 12, 2016.

At a hearing on October 18, 2016, it was reported that support services were terminated because respondents had not made progress and the condition of their home had not changed. The participating social services worker recommended termination of parental rights because the conditions in the home had not significantly improved. JF's guardian ad litem also recommended terminating respondents' parental rights. The trial judge visited the home himself, although he did not make a record of his findings. He authorized a petition for termination of parental rights, and hearings were held on May 10, 2017,

June 20, 2017, and July 5, 2017. The trial judge indicated that he would like to speak with JF. When asked if the parties had any objections, respondent-father's attorney said that he would "actually request it" and respondent-mother's attorney said that he would "encourage the court to talk with [JF]." The trial court spoke with JF off the record and terminated respondents' parental rights on August 7, 2017.

Respondents appealed in the Court of Appeals, contending that the trial court lacked jurisdiction to terminate their parental rights because it had failed to follow court rules at the adjudication stage of the proceedings, i.e., the trial court failed to inform respondents of the rights they would be waiving if their pleas admitting to the jurisdiction of the court were accepted, MCR 3.971(B)(3), and failed to inform them of the consequences of their plea, MCR 3.971(B)(4). They also argued that the trial court erred by personally visiting their home and interviewing the child.

The Court of Appeals affirmed the termination. *In re Ferranti*, unpublished per curiam opinion of the Court of Appeals, issued May 10, 2018 (Docket Nos. 340117 and 340118). It held that, even assuming that the trial court failed to follow the proper procedures under former MCR 3.971(B)[3] when taking respondents' pleas, respondents failed to timely appeal and could not collaterally attack the adjudication after the trial court had terminated their parental rights. *Id*. at 6. The Court of Appeals also held that although the trial court erred by personally visiting and viewing respondents' home, reversal was not warranted because respondents did not demonstrate that the error in any way affected their substantial rights. *Id*. at 8-9. Fi-

[3] See MCR 3.971(B), as amended March 28, 2018, 501 Mich ccxxxviii (2018), effective May 1, 2018.

nally, it held that respondents waived their challenge to the court's *in camera* interview of JF. *Id*. at 9. This Court subsequently ordered and heard oral argument on whether to grant respondents' application for leave to appeal. *In re Ferranti*, 502 Mich 906 (2018).

II. STANDARDS OF REVIEW

The collateral-attack rule is a common-law rule. Note, *Collateral Bar and Contempt: Challenging a Court Order After Disobeying It*, 88 Cornell L Rev 215, 219 n 15 (2002). The interpretation and applicability of a common-law rule is a question of law that is reviewed de novo. *Haksluoto v Mt Clemens Regional Med Ctr*, 500 Mich 304, 310; 901 NW2d 577 (2017). "[W]hen it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change." *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 260; 828 NW2d 660 (2013). In addition, whether due-process concerns may override the collateral-attack rule poses a question of constitutional law that is reviewed de novo. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017). Finally, the interpretation of statutes and court rules is also a question of law that is reviewed de novo. *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017).

III. ANALYSIS

A. *HATCHER*

The trial court clearly erred in failing to abide by MCR 3.971(B)(3) and (4) at the adjudication proceeding, i.e., it failed to apprise respondents of their rights that they would be waiving if their pleas admitting to the jurisdiction of the court were accepted and failed to

apprise them of the consequences of their pleas.[4] However, respondents did not appeal the adjudication until after the trial court had terminated their parental rights, nearly two years after the adjudication. This Court has held that such collateral attacks are impermissible. *Hatcher*, 443 Mich at 437. That is, *Hatcher* held that a parent cannot wait to challenge the adjudication until after the parent's parental rights have been terminated. As we recognized, "If such a delayed attack were always possible, decisions of the probate court would forever remain open to attack, and no finality would be possible." *Id*. at 440 (quotation marks and citation omitted). Accordingly, *Hatcher* held:

> Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack where a direct appeal was available. It should provide

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[4] MCR 3.971 provides, in pertinent part:

> (B) Advice of Rights and Possible Disposition. Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing that is made a part of the file:
>
> * * *
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,
>
> (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
>
> (c) have witnesses against the respondent appear and testify under oath at the trial,
>
> (d) cross-examine witnesses, and
>
> (e) have the court subpoena any witnesses the respondent believes could give testimony in the respondent's favor;
>
> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent.

> repose to adoptive parents and others who rely upon the finality of probate court decisions. [*Id*. at 444.]

As this Court recently explained in *In re Sanders*, 495 Mich 394, 404; 852 NW2d 524 (2014):

> In Michigan, child protective proceedings comprise two phases: the adjudicative phase and the dispositional phase. Generally, a court determines whether it can take jurisdiction over the child in the first place during the adjudicative phase. Once the court has jurisdiction, it determines during the dispositional phase what course of action will ensure the child's safety and well-being. [Citations omitted.]

Child protective proceedings begin with the filing of a petition. MCR 3.961. The trial court must decide at that juncture whether to authorize the petition, which is done "upon a showing of probable cause, unless waived, that one or more of the allegations in the petition are true and fall within MCL 712A.2(b)." MCR 3.965(B)(12). If the court authorizes the petition, the case then proceeds to the adjudicative phase, in which the court must determine, by plea or trial, whether one or more of the statutory grounds alleged in the petition have been proved by a preponderance of the evidence. MCR 3.971; MCR 3.972(E). Once the trial court determines that one or more of the statutory grounds alleged in the petition have been proved by a preponderance of the evidence, the respondent has been adjudicated and the court proceeds to the dispositional phase.

The dispositional phase consists of review hearings and orders imposing courses of action that will ensure the child's safety and well-being. "A dispositional hearing is conducted to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult,

once the court has determined following trial, plea of admission, or plea of no contest that one or more of the statutory grounds alleged in the petition are true." MCR 3.973(A). "[A]n order of disposition placing a minor under the supervision of the court or removing the minor from the home" is "appealable to the Court of Appeals by right[.]" Former MCR 3.993(A)(1).[5] "[T]he dispositional phase ends with a permanency planning hearing, which results in either the dismissal of the original petition and family reunification or the court's ordering [the Department] to file a petition for the termination of parental rights." *Sanders*, 495 Mich at 407.

As this Court has explained, "[T]he probate court's subject matter jurisdiction is established when the action is of a class that the court is authorized to adjudicate, and the claim stated in the complaint is not clearly frivolous." *Hatcher*, 443 Mich at 437. That is, formal jurisdiction is "established by pleadings, such as the petition," not by the evidence. *Id*. at 438; see also *id*. at 443 ("That the evidence failed to support the petition did not affect the jurisdiction of the court, in the proper sense of the term, to hear the cause and to make the order.") (quotation marks and citation omitted).

What the court does in response to the petition represents the exercise of the court's jurisdiction. If the trial court errs while exercising its jurisdiction, this does not affect the court's subject-matter jurisdiction itself. *Id*. at 437 ("Procedural errors that may have occurred did not affect the probate court's subject matter jurisdiction."). As we explained in *Hatcher*, 443 Mich at 438-439:

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[5] See MCR 3.993(A)(1), as adopted February 4, 2003, 467 Mich cccxxxiii (2003), effective May 1, 2003.

> Want of jurisdiction must be distinguished from error in the exercise of jurisdiction. Where jurisdiction has once attached, mere errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, will not render the judgment void, and until set aside it is valid and binding for all purposes and cannot be collaterally attacked. Error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends, the court having general jurisdiction of the cause and the person, is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the correctness of the determination made. [Quotation marks and citations omitted.]

While "lack of subject matter jurisdiction can be collaterally attacked[,] . . . the exercise of that jurisdiction can be challenged only on direct appeal." *Id*. at 439. To be precise, the exercise of jurisdiction "cannot . . . be challenged years later in a collateral attack." *Id*. at 439-440 (quotation marks and citation omitted); see also *In re Gazella*, 264 Mich App 668, 679-680; 692 NW2d 708 (2005) ("Matters affecting the court's exercise of its jurisdiction may be challenged only on direct appeal of the jurisdictional decision, not by collateral attack in a subsequent appeal of an order terminating parental rights.");[6] *In re SLH*, 277 Mich App 662, 668; 747 NW2d 547 (2008) ("Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights.").

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[6] In *Gazella*, 264 Mich App at 680, the Court of Appeals asserted:

> As noted earlier, the original order of disposition entered June 2, 2003, and filed June 5, 2003, stated that an adjudication was held, that the children were found to come within the jurisdiction of the court, and that they were placed in out-of-home care. That is the order that was appealable as of right to challenge the adjudication. By not appealing that order, respondent lost her right to challenge the court's exercise of jurisdiction.

In *SLH*, 277 Mich App at 668-669, 669 n 13, the Court of Appeals explained that an adjudication challenge following an order terminating parental rights is not a collateral attack when termination occurred at the initial disposition:

> Ordinarily, an adjudication cannot be collaterally attacked following an order terminating parental rights. That is true, however, only when a termination occurs following the filing of a supplemental petition for termination after the issuance of the initial dispositional order. If termination occurs at the initial disposition as a result of a request for termination contained in the original, or amended, petition for jurisdiction, then an attack on the adjudication is direct and not collateral, as long as the appeal is from an initial order of disposition containing both a finding that an adjudication was held and a finding that the children came within the jurisdiction of the court.[13]

[13] . . . [B]ecause an initial order of disposition is the first order appealable as of right, an appeal of the adjudication following the issuance of an initial dispositional order is not a collateral attack on the initial adjudication, but a direct appeal, notwithstanding that a termination of parental rights may have occurred at the initial dispositional hearing.

Essentially, what *SLH* explained is that if a respondent-parent appeals the adjudication at the first opportunity that he or she can, this does not constitute a collateral attack.

In *SLH*, the trial court had orally determined that the children came within its jurisdiction and then set the matter for a dispositional hearing without first entering an adjudication order. Following the dispositional hearing, the trial court entered an order of disposition and an order terminating parental rights on the same day, and both orders stated that an adjudication was held and that the children were found to fall within the jurisdiction of the court. The respondent-

parent appealed, arguing that the trial court erred by taking jurisdiction over the children. The Court of Appeals held that this did not constitute a collateral attack because the contemporaneous order of disposition and order terminating parental rights "contain the first appealable finding of adjudication that the children came within the jurisdiction of the court." *Id*. at 668.

In summation, an adjudication cannot be collaterally attacked following an order terminating parental rights unless the termination occurred at the initial disposition. In the instant case, however, the adjudication and the termination were separated by a lengthy period of attempts at reunification. Therefore, respondents are barred from collaterally attacking the adjudication.

At an adjudication hearing on December 21, 2015, respondents admitted to some of the allegations in the petition, and on January 12, 2016, the court entered a dispositional order. Additional dispositional hearings occurred, additional dispositional orders were entered, and services were provided to respondents. On August 7, 2017, the trial court granted the petition to terminate respondents' parental rights. On September 8, 2017, respondents appealed in the Court of Appeals, arguing, among other things, that the trial court erred during the adjudication hearing by failing to advise respondents of their rights as required by MCR 3.971.

Although the trial court certainly breached MCR 3.971 by not advising respondents of their rights, respondents failed to timely raise this issue.[7] Respondents should have raised this issue after the adjudication and the first dispositional order entered on January 12,

[7] Although the Department acknowledges that the trial court did not comply with MCR 3.971, contrary to the majority's contention, the Department has not conceded that this violated respondents' due-process rights.

2016. See former MCR 3.993(A)(1) ("[A]n order of disposition placing a minor under the supervision of the court or removing the minor from the home" is "appealable to the Court of Appeals by right[.]").[8] But, instead, respondents waited nearly two years to raise

[8] The majority takes issue with *Hatcher*'s statement that "[t]he respondent could have appealed the court's exercise of its statutory jurisdiction by challenging the sufficiency of the petition," *Hatcher*, 443 Mich at 438, because, according to the majority, "[t]he error in the adjudication occurred *after* the preliminary hearing, when the probable-cause determination was made [and] the father could not have appealed an error that had yet to occur." However, given that *Hatcher* cited MCR 5.993, which was the predecessor of our current MCR 3.993, immediately after the statement with which the majority takes issue, it is more than reasonably clear that *Hatcher* was stating, in fact, that the respondent could have filed an appeal of right *after* the adjudication, i.e., after the court entered an "order of disposition placing a minor under the supervision of the court," former MCR 3.993(A)(1). The "sufficiency of the petition" remained at issue at that point because the probate court presumably had relied on the allegations in the petition as well as the parents' stipulation that the child should become a temporary ward at the adjudication hearing. For these reasons, I do not believe *Hatcher* was nonsensically suggesting that the father should have appealed an error that had yet to occur.

In addition, and again contrary to the majority's contention, I do not believe that *Hatcher* suggested that "the father could have raised the adjudication error . . . in a motion for rehearing from the order terminating parental rights," which, as the majority itself recognizes, would have been inconsistent with *Hatcher*'s ultimate conclusion. Rather, *Hatcher* simply noted that "[a] parent is . . . entitled to request a rehearing not later than twenty days after an order terminating parental rights and removing the child from parental custody" and that this statutory safeguard ensures the parent time to "challenge a court's exercise of its jurisdiction." *Hatcher*, 443 Mich at 436. Terminating parental rights constitutes an exercise of the court's jurisdiction and, as recognized by *Hatcher*, such an exercise can be challenged by requesting a rehearing not later than 20 days after an order terminating parental rights has been entered. Entering an order of adjudication also constitutes an exercise of jurisdiction and, as also recognized by *Hatcher*, such an exercise can be challenged by filing an appeal of right after the trial court enters its initial dispositional order; it, however, cannot be challenged "years later in a collateral attack where a direct appeal was available." *Id*. at 444.

this issue.[9] *They waited until after several dispositional hearings had been held, after several dispositional orders had been entered, after several months of services had been provided, after JF had been living in foster care for almost two years, and after their parental rights had been terminated nearly two years after adjudication.*

Hatcher bars respondents' collateral attack, as it should. Unlike the majority, I would not overrule *Hatcher* because if there is any realm of law in which finality is critical, it is with regard to child protective proceedings. The Department spent several years attempting (tragically without success) to reunite respondents with their child. Parents who have been given several years to rehabilitate themselves and who have continually failed to do so should not be permitted to reinitiate the entire process by challenging aspects of the adjudication that occurred at its very outset. It is simply not fair to children to require them to endure this process again. It is also not fair to prospective adoptive parents. Given that the dispositional phase of a child protective proceeding may proceed for several months, or even several years, it is important to ensure, as *Hatcher* does, that errors made during the adjudicative phase cannot result in all that was accomplished during the ensuing dispositional phase to be undone. Not only would this result in wasted time, money, resources, and public and private effort, but most importantly it would risk disrupting whatever

[9] Although our court rules at that time did not require the trial court to inform—much less repeatedly inform—respondents that they possessed an appeal of right from the initial dispositional order, these rules did clearly provide for such an appeal of right, see former MCR 3.993(A)(1), they did not provide for the additional and much-delayed appeal of right sought in this case, and respondents were represented by counsel who was certainly aware of all this.

progress and rehabilitation the children might have made during that time.

Such a "do-over" would require the entire process to begin all over—there would have to be another adjudication hearing, another service plan would have to be created, more dispositional hearings would have to be held, respondents would have to be given further opportunities to comply with the service plan, and ultimately, more likely than not, there would have to be another termination hearing. Yet, the end result would almost inevitably be the same—respondents' parental rights would be terminated. The only difference would be that the process would have taken twice as long. Instead of the children having to go through this process, perhaps bouncing around from foster-care home to foster-care home for two to three years, they would then have to endure this process for four to six years. That, in my judgment, would be untenable and unacceptable.

The majority holds that *Hatcher* was wrongly decided because all of the cases on which it relied were, in the majority's view, finely distinguishable in the sense that they were all civil cases in which a second action was started to undo a prior final order,[10] whereas *Hatcher* and the present case are child protection cases

[10] For example, in *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 260 NW 908 (1935), this Court held that a divorce judgment could not be collaterally attacked in a subsequent action to set aside a conveyance of real estate. In addition, in *Life Ins Co of Detroit v Burton*, 306 Mich 81; 10 NW2d 315 (1943), this Court held that an order reforming a surety bond could not be collaterally attacked in a subsequent action to set aside a sheriff's sale. Finally, in *Edwards v Meinberg*, 334 Mich 355; 54 NW2d 684 (1952), this Court held that a judgment in an action in assumpsit on a promissory note could not be collaterally attacked in a subsequent action for damages for abuse of process in obtaining a writ of garnishment against the plaintiff's wages to satisfy the original judgment.

in which the parents are simply challenging a nonfinal order (the adjudication) after the first final order (the termination order) has been entered. The majority is correct that generally a party appealing a final order in a case can raise issues relating to prior nonfinal orders in that same case. See *Green v Ziegelman*, 282 Mich App 292, 301 n 6; 767 NW2d 660 (2009) ("[A] party claiming an appeal of right from a final order is free to raise issues on appeal related to prior orders.") (quotation marks and citation omitted). The majority is also correct that an adjudication/initial dispositional order is not a final order and that the first final order is the order terminating parental rights. See MCR 7.202(6)(a)(i) (defining "final order" as "the first judgment or order that disposes of all the claims and adjudicates the rights and liabilities of all the parties"). Nonetheless, the majority is seriously *incorrect* in failing to recognize that although there is only one final order in a child protection case, there are at least two orders that are appealable by right, i.e., the initial dispositional order and the order terminating parental rights. Presumably, the initial dispositional order is appealable by right at least in significant respect so that errors that have occurred during the adjudication can be remedied in a timely fashion. This, once again, is the appropriate time at which the parents should raise challenges they have regarding the adjudication.

A "collateral attack" is defined as "[a]n attack on a judgment in any manner other than by action or proceeding, whose very purpose is to impeach or overturn the judgment; or, stated affirmatively, a collateral attack on a judgment is an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment." *Black's Law Dictionary* (6th ed). Former MCR 3.993(A)(1) provided that "an order of disposition plac-

ing a minor under the supervision of the court" was appealable by right. This appeal by right of the order of disposition placing a minor under the supervision of the court is the proceeding whose "very purpose" is to overturn the decision to place a minor under the supervision of the court, i.e., the adjudication. In other words, *this* moment is the time to directly attack the adjudication. An order terminating parental rights is also appealable by right. Former MCR 3.993(A)(2).[11] However, this appeal by right has an "independent purpose" other than overturning the adjudication, which is to overturn the trial court's actual decision to terminate parental rights. In other words, the "very purpose" of this appeal is to attack the termination, not the adjudication. Therefore, attacking the adjudication in the appeal of the termination order clearly constitutes a "collateral"—rather than a direct—attack.[12]

The majority rationalizes its conclusion on the grounds that this Court has putatively adopted numerous "exceptions" to *Hatcher*'s collateral-attack rule and, as a result, this Court should now simply overrule the decision. Once again, I disagree. Indeed, I do not believe that any of the cases cited by the majority actually adopted any "exception" to the *Hatcher* rule. In *Sanders*, 495 Mich at 401, for example, *Hatcher* did

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[11] The new court rules renumber this provision as MCR 3.993(A)(4), but the language is unchanged.

[12] Moreover, regardless of whether a posttermination challenge to the adjudication is labeled a collateral attack or a direct attack, the critical point is that *Hatcher* simply requires a timely appeal of the adjudication, which both parties and the amici agree benefits all involved, including parents, children, and prospective adoptive parents, as well as the public interests served by this process. Thus, even if one takes issue with characterizing a posttermination challenge as a "collateral" challenge, as the majority does, that still does not mean that we should abolish the *Hatcher* rule, which again simply requires a timely appeal of the adjudication.

not apply because there had never been any adjudication of the respondent-father; the trial court had simply applied the "one-parent" doctrine—that is, the court entered dispositional orders affecting the rights of both parents based on an adjudication solely of the mother. Given that the respondent-father obviously could not have appealed that adjudication because he was not a party, his challenge of that adjudication in his appeal after the termination of *his* parental rights was not a collateral attack. See *In re Kanjia*, 308 Mich App 660, 670; 866 NW2d 862 (2014) ("Because respondent was never adjudicated, and in fact was not named as a respondent in the trial court's order of adjudication, it is difficult to see how he could have appealed that order of adjudication."). Because *Sanders* did not involve a collateral attack, *Sanders* could not have given rise to an "exception" to *Hatcher*'s collateral-attack rule. And, unlike the respondent in *Sanders* (as well as in *Kanjia*), respondents here were fully adjudicated by the trial court; nothing precluded them from directly attacking the resultant adjudication order.[13]

In addition, in *In re Hudson*, 483 Mich 928 (2009), and *In re Mitchell*, 485 Mich 922 (2009), this Court simply pointed out errors that were made during the adjudications; these errors were not dispositive though

[13] Similarly, *In re Wangler*, 498 Mich 911, 911 (2015), also could not have created an "exception" to *Hatcher*; it simply held that because "the court purported to issue dispositional orders without first adjudicating the respondent-mother, the respondent-mother's appeal should not be regarded as an impermissible collateral attack on jurisdiction." In other words, *Wangler* held that because the respondent had never been formally adjudicated, given that her adjudication had been held in abeyance, her challenge of the adjudication proceeding following the termination of her parental rights was not a collateral challenge. Again, unlike the respondent in *Wangler*, respondents in the instant case were formally adjudicated; thus, their challenge of the adjudication following the termination of their parental rights was a collateral challenge.

because the trial court had also made errors during the disposition stage, e.g., "the trial court committed clear error in finding that the Department of Human Services presented clear and convincing evidence in support of the statutory grounds for terminating the respondent-mother's parental rights." *Hudson*, 483 Mich at 928. Therefore, I would hardly characterize these cases as having created "exceptions" to *Hatcher*.[14] Accordingly, contrary to the majority's assertion, this Court has not already carved out numerous "exceptions" to the *Hatcher* rule, and for the reasons articulated throughout this dissent, I would not begin to do so today.

As noted earlier, the collateral-attack rule is a common-law rule, and "when it comes to alteration of the common law, the traditional rule must prevail absent compelling reasons for change." *Price*, 493 Mich at 260. Respondents' predominant concern regarding *Hatcher*'s collateral-attack rule is that it is unfair because trial courts are not advising parents of their appellate rights following adjudication and that despite not knowing their appellate rights, the collateral-attack rule punishes respondents for not appealing.

[14] *In re Mays*, 490 Mich 993, 994 (2012), also did not create an "exception" to *Hatcher* because it merely held that "the trial court clearly erred in concluding that a statutory basis existed for termination of respondent's parental rights." Indeed, *Mays* expressly stated that it was not addressing the validity of the adjudication because that issue had not been timely raised and expressly cited *Hatcher* in support of that position. *Id.* at 994 n 1. Similarly, *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010), cannot be characterized as creating an "exception" to *Hatcher* because it merely held that the Department did not sufficiently involve the respondent in the reunification process; it did not even address the adjudication process. Finally, *In re Jones*, 499 Mich 862 (2016), also cannot be characterized as creating an "exception" to *Hatcher* because all this Court did there was to enter an order consistent with the parties' joint motions requesting that we vacate the trial court's order terminating the respondent's parental rights.

However, this Court just recently (and correctly, in my judgment) amended the court rules to address that problem. Specifically, we just amended the court rules to require the trial court to advise parents that they have an appeal of right from the initial dispositional order and that if they do not challenge the adjudication at that point, they will not be able to challenge it after their parental rights have been terminated, with two exceptions.[15] At oral argument, respondents' counsel supported this idea: "I wholeheartedly agree with the court rule and the world you want, which is early decisions, appeal them right away, and it benefits everybody." The Department and the Attorney General also indicated support for this idea. Given our recent court rule amendments, the majority has set forth no reason, let alone a "compelling reason," to justify its present alteration of the common-law rule.

The majority asserts that overruling *Hatcher* will not cause " 'practical, real-world dislocations.' " However, this is only true because of this Court's recent court rule amendments. In other words, if this Court had not amended the court rules to essentially incorporate *Hatcher* into the court rules, the majority's overruling of *Hatcher* would have caused " 'practical, real-world dislocations,' " because, as discussed earlier, it would have allowed parents to bring untimely challenges regarding the adjudication that, if successful, would have required the process to begin all over again no matter how much time had already elapsed attempting (unsuccessfully) to reunite the parents with their children.

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[15] Parents will still be able to challenge the adjudication in an appeal from the order terminating their parental rights if their rights were terminated at the initial dispositional hearing, which, as discussed earlier, is already allowed under *SLH*, 277 Mich App at 668-669, and also if the court failed to inform them of their right to appeal, MCR 3.971(C); MCR 3.972(G); MCR 3.973(H). I also support these exceptions.

I am not sure why the majority feels compelled to overrule *Hatcher* given that the Court has now essentially incorporated it into our court rules. The majority says the following about *Hatcher*:

> *Hatcher* disrupts the careful balancing of interests in our juvenile code by preventing judicial review of meritorious claims of defects in the adjudication. That is, it prevents review of mistakes in the government process that permanently separates a parent from a child. A parent's only remedy under *Hatcher* is by way of an interlocutory appeal, disincentivizing him or her from timely cooperating with the Department and further delaying a final determination. *Hatcher* disserves parents, their children, and the state. It's time to disavow it.

Yet we have just incorporated *Hatcher* into our court rules by adopting a new rule that requires that parents timely raise challenges regarding the adjudication in their appeal of right from the initial dispositional order. MCR 3.971(B)(8); MCR 3.972(F)(3); MCR 3.973(G)(4). I am not sure why the majority has these concerns regarding *Hatcher* but not regarding the amended court rules. Regardless, I believe that the majority's concerns regarding *Hatcher* are unfounded.

To begin with, *Hatcher* does not "prevent[] judicial review of meritorious claims"; rather, it merely requires that such claims be pursued in a timely manner, which is consistent with the interests of all affected parties, including the children themselves. In other words, there is an appropriate time to challenge the adjudication and an inappropriate time, and waiting until years after the adjudication, and until after parental rights have been terminated, fits squarely within the latter category.

Next, the majority contends that "[a] parent's only remedy under *Hatcher* is by way of an interlocutory

appeal, disincentivizing him or her from timely cooperating with the Department and further delaying a final determination." But nothing about *Hatcher* prevents a parent from both challenging an adjudication and at the same time abiding by the court's orders. There will be no disincentive, just as there is no particular or obvious disincentive in the many cases in which an interlocutory appeal is filed. Furthermore, it is certainly better to delay a final determination than it is to wait until after that determination has been made and then require a complete "do-over." Indeed, both parties at oral argument agreed that immediately appealing the adjudication benefits everyone. As respondents' counsel explained: "[W]e don't want adjudication appeals—it's not good for the parents I represent to have an adjudicatory error two years later. And then, we have to go back in time." And as the Department further explained, witnesses may be difficult to find, unavailable, or simply may not remember as well given the passage of time. For all these reasons, I would not overrule *Hatcher*.

B. DUE PROCESS

This Court asked the parties to address "if *Hatcher* was correctly decided, whether due process concerns may override the collateral bar rule . . . ." *In re Ferranti*, 502 Mich at 906. I would answer this inquiry in the negative. *Hatcher* expressly overruled *Fritts v Krugh*, 354 Mich 97; 92 NW2d 604 (1958), which "attempted to correct what it perceived to be a gross lack of procedural due process" by "permitt[ing] [a] collateral attack on the exercise of jurisdiction." *Hatcher*, 443 Mich at 440. By overruling *Fritts*, despite recognizing that it involved a due-process challenge, *Hatcher* made it altogether clear that it intended the collateral-attack rule to apply to due-process challenges.

Almost any violation of court rules can be couched in terms of a constitutional due-process violation.[16] For example, in this case, the majority holds that the trial court's failure to inform respondents of (a) the rights they would be waiving if their plea admitting to the jurisdiction of the court was accepted, as is required by MCR 3.971(B)(3); and (b) the consequences of their plea, as is required by MCR 3.971(B)(4), violated due process. See also, e.g., *Hudson*, 483 Mich at 929 (CORRIGAN, J., concurring) (concluding that the trial court's failure to advise the respondent of the consequences of her plea of admission, contrary to MCR 3.971(B), and failure to appoint counsel at the respondent's first appearance, contrary to MCL 712A.17c, violated the respondent's due-process rights). Accordingly, if this Court were to adopt a due-process exception to the rule of *Hatcher*, that exception would effectively swallow the entire rule. In other words, adopting a due-process exception would be tantamount to overruling *Hatcher*.

Furthermore, not allowing parents to challenge the adjudication after parental rights have been terminated can hardly be said to violate their due-process rights because they have enjoyed a full opportunity to challenge the adjudication, from which determination

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[16] See *In re Sanders*, 495 Mich at 458 (MARKMAN, J., dissenting):

> Concerning due process, it is always possible to extend additional procedural rights and entitlements to persons who come into contact with the government, as criminal defendants, public employees, consumers of public services, regulated parties, recipients of social-services benefits, or parents of abused and neglected children. Additional hearings and additional appeals can always be convened, more protective rules of evidence can always be prescribed, and broader compliance with ever finer details of process can always be required. There is simply no end to the argument that "fairness" requires something more, and there is little specificity in the Due Process Clause that either sustains or refutes most such arguments.

they possess an appeal of right. That they do not also enjoy the right to challenge the adjudication *after* termination is simply a function of the fact that the state also possesses an undeniable interest in seeking relief for the abused and neglected child in a timely and reasonable manner.[17]

C. PRESERVATION AND PLAIN ERROR

This Court also asked the parties to address "what must a respondent do to preserve for appeal any alleged errors in the adjudication" and "by what standard should courts review the respondents' challenge to the initial adjudication . . . ." *In re Ferranti*, 502 Mich at 906. I agree with the majority that "a party's failure to timely assert a right in the trial court generally means that any resulting error will be treated as 'unpreserved' if challenged on appeal," and it is undisputed that respondents did not challenge the adjudication at the trial court level. To preserve for appeal an alleged error in the adjudication, the respondent would have had to have raised the error at the

[17] See *Mathews v Eldridge*, 424 US 319, 333, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), which provides that the following factors should generally be considered when determining "what process is due":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

While respondents' "private interest" in their parenthood is undeniably of the highest order, there is no obvious "risk of an erroneous deprivation" of this interest by the requirement that an appeal taken to rectify errors occurring during the adjudication be undertaken in a timely manner. Furthermore, the "Government's interest" in the circumstances of the abused and neglected child is also of the highest order.

adjudication hearing. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006) ("In order to properly preserve an issue for appeal, a defendant must raise objections at a time when the trial court has an opportunity to correct the error . . . .") (quotation marks and citation omitted). As this Court explained:

> Any other conclusion would be contrary to the rule that defendants cannot "harbor error as an appellate parachute." "The rule that issues for appeal must be preserved in the record by notation of objection is a sound one," and that rule is totally eviscerated in situations, such as this, where defendants never address appealable issues with the trial court. [*Id*. at 278 n 39 (citations omitted).]

If the respondent does not properly preserve the issue, this Court should review the respondent's challenge to the initial adjudication for plain error. See *Hudson*, 483 Mich at 928 ("The trial court also committed plain error, *People v Carines*, 460 Mich 750, 763 (1999), in failing to . . . timely appoint counsel in violation of MCL 712A.17c(4) and (5), MCR 3.915(B)(1), MCR 3.965(B)(5), and MCR 3.974(B)(3)(a)(i), and in failing to advise the respondent that her plea could later be used in a proceeding to terminate parental rights in violation of MCR 3.917(B)(4)."); *Mitchell*, 485 Mich at 922 ("[T]he trial court committed plain error, *People v Carines*, 460 Mich 750, 763 (1999), in failing to timely appoint counsel in violation of MCL 712A.17c(4) and (5), MCR 3.915(B)(1), MCR 3.965(B)(5), and MCR 3.974(B)(3)(a)(i), and in failing to advise the respondent that his plea could later be used in a proceeding to terminate his parental rights in violation of MCR 3.971(B)(4).").

In *Carines*, 460 Mich at 763, this Court held:

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred,

> 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [Citations omitted; alteration in original.]

In this context, it would be difficult for a respondent to prove that an error affected the outcome of the lower-court proceedings. For example, in the instant case, the errors were that the trial court failed to inform respondents of (a) the rights that they would be waiving if their plea admitting to the jurisdiction of the court was accepted, as is required by MCR 3.971(B)(3); and (b) the consequences of their plea, as is required by MCR 3.971(B)(4). Although these were certainly errors and were plain errors, I do not understand how these errors conceivably affected the outcome of the proceedings. Respondents have nowhere alleged that they would not have pleaded to the allegations in the petition if the trial court had properly advised them of the rights that they were waiving and/or of the consequences of their plea.[18] And even if they had so alleged, I do not understand how the outcome of the proceedings would have been altered because, at most, an adjudication trial would have been conducted and the trial court

[18] Furthermore, respondents were actually advised of many of their rights at the preliminary hearing on October 29, 2015, and were both represented by counsel at every phase of the proceedings.

likely would have found again that one or more of the statutory grounds alleged in the petition had been proved by a preponderance of the evidence, i.e., that respondents were unfit.[19] There is simply no serious question that even absent respondents' plea, the trial court would have adjudicated respondents, the dispositional phase would have proceeded in the same way, and respondents' parental rights would have been terminated. Indeed, respondents do not even dispute the sufficiency of the evidence in support of the adjudication or of the termination of their parental rights. Therefore, in my view, although the majority overrules *Hatcher*, respondents are still not entitled to relief.

D. HOME VISIT

This case also involves two non-*Hatcher* issues. The first such issue we asked the parties to address is "whether a trial court is permitted to visit a respondent's home to observe its condition, and, if so, what parameters should apply to doing so[.]" *In re Ferranti*, 502 Mich at 906. The parties agree that a trial court is not permitted to visit a respondent's home to observe its condition. MCR 2.507(D), the rule allowing under certain circumstances the court's view of "property or a place where a material event occurred," is not among the rules applicable to child protective proceedings. MCR 3.923(A), which *does* apply, provides:

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[19] The majority asserts that "[t]his misses the point" because "the constitutional deficiencies here are not forgiven by what might have transpired at trial." Respectfully, I believe it is the majority that errs because it is well established that parties are not entitled to relief for unpreserved constitutional errors unless they can establish that "the error affected the outcome of the lower court proceedings," *Carines*, 460 Mich at 763, and the latter determination is necessarily made by comparing the flawed proceeding with a hypothetical unflawed proceeding, i.e., by inquiring as to "what might have transpired at trial."

> If at any time the court believes that the evidence has not been fully developed, it may:
>
> (1) examine a witness,
>
> (2) call a witness, or
>
> (3) adjourn the matter before the court, and
>
> (a) cause service of process on additional witnesses, or
>
> (b) order production of other evidence.

Note that the court rule does not allow the court to view a home. For these reasons, I agree with the parties and the Court of Appeals that the trial court erred by visiting respondent's home.

However, I further agree with the Court of Appeals that this error was harmless. Respondents did not object to the error, and therefore the plain-error test applies. See *Carines*, 460 Mich at 763-764. Even assuming that there was error and that the error was plain, respondents are not entitled to relief because they were not prejudiced as a result of the error. As the Court of Appeals explained:

> [G]iven the trial court's reliance on the testimony of witnesses who described both the historical condition of the home, the services provided, and the current condition of the home, as well as the effect of the condition of the home on JF's medical condition, it does not appear that the trial court's visit to the home affected the outcome of the proceedings. The court found that "the many professionals unanimously agreed that the house was unhygienic and was probably not going to improve" even though the condition of the home was "not as atrociously bad as it was." The trial court's lone reference to the court's viewing of the home was that
>
> > it is not where a person with [spina bifida] will thrive. [JF] chooses to crawl for locomotion when she is in the home and the home will never be clean enough for her to avoid infections.

> This finding is amply supported by the testimony of the witnesses with respect to the condition of the home and its effect on JF's medical condition, and the trial court's statement regarding its view of the home reflects that the court's viewing of the home confirmed the witnesses' testimony. Under these circumstances, respondents have failed to demonstrate that the trial court's error in visiting the home affected their substantial rights. [*Ferranti*, unpub op at 8-9.]

I agree with the Court of Appeals.

E. INTERVIEW OF THE CHILD

The other non-*Hatcher* issue we asked the parties to address concerns "whether a trial court may interview a child who is the subject of child protective proceedings in chambers, and, if so, what parameters should apply to doing so." *In re Ferranti*, 502 Mich at 906. Again, the parties agree that a trial court may not interview in chambers a child who is the subject of child protective proceedings. See *In re HRC*, 286 Mich App 444; 781 NW2d 105 (2009). While the court rules permit the use of *in camera* interviews for the limited purpose of determining a child's parental preference in child custody cases, see MCR 3.210(C)(5), they do not permit the use of *in camera* interviews in child protective cases.[20] Accordingly, the trial court erred by conducting an *in camera* interview of the child.

However, I agree with the Court of Appeals that respondents waived this issue. At one point,

[20] Perhaps this is because while the Child Custody Act, MCL 722.21 *et seq.*, requires the trial court in custody cases to take a child's preference into consideration as long as the court considers the child to be of sufficient age to express a preference, MCL 722.23(i), the juvenile code does not require a trial court to consider a child's preference in a termination-of-parental-rights case. This may have something to do with the nature of these proceedings. A termination of parental rights is permanent, whereas a custody order can be modified.

respondent-father's counsel asked respondent-father, "Are you asking the Court to interview [JF] prior to making a decision on termination?" and respondent-father answered, "I would ask that, yes." Subsequently, after both parties indicated that they had no further proofs, the trial judge indicated that he was considering speaking with JF but admitted that there was no statute that provides for such an interview, and he asked the parties if they had any objections. In response, respondent-father's counsel stated, "I would actually request it," and respondent-mother's counsel stated, "We encourage the court to talk with [JF]."

I also believe the parties were well aware that the judge was planning on speaking with JF in chambers. There was never any mention of her testifying in court; rather, the matter was always stated in terms of the judge "interviewing," "speaking with," and "talking with" JF. Furthermore, the guardian ad litem asked the judge if he would be interviewing JF "here at the court or at the Lutheran [family services office]?" And the judge responded, "[L]et's go to the back chambers." In light of these statements, I believe it was reasonably clear that the judge planned to interview JF off the record in his chambers, and the parties not only did not object, but they affirmatively encouraged the judge to talk with JF. Therefore, the issue was waived, and "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted).

IV. CONCLUSION

Because I believe the Court of Appeals correctly held that: (a) respondents cannot collaterally attack the

instant adjudication after their parental rights have been terminated, (b) respondents waived the issue pertaining to the interview of the child, and (c) any error in visiting respondents' home was harmless, I would affirm the judgment of the Court of Appeals. In addition, and unlike the majority, I would not overrule *Hatcher*, even if in light of our new court rules, the impact of so doing would only be upon this single case, this single child, JF alone. Just as the new court rules reasonably balance the rights of parents and children, and afford a clear opportunity for a fresh start for the abused or neglected child, so too did the prior court rules; it is not right that JF *alone* should be made subject to a *third* court rule regime, an altogether singular regime, a regime that does not, in my judgment, reasonably balance the interests of parent and child, a regime in which, before *JF*'s fresh start can begin, a lengthy re-do of an already lengthy and fair legal process must first proceed because of the failure of respondents—already deemed by a court of law to have acted neglectfully—to have abided by the law in pursuing a timely appeal, much less to have corrected their maltreatment of JF. Thus, in a realm of the law in which reasonable expedition of decision-making has always been thought by the judiciary to be paramount, the majority imposes in this single case a process that is reflective of our legal system at its most unnecessarily drawn out and dilatory. For all the reasons set forth in this opinion, I respectfully dissent.[21]

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[21] Notably, the majority overrules *Hatcher*, reverses the judgment of the Court of Appeals, and remands to the trial court for further proceedings without providing any guidance concerning what number of years of further proceedings are required. The majority fails even to make clear whether JF can remain in foster care or whether she, a child suffering from spina bifida and chronic kidney disease, must now be

ZAHRA, J., concurred with MARKMAN, J.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

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returned to respondents' home, one in which she has already suffered considerably from medical and physical neglect.

DORKO v DORKO

Docket No. 156557. Argued on application for leave to appeal March 6, 2019. Decided June 20, 2019.

Plaintiff, Richard W. Dorko, and defendant, Sherry S. Dorko, obtained a judgment of divorce in the Kalamazoo Circuit Court on August 3, 2005, that awarded defendant half of the marital interest in plaintiff's pension and retirement benefits. Plaintiff retired in 2014 and began collecting his full pension and retirement benefits. Ten years and eight days after entry of the divorce judgment, defendant submitted a proposed qualified domestic-relations order (QDRO) to the trial court, which entered the order on August 19, 2015. Defendant then submitted the proposed QDRO to the pension plan administrator, Fidelity. On January 4, 2016, Fidelity refused to qualify the proposed QDRO because of deficiencies in the draft language, which defendant corrected in an amended proposed QDRO that she submitted to the trial court on January 8, 2016. Plaintiff objected and moved to set aside the first proposed QDRO and to deny the amended QDRO, arguing that entry of any QDRO was barred by the 10-year period of limitations in MCL 600.5809(3), which applies to the enforcement of noncontractual money obligations. The trial court, G. Scott Pierangeli, J., denied plaintiff's motion and entered the amended proposed QDRO on June 27, 2016, ruling that the 10-year period of limitations in MCL 600.5809(3) began to run only once plaintiff's retirement benefits became due following his retirement, not upon entry of the divorce judgment in 2005. After granting plaintiff's application for leave to appeal, the Court of Appeals, BOONSTRA, P.J., and RONAYNE KRAUSE and SWARTZLE, JJ., concluded in an unpublished per curiam opinion issued August 17, 2017 (Docket No. 333880), that it was bound by *Joughin v Joughin*, 320 Mich App 380 (2017), which held that MCL 600.5809(3) does not apply to a party's request to enter a proposed QDRO, and that defendant was therefore not time-barred from submitting a proposed QDRO for entry. Plaintiff applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 502 Mich 878 (2018).

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal, *held*:

The limitations period in MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO because such a request does not involve an action to enforce a noncontractual money obligation; it merely seeks to implement a provision of the divorce judgment. Accordingly, the Court of Appeals reached the correct conclusion by affirming the trial court order in this case. However, *Joughin* erred by holding that entry of a proposed QDRO is a ministerial task. The Court of Appeals judgment was vacated to the extent that its reasoning was based on the aspects of *Joughin* that were inconsistent with this opinion.

1. MCL 600.5809 sets forth the period of limitations governing the enforcement of judgments. MCL 600.5809(1) provides that a person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by MCL 600.5809. MCL 600.5809(3) provides, in relevant part, that the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record in this state from the time of the rendition of the judgment or decree. MCL 600.5809(3) further states that within this limitations period, an action may be brought upon the judgment or decree for a new judgment or decree, which, in turn, is subject to MCL 600.5809(3). In *Joughin*, the Court of Appeals correctly held that MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO because such a request does not involve an action to enforce a noncontractual money obligation; it merely seeks to implement a provision of the divorce judgment. In other words, a party's request for entry of a proposed QDRO does not involve a distinct legal claim, and only claims can be barred by a statute of limitations.

2. The *Joughin* majority erred by holding that entry of a proposed QDRO is a ministerial task. Although a proposed QDRO must reflect the terms of the judgment of divorce, it must also meet the requirements of a plan administrator before the administrator will qualify it. Federal law specifies certain minimum requirements for QDROs, but it does not otherwise limit a plan administrator's discretion to determine plan procedures, and plan administrators have discretion to reject proposed QDROs that do not comply with their guidelines. The review process before a proposed QDRO is qualified can be lengthy, during which time a participant's status in the plan or the plan procedures can

change. Such a change may necessitate entry of a new or amended proposed QDRO and further exercise of discretion by a trial court to ensure that the order effectuates the terms of the divorce judgment. Therefore, entry of a QDRO is not a ministerial task prescribed and defined by law with such precision and certainty that it leaves nothing to the trial court's discretion or judgment.

Court of Appeals judgment affirmed in part and vacated in part; case remanded to the Kalamazoo Circuit Court for further proceedings.

1. DIVORCE — QUALIFIED DOMESTIC-RELATIONS ORDERS — STATUTORY LIMITATIONS PERIODS.

The limitations period in MCL 600.5809, which governs the enforcement of judgments, does not apply to a party's request for entry of a proposed qualified domestic-relations order.

2. DIVORCE — ENTRY OF QUALIFIED DOMESTIC-RELATIONS ORDERS — DISCRETIONARY OR MINISTERIAL.

The entry of a qualified domestic-relations order is not a ministerial task prescribed and defined by law with such precision and certainty that it leaves nothing to the trial court's discretion or judgment.

Schroder Law (by *Jeffrey M. Schroder*) for plaintiff.

Butler, Toweson & Payseno, PLLC (by *George T. Perrett*) for defendant.

Amicus Curiae:

Saraphoena B. Koffron for the Family Law Section of the State Bar of Michigan.

PER CURIAM. In this case, we consider whether the 10-year period of limitations in MCL 600.5809(3) applies to a party's request to enter a qualified domestic-relations order (QDRO)[1] when a judgment of divorce

[1] Under the applicable federal statute, 29 USC 1056(d)(3)(B)(ii), such orders are referred to only as "domestic relations orders" and are therefore sometimes referred to as "DROs." The orders do not become "qualified" until they are approved by a plan administrator. For the sake

awards an interest in a spouse's retirement benefits. The Court of Appeals concluded that it was bound by *Joughin v Joughin*, 320 Mich App 380; 906 NW2d 829 (2017), which held that MCL 600.5809(3) does not apply to a party's request to enter a proposed QDRO, and that defendant-wife was therefore not time-barred from submitting a proposed QDRO for entry. We agree with *Joughin*'s holding that MCL 600.5809(3) does not apply to a request to enter a proposed QDRO, and thus affirm the result reached by the Court of Appeals in this case, but we write to clarify the reasons this holding is correct.

I. BACKGROUND

The parties divorced on August 3, 2005, following a 28-year marriage. The judgment of divorce awarded defendant-wife half of the marital interest in plaintiff-husband's pension and retirement benefits via a QDRO. The judgment stated:

> **Qualified Domestic Relations Order:** Defendant is awarded ½ of the marital interest of Plaintiff's retirement plan via QDRO through employment with General Motors. She shall share in any early retirement subsidy under the Plan in proportion to her award. She shall be entitled to csot-of-living [sic] and other post-retirement increases in proportion to her award. She shall be allowed to elect to receive benefits under the Plan as soon as the Plan permits. To the extent necessary to protect her interest in the event of Plaintiff's death, she shall be designated surviving spouse.

Plaintiff retired in 2014 and began collecting his full pension and retirement benefits. Ten years and eight

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of consistency with the reference used by the Court of Appeals, we refer to domestic-relations orders that have not yet been approved by a plan administrator as "proposed QDROs." See *Joughin v Joughin*, 320 Mich App 380, 383 n 2; 906 NW2d 829 (2017).

days after entry of the divorce judgment, defendant submitted a proposed QDRO to the trial court. Receiving no response and no objection, the trial court entered the order on August 19, 2015. Defendant then submitted the proposed QDRO to the pension plan administrator, Fidelity. On January 4, 2016, however, Fidelity refused to qualify the proposed QDRO because of deficiencies in the draft language. Defendant corrected the identified deficiencies and submitted an amended proposed QDRO to the trial court on January 8, 2016. Plaintiff objected and, after retaining an attorney, moved to set aside the first proposed QDRO and to deny the amended QDRO. In his motion, plaintiff argued that entry of any QDRO was barred by the 10-year period of limitations in MCL 600.5809(3), which applies to the enforcement of noncontractual money obligations. The trial court denied plaintiff's motion and entered the amended proposed QDRO on June 27, 2016. It also denied plaintiff's motion for a stay. Ruling from the bench, the trial court concluded that the 10-year period of limitations in MCL 600.5809(3) began to run only once plaintiff's retirement benefits became due following his retirement, not upon entry of the divorce judgment in 2005. Defendant submitted the amended proposed QDRO to Fidelity, and by letter of August 12, 2016, Fidelity approved the amended QDRO.

Plaintiff filed an application for leave to appeal in the Court of Appeals, which the Court granted. At the time, another case involving the application of MCL 600.5809(3) to the entry of a proposed QDRO, *Joughin*, 320 Mich App 380, was also pending before the Court of Appeals. The Court of Appeals decided *Joughin* on July 11, 2017, in a split, published decision. In *Joughin*, the majority held that "the act to obtain entry of a proposed QDRO is a ministerial task done in conjunction with the divorce judgment itself."

Id. at 388. Therefore, "because the entry of the proposed QDRO is not an enforcement of a noncontractual money obligation, the 10-year period of limitations provided in MCL 600.5809(3) does not apply, and [the] request to have the proposed QDRO entered by the trial court was not time-barred." *Id*. at 389.[2] Relying on *Joughin*, the panel in the instant case held that "defendant's submissions of the proposed QDROs were merely ministerial tasks attendant to the judgment of divorce, which are not time-barred by MCL 600.5809(3)." *Dorko v Dorko*, unpublished per curiam opinion of the Court of Appeals, issued August 17, 2017 (Docket No. 333880), p 2.

Plaintiff applied for leave to appeal in this Court, and we ordered argument on the application, asking the parties to address whether plaintiff waived any statute-of-limitations defense, whether *Joughin* was correctly decided, and when, if MCL 600.5809(3) applies, a claim accrues for retirement benefits awarded by a judgment of divorce.

II. ANALYSIS

Retirement plans must comply with the federal Employee Retirement Income Security Act (ERISA) of 1974, 29 USC 1001 *et seq*., which precluded pension plan participants from assigning or alienating their benefits under plans that were subject to the act. *Roth v Roth*, 201 Mich App 563, 567; 506 NW2d 900 (1993), citing 29 USC 1056(d)(1) and 26 USC 401(a)(13). ERISA also contained a preemption provision, designed to establish the regulation of pension plans as an exclusively federal concern. *Roth*, 201 Mich App at 567; 29 USC 1144; *Pilot Life Ins Co v Dedeaux*, 481 US

[2] The parties in *Joughin* did not ask this Court to review the Court of Appeals' decision.

41, 46; 107 S Ct 1549; 95 L Ed 2d 39 (1987). In 1984, however, Congress enacted the Retirement Equity Act, which provided an exception to the restriction on assigning or alienating one's benefits by allowing QDROs. A QDRO " 'creates or recognizes the existence of an alternative payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under the plan . . . .' " *Moore v Moore*, 266 Mich App 96, 100 n 5; 700 NW2d 414 (2005), quoting 29 USC 1056(d)(3)(B)(i)(I). QDROs are thus exempt from ERISA's preemption provisions and may be used to distribute funds to a payee who is not a named beneficiary under a retirement plan. 29 USC 1144(b)(7); 26 USC 401(a)(13)(B). Accordingly, when a judgment of divorce awards an interest in a retirement plan under ERISA to an alternate payee spouse, entry of a proposed QDRO is a necessary prerequisite to effectuate the distribution of benefits pursuant to that interest. The question we are faced with here is whether the 10-year limitations period in MCL 600.5809(3) applies to a party's request to enter a proposed QDRO. We review de novo questions involving the interpretation and application of a statute of limitations. See *Oade v Jackson Nat'l Life Ins Co*, 465 Mich 244, 250; 632 NW2d 126 (2001).[3]

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[3] At the outset, we reject defendant's argument that plaintiff waived any statute-of-limitations defense under MCR 2.111(F)(3) ("Affirmative defenses must be stated in a party's responsive pleading . . . .") or MCR 2.116(D)(2) ("The grounds listed in subrule (C) . . . (7) [statute of limitations] must be raised in a party's responsive pleading, unless the grounds are stated in a motion filed under this rule prior to the party's first responsive pleading."). A party's request for entry of a QDRO is not a "pleading" requiring a "responsive pleading" under the court rules. See MCR 2.110(A) and (B). Although plaintiff did not respond when defendant submitted her first proposed QDRO, he also did not assent to the entry of that order. And in any event, the original proposed QDRO has

MCL 600.5809 sets forth the period of limitations governing the enforcement of judgments and provides, in pertinent part, the following:

> (1) A person shall not bring or maintain an action to enforce a noncontractual money obligation unless, after the claim first accrued to the person or to someone through whom he or she claims, the person commences the action within the applicable period of time prescribed by this section.
>
> * * *
>
> (3) Except as provided in subsection (4), the period of limitations is 10 years for an action founded upon a judgment or decree rendered in a court of record in this state . . . from the time of the rendition of the judgment or decree. . . . Within the applicable period of limitations prescribed by this subsection, an action may be brought upon the judgment or decree for a new judgment or decree. The new judgment or decree is subject to this subsection.

In *Joughin*, 320 Mich App at 389, the majority held that MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO because such a request does not involve an *action* to enforce a noncontractual money obligation. We agree. A party's request for entry of a proposed QDRO does not involve a distinct legal "claim." Only claims can be barred by a statute of limitations. A claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when damage results." MCL 600.5827. But the right to seek a postjudgment order does not

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no value or effect at this point, given that Fidelity refused to qualify the order. Regarding the second proposed QDRO, plaintiff raised his statute-of-limitations argument before any hearing on his initial objections. Under the circumstances, this issue is not waived. See *Sweebe v Sweebe*, 474 Mich 151, 156-157; 712 NW2d 708 (2006) (defining waiver as the intentional relinquishment of a known right).

arise from a wrong; instead, that right arises out of the divorce judgment itself. Asking a court to enter a proposed QDRO is therefore not an "action" that can be time-barred by a statute of limitations because the order does not depend on any underlying *cause* of action.[4] Rather, such a request merely implements a provision of the divorce judgment.

There is an important distinction between a postjudgment *order* that implements a term of a divorce judgment and an *action* to enforce that judgment. Entry of postjudgment orders is governed by the court rules, involves no new case or controversy, and is adversarial only to the extent that the parties dispute whether the order appropriately implements the judgment. Here, defendant's right to *entry* of the proposed QDRO had already been adjudicated. Accordingly, although plaintiff could object to the form or content of defendant's proposed QDRO, he did not have any right to challenge the entry of the proposed QDRO itself.[5]

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[4] Further, Michigan law provides that a civil "action" may only be commenced "by filing a complaint with the court." MCL 600.1901; see also MCR 2.101(A). Requesting the entry of a proposed QDRO is not the same as filing a complaint.

[5] Relying on *Neville v Neville*, 295 Mich App 460, 467; 812 NW2d 816 (2012), the *Joughin* majority concluded that a proposed QDRO is *part of* the divorce judgment itself, such that a party's request to enter the QDRO could not be construed as an action to enforce the same. But *Neville* did not involve the question whether MCL 600.5809(3) applies to a party's request to enter a proposed QDRO pursuant to a judgment of divorce. Instead, the issue in *Neville* was whether a defendant's challenge to a proposed QDRO *already entered* was timely under MCR 2.612(C), which governs motions for relief from judgment. The *Joughin* majority's reliance on *Neville* was therefore misplaced. We need not decide today whether *Neville* correctly held that a proposed QDRO, once entered, is properly considered *part of* the judgment of divorce. For purposes of this case, it is sufficient to say that a party's request for entry of a proposed QDRO does not involve an "action" under MCL 600.5809, such that the statute of limitations does not apply.

Defendant's procedural right to entry of the proposed QDRO was indisputably established by the judgment of divorce.

We must differentiate between defendant's *procedural* entitlement to entry of a proposed QDRO and her *substantive* right to receive 50% of plaintiff's retirement benefits. When a party breaches a substantive obligation arising out of a legal judgment, that breach gives rise to an independent cause of action. The harmed party then acquires the right to bring an action to enforce the judgment. Applying this distinction to the facts here, when plaintiff retired and began collecting 100% of his retirement benefits due, in contravention of the terms of the divorce judgment, a distinct "wrong" occurred, giving rise to a cause of action that defendant could bring to enforce the noncontractual money obligation imposed by the judgment of divorce. Accordingly, if defendant wanted to recover those payments plaintiff collected in contravention of the divorce judgment, she would have 10 years to do so under MCL 600.5809(3). But again, an action to redress the breach of a substantive obligation arising under a divorce judgment is distinct from the procedural entry of a postjudgment order required by the judgment.[6] In sum, although

[6] In *Rybinski v Rybinski*, 333 Mich 592, 596; 53 NW2d 386 (1952), we held that the 10-year period of limitations in the predecessor statute to MCL 600.5809(3) applied when a party filed a petition within the divorce action itself, seeking to enforce a support obligation provided by the divorce decree. Likewise, in *O'Leary v O'Leary*, 321 Mich App 647, 654; 909 NW2d 518 (2017), the Court of Appeals held that MCL 600.5809(3) applied to a party's postjudgment motion in a divorce action, seeking to divide equally the debt outstanding after sale of the marital home, as provided in the divorce judgment. Although the harmed parties in these cases did not technically file separate actions or new complaints, the rights they were seeking to enforce were *substantive* rights provided in the divorce judgments, meaning they *could have* filed independent enforcement actions. Thus, these cases are distinguishable

MCL 600.5809(3) does not apply to defendant's request for entry of a proposed QDRO, it *would* apply to any attempts she made to recover retirement benefits plaintiff has received in violation of the substantive requirements of the divorce judgment.

Although a party's request for entry of a proposed QDRO implicates a procedural rather than a substantive right, we disagree with the *Joughin* majority that entry of a proposed QDRO is a ministerial task. A ministerial act is one "where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment." *Solo v Detroit*, 303 Mich 672, 677; 7 NW2d 103 (1942) (quotation marks and citations omitted). Entry of a proposed QDRO is not so simple. Although a proposed QDRO must reflect the terms of the judgment of divorce, the order must also meet the requirements of a plan administrator before the administrator will qualify it. See 26 USC 414(p)(3); 29 USC 1056(d)(3)(D) (domestic-relations orders cannot require a plan to provide a type of benefit, form of benefit, or other option not otherwise provided for in the plan). Federal law specifies certain minimum requirements for QDROs, 26 USC 414(p)(2); 29 USC 1056(d)(3)(C), but it does not otherwise limit a plan administrator's discretion to determine plan procedures. And plan administrators have discretion to reject proposed QDROs that do not comply with their guidelines. The review process before a proposed QDRO is qualified can be lengthy,[7] during which time a participant's status in

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from the circumstances here because a party's request for entry of a proposed QDRO implicates only a procedural, and not a substantive, right.

[7] 26 USC 414(p)(7); 29 USC 1056(d)(3)(H) (providing an 18-month time frame for plan administrators to review and then reject or qualify a domestic-relations order).

the plan or the plan procedures can change. A change in participant status or the plan procedures may necessitate entry of a new or amended proposed QDRO and further exercise of discretion by a trial court to ensure that the order effectuates the terms of the divorce judgment. Therefore, entry of a QDRO is not a ministerial task prescribed and defined by law with such precision and certainty that it leaves nothing to the trial court's discretion or judgment. See *Taylor v Ottawa Circuit Judge*, 343 Mich 440, 444; 72 NW2d 146 (1955).

III. CONCLUSION

In sum, we agree with the Court of Appeals that MCL 600.5809(3) does not apply to a party's request for entry of a proposed QDRO provided for in a judgment of divorce; defendant was not time-barred from submitting her request. But, as explained in this opinion, we disagree with certain aspects of the reasoning the *Joughin* majority used to reach this conclusion. We thus affirm the judgment of the Court of Appeals in part, vacate it in part, and remand the case to the Kalamazoo Circuit Court for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

In re BRENNAN

Docket No. 157930. Argued June 19, 2019 (Calendar No. 1). Decided June 28, 2019.

The Judicial Tenure Commission filed a formal complaint against 53rd District Court Judge Theresa M. Brennan alleging 17 counts of judicial misconduct related to both her professional conduct and to her conduct during her divorce proceedings. The Supreme Court appointed retired Wayne Circuit Court Judge William J. Giovan to act as master to hear the complaint. With the permission of the commission, its deputy executive director petitioned for the interim suspension of respondent. The Supreme Court denied the petition without prejudice to the commission filing such a petition. 503 Mich 943 (2019). The commission thereafter petitioned for the interim suspension of respondent without pay. The Supreme Court granted the petition for interim suspension but with pay. 503 Mich 952 (2019). After a hearing, the master concluded by a preponderance of the evidence that respondent had committed misconduct in office with respect to all but one count of the second amended complaint. In particular, the master found that respondent had (1) failed to disclose when she presided over *People v Kowalski* (Livingston Circuit Court Case No. 08-17643-FC) that she was involved in a romantic relationship with the principal witness, Detective Sean Furlong, and did not disqualify herself from the case on that basis; (2) failed to immediately disqualify herself from hearing her own divorce case and destroyed evidence even though she knew that her then-estranged husband had filed an ex parte motion to preserve evidence; (3) failed to disclose her relationship with attorney Shari Pollesch or to disqualify herself from hearing cases in which Pollesch or her firm served as counsel for a party; (4) made false statements under oath when deposed in her divorce case; (5) made false statements during certain cases over which she presided regarding her relationships with Furlong and Pollesch; (6) made false statements under oath to the commission; (7) verbally abused attorneys, litigants, witnesses, and employees; (8) directed employees to perform personal tasks for her during work hours; (9) allowed employees to perform work for her judicial campaign during work hours; and (10) interrupted two

depositions she attended during her divorce case. The commission reviewed the hearing transcript, the exhibits, and the master's report and concluded that the examiner had established by a preponderance of the evidence that respondent had engaged in judicial misconduct and conduct prejudicial to the administration of justice, including failing to disclose relevant facts regarding her relationship with the lead detective in a criminal case over which she presided, failing to disclose her relationship with an attorney representing a litigant in a case over which she presided, failing to immediately recuse herself from hearing her own divorce case, tampering with evidence in her own divorce case, and lying under oath. The commission recommended that respondent be removed from judicial office and that she be ordered to pay costs, fees, and expenses under MCR 9.205(B) because of her intentional misrepresentations and misleading statements to the commission. Respondent petitioned the Supreme Court, requesting that the Court reject the commission's recommendation.

In a unanimous memorandum opinion, the Supreme Court *held*:

The commission's findings of fact were supported by the record, and its conclusions of law and analysis, under *In re Brown*, 461 Mich 1291 (1999), of the appropriate sanctions were correct. The cumulative effect of respondent's misconduct required her removal from office and imposition of a conditional six-year suspension. The more serious sanction was warranted because six of the seven *Brown* factors weighed in favor of a more serious sanction; the most severe sanction was particularly warranted because respondent made false statements under oath, tampered with evidence in her divorce proceeding, and failed to disclose the extent of her relationship with Furlong during the *Kowalski* trial. Respondent's argument that the participating members of the commission should have disqualified themselves was without merit. Respondent was ordered to pay costs, fees, and expenses under MCR 9.205(B) in light of the intentional misrepresentations and misleading statements she made in her written responses to the commission and during her testimony at the public hearing.

Respondent ordered removed from her current office and suspended from holding judicial office for six years; commission ordered to submit an itemized bill of costs, fees, and expenses incurred in prosecuting the complaint.

Justice CLEMENT, joined by Justice CAVANAGH, concurring, agreed with the majority's factual findings, conclusion of misconduct, and decision to remove respondent from office, but wrote separately to express her concern regarding the Court's authority

under Const 1963, art 6, § 30(2) to impose both a removal and a conditional suspension on respondent. Although the Court was bound on this issue by *In re McCree*, 495 Mich 51 (2014), which held that the Supreme Court had authority to impose both a removal and a conditional suspension on a respondent judge, *McCree* relied on distinguishable caselaw and contained troubling constitutional analysis. Justice CLEMENT joined the majority opinion in full because respondent did not seek to overrule *McCree* and did not provide a basis for distinguishing the case.

Lynn A. Helland and *Casimir J. Swastek* for the Judicial Tenure Commission.

Dickinson Wright PLLC (by *Dennis C. Kolenda*) for Theresa M. Brennan.

MEMORANDUM OPINION. On June 19, 2019, the Court heard oral argument concerning the findings and recommendation of the Judicial Tenure Commission in this matter. The commission's Decision and Recommendation for Discipline is attached as an exhibit to this opinion.

This Court has conducted a de novo review of the commission's findings of fact, conclusions of law, and recommendations for discipline.[1] Having done so, we adopt in part the recommendations made by the commission. Effective immediately, we order that respondent, 53rd District Court Judge Theresa M. Brennan, be removed from office. In addition, we impose a six-year conditional suspension without pay effective on the date of this decision. Should respondent be elected or appointed to judicial office during that time, respondent "will nevertheless be debarred from exercising the power and prerogatives of the office until at least the expiration of the suspension."[2] Our order of

[1] See *In re Morrow*, 496 Mich 291, 298; 854 NW2d 89 (2014).

[2] *In re Probert*, 411 Mich 210, 237; 308 NW2d 773 (1981).

discipline is based on the following misconduct alleged in the second amended complaint:

(1) Respondent failed to disclose the extent of her relationship with Detective Sean Furlong, a witness in *People v Kowalski*, Case No. 08-17643-FC, to the parties in that case (Counts I and V);

(2) Respondent failed to disclose the extent of her relationship with attorney Shari Pollesch and Pollesch's law firm in several cases over which respondent presided (Count II);

(3) Respondent failed to immediately disqualify herself from her own divorce proceeding and destroyed evidence in that divorce proceeding even though she knew that her then-estranged husband had filed an ex parte motion for a mutual restraining order regarding the duty to preserve evidence (Counts IV and XVI);

(4) Respondent made false statements (a) during court proceedings over which she presided, (b) to the commission while under oath during these proceedings, and (c) while testifying at her deposition under oath in her divorce proceeding (Counts XIII, XIV, and XVII);

(5) Respondent was persistently impatient, undignified, and discourteous to those appearing before her (Counts IX, X, and XV);

(6) Respondent required her staff members to perform personal tasks during work hours (Count XI);

(7) Respondent allowed her staff to work on her 2014 judicial campaign during work hours (Count XII); and

(8) Respondent improperly interrupted two depositions that she attended during her divorce proceeding (Count VII).

"The purpose of the judicial disciplinary process is to protect the people from corruption and abuse on the

part of those who wield judicial power."[3] When evaluating a recommendation for discipline made by the commission, "[t]his Court gives considerable deference to the [commission's] recommendations for sanctions, but our deference is not a matter of blind faith."[4] "Instead, it is a function of the [commission] adequately articulating the bases for its findings and demonstrating that there is a reasonable relationship between such findings and the recommended discipline."[5] "This Court's overriding duty in the area of judicial discipline proceedings is to treat equivalent cases in an equivalent manner and . . . unequivalent cases in a proportionate manner."[6] "In determining appropriate sanctions, we seek to restore and maintain the dignity and impartiality of the judiciary and to protect the public."[7]

In this case, we adopt the commission's findings of fact because our review of the record reveals that they are amply supported. In addition, we agree with the commission's conclusions of law and analysis of the appropriate sanction. Regarding the commission's conclusions of law, we agree that respondent violated Canons 1, 2(A), 2(B), and 7(B)(1)(b) of the Code of Judicial Conduct; committed misconduct under MCR 9.104(1) to (4);[8] engaged in "misconduct in office" and

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[3] *In re McCree*, 495 Mich 51, 74; 845 NW2d 458 (2014) (quotation marks and citation omitted).

[4] *In re Simpson*, 500 Mich 533, 558; 902 NW2d 383 (2017) (quotation marks, citation, and brackets omitted).

[5] *Id*. (quotation marks and citations omitted).

[6] *In re Morrow*, 496 Mich 291, 302; 854 NW2d 89 (2014) (quotation marks and citation omitted).

[7] *McCree*, 495 Mich at 74 (quotation marks and citation omitted).

[8] Respondent has not argued that MCR 9.104, which governs professional disciplinary proceedings before the Attorney Disciplinary Board,

"conduct clearly prejudicial to the administration of justice" under Const 1963, art 6, § 30(2) and MCR 9.205(B); and violated the standards or rules of professional conduct adopted by the Supreme Court, contrary to MCR 9.104(4). Regarding the commission's disciplinary analysis, we agree with the commission that six of the seven factors articulated in *In re Brown*[9] weigh in favor of a more serious sanction, and we conclude that the sanction we have imposed in this case is proportional to sanctions imposed in other judicial-misconduct cases.[10] We are particularly persuaded that these most severe sanctions are necessary because of respondent's misconduct in making false statements under oath, in tampering with evidence in her divorce proceedings, and in failing to disclose the extent of her relationship with Detective Furlong in *People v Kowalski*.[11]

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is not applicable in this context. Therefore, we need not decide this question. See *Simpson*, 500 Mich at 555 n 26.

[9] *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999).

[10] We note that we are imposing a six-year conditional suspension effective on the date of this opinion, instead of having the removal extend through the next judicial term as requested by the commission.

[11] We are not often confronted with the multifarious acts of misconduct that are present in this case. The individual findings of misconduct range from those warranting the most severe sanction of removal (such as lying under oath) to those that are still unacceptable, but might warrant a lesser sanction (such as respondent's improper demeanor on the bench). But we are not called upon to assess an appropriate sanction for each discrete finding of misconduct. Instead, we must determine the appropriate sanction for all of respondent's misconduct taken as a whole. We note, however, that "[t]his Court has consistently imposed the most severe sanction by removing judges for testifying falsely under oath." *In re Adams*, 494 Mich 162, 186; 833 NW2d 897 (2013) (citing multiple cases). And we have previously found a conditional suspension appropriate when a judge "has not yet learned from his mistakes and that the likelihood of his continuing to commit judicial misconduct is high." *McCree*, 495 Mich at 86.

We have considered respondent's argument that the participating members of the commission should have disqualified themselves. We find respondent's argument to be without merit.

On the basis of the intentional misrepresentations and misleading statements in respondent's written responses to the commission and during her testimony at the public hearing, we find respondent liable under MCR 9.205(B), in an amount subject to review by this Court, for the costs, fees, and expenses incurred by the commission in prosecuting the complaint. We order the commission to submit an itemized bill of costs.

The cumulative effect of respondent's misconduct convinces this Court that respondent should not remain in judicial office. Therefore, we remove respondent from office and conditionally suspend her without pay for a period of six years, with the suspension becoming effective only if respondent regains judicial office during that period.[12] Pursuant to MCR 7.315(C)(3), the Clerk of the Court is directed to issue the order removing and suspending respondent from office forthwith.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

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[12] The concurrence questions this Court's power to suspend a judge beyond her current term of office. Because no party has raised those issues here, we decline to address those issues in this case.

EXHIBIT

STATE OF MICHIGAN

BEFORE THE JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

HON. THERESA M. BRENNAN
53rd District Court
224 N. First Street
Brighton, MI 48116
_____/

Formal Complaint No. 99

DECISION AND RECOMMENDATION FOR DISCIPLINE

At a session of the Michigan Judicial Tenure Commission held on April 8, 2019, in the City of Detroit

PRESENT:[1]

Hon. Monte J. Burmeister, Chairperson
Thomas J. Ryan, Esq., Vice-Chairperson
Hon. Karen Fort Hood, Secretary
Ari Adler
Hon. Jon H. Hulsing
Melissa B. Spickler
Hon. Brian R. Sullivan

I. Introduction

The Judicial Tenure Commission of the State of Michigan ("Commission") files this recommendation for discipline against Hon. Theresa M. Brennan ("Respondent"), who at all material times was a judge of the 53rd District Court ("the Court") in the City of Brighton, County of Livingston, State of Michigan.

[1] Hon. Pablo Cortes and James Burdick, Esq. have recused themselves from this case and took no part in this Decision and Recommendation for Discipline.

This action is taken pursuant to the authority of the Commission under Article 6, § 30 of the Michigan Constitution of 1963, as amended, and MCR 9.203.

Having reviewed the hearing transcript, the exhibits, and the Master's report, and having considered the oral arguments of counsel, the Commission concludes, as did the Master, that the Examiner has established by a preponderance of the evidence that Respondent committed misconduct, including failing to disclose relevant facts regarding her relationship with a lead detective in a criminal case before her, failing to disclose relevant facts regarding her relationship with an attorney representing a litigant in a case before her, failing to immediately recuse herself from her own divorce case, tampering with evidence in her own divorce case, and lying under oath.

For the reasons set forth herein, the Commission recommends that the Supreme Court remove Respondent from the office of judge of the 53rd District Court on the basis of her judicial misconduct. In addition, the Commission recommends that the Supreme Court order Respondent to pay costs, fees, and expenses in the amount of $35,570.36 pursuant to MCR 9.205(B), based on her intentional misrepresentations and misleading statements made to the Commission.

II. Procedural Background

On June 12, 2018, the Commission filed a Formal Complaint against Respondent. On July 23, 2018, the Commission filed its First Amended Complaint

against Respondent, alleging (1) failure to disclose the extent of her relationship with Detective Sean Furlong, or to disqualify herself, in *People v Kowalski*, (2) failure to disclose the extent of her relationship with Shari Pollesch and Pollesch's law firm in several cases before her, (3) failure to disclose her relationship with Francine Zysk a/k/a Francine Sumner, or to disqualify herself, in Zysk/Sumner's divorce case, (4) failure to disqualify herself from her own divorce case, *Root v Brennan*, (5) appearance of impropriety regarding Sean Furlong, (6) appearance of impropriety regarding Francine Zysk, (7) conduct during depositions in *Root v Brennan*, (8) failure to be faithful to the law in *Brisson v Terlecky*, (9) improper demeanor in *Brisson v Terlecky*, (10) improper demeanor in *Sullivan v Sullivan*, (11) directing staff to conduct Respondent's personal tasks on court time, (12) improper campaign activities, (13) misrepresentations during court proceedings, and (14) misrepresentations to the Commission.

The Michigan Supreme Court appointed Hon. William J. Giovan as Master, to conduct a public hearing on the allegations in the Formal Complaint. The Master held an eight-day public hearing on the First Amended Complaint, commencing October 1, 2018. The Commission filed its Second Amended Complaint on October 29, 2018, deleting Count III regarding failure to disclose or disqualify with respect to Francine Zysk and Count VI regarding an appearance of impropriety with respect to Francine Zysk, and adding claims for persistent

discourtesy (Count XV), destruction of evidence (Count XVI), and perjury, false statements, and misrepresentations (Count XVII). Due to the additional charges, the Master held an additional day of testimony on November 19, 2018.

In the Master's Findings of Fact and Conclusions of Law, issued on December 20, 2018, the Master concluded by a preponderance of the evidence that Respondent committed misconduct in office with respect to all but one count in the Second Amended Complaint.[2] The Commission heard objections to the Master's report at a hearing held on March 4, 2019.

III. Standard of Proof

The standard of proof applicable in judicial disciplinary matters is the preponderance of the evidence standard. *In re Ferrara*, 458 Mich 350, 360; 582 NW2d 817 (1998). The Examiner bears the burden of proving the allegations in the Complaint. MCR 9.211(A). The Commission reviews the master's findings de novo. *In re Chrzanowski*, 465 Mich 468, 480-481; 636 NW2d 758 (2001). Although the Commission is not required to accept to the master's findings of fact,

[2] The Master did not address Count VIII, alleging failure to be faithful to the law in *Brisson v Terlecky* and the Examiner did not object to the master's lack of finding with respect to that count. See Examiner's Response to Objections to Master's Report, p 1 n 2. In addition, the Examiner withdrew Counts XVII(b)(i) and XVII(k). The Master did not make a finding with respect to Count XVII(o) and the Examiner indicated that it would not seek a finding on that count. *Id.* Given the record before the Commission, the Commission is not issuing a recommendation with respect to Count VIII, Count XVII(b)(i), Count XVII(k), or Count XVII(o).

it may appropriately recognize and defer to the master's superior ability to observe the witnesses' demeanor and comment on their credibility. Cf. *In re Lloyd*, 424 Mich 514, 535; 384 NW2d 9 (1986).

IV. Findings of Fact

The Commission adopts the Master's findings of fact, except where specifically noted below. The Commission highlights and supplements the facts found by the Master, as follows:

Count I

Failure to Disclose/Disqualify in *People v Kowalski*

In March 2009, *People v Kowalski,* Case No. 08-17643-FC, in which the defendant was charged with first-degree murder, was assigned to Respondent. Michigan State Police Detective Sean Furlong was the co-officer in charge of the case. Detective Furlong investigated the case, took the defendant's confession, and testified at trial. Before the *Kowalski* case was assigned to Respondent, Respondent told her judicial secretary/court recorder Kristi Cox, that she was sure that Mr. Kowalski was guilty based on a conversation she had about the case with Detective Furlong. Nevertheless, Respondent presided over pretrial hearings in the case, ruling that the defendant's confession was admissible and that a defense expert witness was precluded from testifying at trial regarding false confessions. These rulings were affirmed on appeal.

The case was scheduled for trial on January 7, 2013. On January 4, 2013, the assistant prosecutor assigned to the case received a letter from attorney Thomas Kizer, alleging inappropriate contacts between Respondent and Detective Furlong, and between Respondent and Detective Furlong's colleague, Detective Christopher Corriveau. At a pretrial conference in Respondent's chambers on January 4, 2013, the assistant prosecutor and defense counsel advised Respondent of the allegations of inappropriate contact. In response to the allegations, Respondent stated that, while she was friends with the two detectives, there was nothing that required her disqualification. Thereafter, Mr. Kowalski moved to disqualify Respondent from the case. Respondent denied the motion, explaining that, while she was friends with Furlong and Corriveau, the friendships did not affect her ability to fairly decide the case. Chief Judge David Reader later affirmed the denial of the motion to disqualify. At no time did Respondent inform the parties that she had told a member of the her staff that Detective Furlong had persuaded her of Mr. Kowalski's guilt before the case was assigned to her, that she had more than 1500 telephone calls of a social nature with Furlong between July 2008 and the beginning of the *Kowalski* trial, that she was on the phone with Furlong for 1-2 hours every month between November 2011 and the start of the *Kowalski* trial, or that she exchanged approximately 400 texts with Furlong from 2010 until the start of the *Kowalski* trial.

The Master concluded that Respondent was engaged in a romantic relationship with Furlong before and during the *Kowalski* case. The Master's finding was based, at least in part, on evidence that Furlong kissed Respondent in her chambers in 2007,[3] and evidence that, after the *Kowalski* sentencing, Kristi Cox found Respondent in her office, severely distressed because Furlong had told her that they could no longer be friends. Respondent's distress was so severe that she was unable to take the bench for her afternoon docket. In addition to these incidents, the Master's conclusion was based on evidence that Respondent socialized with Furlong, that she allowed him to use her cottage, that Furlong had been a dinner guest at her home, and that Respondent's husband sometimes gave Furlong his University of Michigan football season tickets at Respondent's urging, as well as evidence of the number of telephone calls and texts between Respondent and Furlong.

The Commission finds it unnecessary to determine whether the relationship between Respondent and Furlong was a romantic one. Regardless of whether the relationship was "romantic," as found by the Master, or a close friendship, the evidentiary record shows that Respondent was engaged in what was clearly a very close, personal relationship with Furlong during the relevant time period. The relationship required, at a minimum, that Respondent disclose the fact of her close,

[3] Respondent contends that the kiss was not consensual.

personal relationship to the parties in the *Kowalski* case so that the parties could determine whether to move for disqualification under MCR 2.003.[4]

Count II

Failure to Disclose/Disqualify in Cases Involving Shari Pollesch

Respondent was a friend of attorney Shari Pollesch, a principal in a law firm located in Brighton, Michigan. Respondent considered Ms. Pollesch one of her best friends. Ms. Pollesch testified that she and Respondent were "close friends," that she had known Respondent for about 25 years, and that "[e]verybody knew" that she and Respondent were longtime friends. During their friendship, Respondent and Ms. Pollesch took ski trips together, participated in a book club, took walks during lunch, and were guests at each other's cottages. In addition, Respondent provided her home for Ms. Pollesch's wedding. Ms. Pollesch provided legal services to Respondent's husband's business, to Respondent's husband, personally, and to Respondent's sister. Ms. Pollesch was one of three friends that submitted a statement to the Judicial Tenure Commission on Respondent's behalf in 2009.

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[4] Citing *Adair v Michigan,* Mich 1027; 709 NW2d 567 (2006) and *In re Haley,* 476 Mich 180, 200; 720 NW2d 246 (2006), Respondent argues in her Objections to Master's Report that the "appearance of impropriety standard" is not applicable to Respondent's duty to disqualify herself because MCR 2.003(C) sets forth specific relationships that require disqualification, none of which fit the facts of this case. Respondent's argument is misplaced because MCR 2.003 was amended in 2009 to add "the appearance of impropriety" as a ground for disqualification.

Ms. Pollesch appeared as counsel in five cases before Respondent in 2014-2016. Attorneys from Ms. Pollesch's firm appeared before respondent in another five cases. Respondent failed to disclose her close, personal relationship with Ms. Pollesch to the parties in the cases in which Ms. Pollesch or another member of her firm appeared as counsel before Respondent. In addition, Respondent denied motions for disqualification in two cases in which disqualification was sought on the basis of a relationship with Ms. Pollesch, in *Scheibner v Scheibner,* Case No. 13-47392-DM and *McFarlane v McFarlane,* Case No. 15-6492-DO.

Counts IV and XVI

Failure to Immediately Disqualify in Her Own Divorce Case and Destruction of Evidence

Respondent's former husband, Donald Root, filed a complaint for divorce from Respondent on or about December 2, 2016. The case was assigned to Respondent under a court policy providing that all "DO" cases were to be assigned to her. Chief Judge David Reader advised Respondent of the filing that day. Respondent did not disqualify herself from the case that day or the following business day, Monday, December 5, 2012. On Tuesday, December 6, 2016, Donald Root filed a Motion for Entry of Ex Parte Mutual Restraining Order Regarding the Duty to Preserve Evidence. Chief Judge Reader instructed his secretary, Jeannine Pratt, to call Respondent to emphasize the immediate need for a

disqualification order. Ms. Pratt called Respondent and emailed to her a copy of the ex parte motion and a disqualification order. Ms. Pratt advised Respondent that she would pick up the executed order that afternoon. When Ms. Pratt arrived to pick up the executed order, Respondent told her that she would not be signing the order until she spoke to her attorney. The next day, December 7, 2016, Respondent's office informed Judge Reader that the signed disqualification order was in the court mail. The disqualification order was received by the Howell court on December 8, 2016.

Between her learning of the filing of the ex parte motion on December 6, 2016, and the receipt of the disqualification order by the Howell court on December 8, 2016, Respondent attempted to delete information and an email account from her cell phone. On December 8, 2018, Respondent asked her court recorder, Felica Milhouse, to attempt to delete her Hotmail account from the cell phone. Milhouse attempted to delete the account through the phone's settings, but was unsuccessful. Milhouse then conducted a Google search regarding how to delete a Hotmail account from a cell phone. When Milhouse was unable to immediately delete the account, Respondent, who was about to take the bench, directed Milhouse to leave the courtroom and to return to the office after calling the first case to continue to attempt to delete the account. Despite her attempts, Milhouse ultimately was unsuccessful in deleting the account.

On or about December 8, 2016, Respondent bought a new cell phone at an AT&T store. At Respondent's request, the AT&T store employee transferred the data from her original phone to her new phone, and had her original phone reset to its factory settings, erasing all data from the original phone. Respondent testified that there were "some glitches" when the contents of the original phone were transferred to the new phone. Respondent then gave the original phone, which now contained no data, to her attorney, without communicating to anyone that she had wiped the data from the original phone. When asked whether she advised anyone that the data from the original phone had been transferred to her new phone, Respondent testified that the issue never came up because the divorce ultimately settled four months later.

On November 2, 2018, the parties stipulated to the following facts:

> When data is copied from the old phone to the new phone, there is not a bit-for-bit copying of the data, and it is likely that some data is not copied. The data that may not be copied includes registry data, metadata, file system data, and database information, all of which are useful to a forensic search of the old phone. Accordingly, it is likely that restoring the old phone to factory settings will result in the loss of forensically useful information, even if the owner of the old phone makes an effort to copy all data from the old phone to the new phone.
>
> Once the old phone is reset to factory settings it is no longer possible to determine what data was not copied to the new phone. For instance, if a customer tells the tech to copy everything to the new phone except X, and the tech does that and then resets the old phone to factory settings, it is no longer possible to determine what X was,

> or that X was not copied. Similarly, if a customer deletes some data from the old phone before giving it to the tech, then asks the tech to copy everything that is on the old phone to the new phone, then the old phone is restored to factory settings, it is no longer possible to determine what the customer deleted from the old phone prior to requesting that data be copied to the new phone.

Given these facts, it is more likely than not that Respondent's conduct constituted tampering with evidence, in violation of MCL 750.483a(5)(a).

Counts XIII, XIV, and XVII

Misrepresentations, False Statements, and Perjury

The Master described Respondent's willingness to give false testimony under oath as "breathtaking." The Commission agrees that the evidence shows that Respondent made misrepresentations and false statements with a frequency and intent to deceive that is completely at odds with her position as an officer of the court. While, except where noted, the Commission adopts the Examiner's "Appendix 2 - False Statements," as accurate, as did the Master, it emphasizes the following false and material misrepresentations made by Respondent:

A. False Statements Under Oath at Deposition

Respondent made false statements under oath while testifying at her deposition in her divorce case. On January 16, 2017, Respondent testified during her deposition that when she asked her staff to attempt to delete her email account from her cell phone, she was speaking only "jokingly." Respondent's testimony

was false. Respondent's court recorder, Felica Milhouse, denied that Respondent was joking when she asked Milhouse to attempt to delete the email account. Because she did not believe Respondent's request was a joke, Milhouse attempted to delete the account through the phone's settings and then conducted a Google search regarding how to delete the account. When Milhouse's initial attempts at deleting the account were unsuccessful, Respondent directed Milhouse to leave the courtroom after calling the first case and to return to the office to continue her attempts to delete the account. In addition, research attorney Robbin Pott testified that she overheard Respondent asking her judicial secretary and her court reporter how to delete information from a cell phone. Pott also overheard Respondent asking a police officer, who came in to have a warrant signed, what was the best way to destroy a phone. Pott testified that Respondent's continued requests for advice regarding how to delete information from the cell phone convinced Pott that Respondent was not joking. Further, Respondent eventually admitted in her testimony at the formal hearing that she was sincere in her request that Milhouse attempt to delete the email account from the cell phone.

On February 9, 2017, Respondent falsely testified at her deposition that she did not request help with deleting information from her cell phone. The evidence showed that Respondent asked employee Felica Millhouse to help her to delete her email account from the cell phone on December 8, 2016. Respondent testified at

her deposition that she did not take any steps to delete information from, or to reset, her cell phone. Contrary to this representation, the evidence showed that Respondent asked an employee of an AT&T store to delete messages from her cell phone on December 8, 2016. Moreover, Respondent acknowledged at the formal hearing that she caused an employee of an AT&T store to transfer all data from the original cell phone to a new cell phone and to then reset the original cell phone to its factory settings, deleting all date from the original phone.

B. False Statements During Court Proceedings

Respondent minimized her relationship with Detective Furlong during the *Kowalski* case. Respondent's statements during the hearing on the *Kowalski* defendant's motion for disqualification concealed the depth of her relationship with Furlong. Respondent represented on the record that her relationship with Furlong was simply that she was "friends" with him, just as she was friends with the prosecutor or the prosecutor's wife. The extensive evidence presented at the formal hearing regarding the especially close and personal nature of Respondent's relationship with Furlong demonstrates that Respondent's characterization of the relationship was false.

Respondent made another false misrepresentation on the record in *McFarlane v McFarlane*, over which Respondent presided. The *McFarlane* defendant moved to disqualify Respondent on the basis of her relationship with

Shari Pollesch. During April 25, 2017 hearing on the motion, Respondent falsely stated on the record that she had learned that Shari Pollesch provided legal representation to her husband only shortly before her divorce complaint was filed in December 2016. This representation was shown to be false by Respondent's own statement on the record in *Parker & Parker v Magyari,* 53rd District Court Case No. 14-4250-GC, on December 16, 2014, that her "best friend," i.e, Shari Pollesch, provided legal representation to her husband. (Exhibit 2-43). In addition, Respondent's now former husband, Daniel Root, testified that Shari Pollesch began providing legal representation to his business in June 2011 and that he and Pollesch terminated the legal representation when he filed for divorce from Respondent, in December 2016. Root testified that he was "very confident" that Respondent knew that Shari Pollesch represented him.

C. Material Misrepresentations to the Commission

Respondent made material, false statements, under oath, to the Commission during these proceedings. Respondent made a false and material misrepresentation to the Commission regarding when she learned that Shari Pollesch provided legal representation to her former husband, Daniel Root. Respondent represented to the Commission, under oath, that she learned of Pollesch's representation of Root only shortly before the complaint in her divorce case was filed, in December 2016. This representation was shown to be false by Respondent's own statement on the record

in *Parker & Parker v Magyari,* 53rd District Court Case No. 14-4250-GC, on December 16, 2014, that her "best friend," i.e, Shari Pollesch, provided legal representation to her husband. (Exhibit 2-43). In addition, Daniel Root testified that he was "very confident" that Respondent knew that Shari Pollesch represented him.

Respondent represented to the Commission, under oath, in both a written response and during testimony at the formal hearing, that she rarely handled warrant requests while on the bench, and that she routinely took officers to her office to sign warrants. Respondent's statements were contradicted by testimony from Kristi Cox that, if a police officer came in for a search warrant when Respondent was on the bench, Respondent would stop the proceedings and handle the search warrant in the courtroom. Felica Milhouse also testified that Respondent normally handled warrants from the bench if an officer came into the courtroom while court was in session. Cox testified that if Detective Furlong came to the courtroom for a search warrant, however, Respondent would declare a recess, take Detective Furlong back to her office, and close the door.

Respondent represented to the Commission that she did not text Detective Furlong during the *Kowalski* trial. This representation was shown to be false by telephone records showing that Respondent did, in fact, text Detective Furlong during the trial. See Exhibit I-24.

Respondent made a false and material misrepresentation to the Commission that she never allowed campaign work to be done during work hours. The testimony of Kristi Cox and Jessica Sharpe, discussed above, that Respondent worked with them on campaign activities during work hours demonstrated that Respondent knew that her statements to the Commission were false.

Counts IX and X

Improper Demeanor

While the Commission does not adopt the Master's finding that it was "the universal opinion of any witness who testified about the judge's demeanor" that she was consistently abusive to the attorneys, litigants, and witnesses, the Commission does find that a preponderance of the evidence showed that Respondent was persistently impatient, undignified, and discourteous to those appearing before her. Attorneys testifying at the formal hearing indicated that Respondent was routinely disrespectful to attorneys and litigants, and described Respondent's demeanor on the bench as "appalling" and "abusive." One of the attorneys testified that Respondent "would routinely interrupt and basically prevent you from presenting your case to her," and that "[s]he never had the information she needed to make her best decision. I don't think she cared." In *Sullivan v Sullivan,* unpublished per curiam opinion of the Court of Appeals, issued May 17, 218 (Docket Nos. 330543, 334273), a divorce case over which Respondent

presided, the Court of Appeals determined that Respondent's hostility toward counsel was such that "[t]he appearance of justice would be better served if the case is remanded to a different judge."

Count XI

Directing Employees to Perform Respondent's Personal Tasks

The Commission adopts the Master's finding that Respondent committed misconduct by requiring her staff members to perform personal tasks during work hours, noting that "[w]hatever may be the correct standard of what a judge can properly ask of an employee, Judge Brennan went far beyond it." The evidence showed that Respondent required her staff to perform personal tasks during work hours, such as taking her car to the dealership, refueling her car, paying her bills, waiting at Respondent's house for cable television to be installed, and staining the deck of Respondent's home.[5]

Count XII

Improper Campaign Activities

The Master concluded that Respondent engaged in misconduct by allowing her staff to work on her 2014 judicial campaign during work hours. Both Kristi Cox and Jessica Sharpe testified that, on one occasion, they assisted Respondent

[5] While Respondent paid her law clerk/magistrate, Jessica Yakel Sharpe, for staining the deck, the work was partially done while Sharpe was also being paid by the county.

with her campaign by responding to questionnaires from news outlets during work hours. Specifically, Kristi Cox testified that, while some of the work was done in the break room:[6]

> . . . it was kind of a joke that we used that we were on break, quote/unquote, and we'd kind of laugh about it and we'd go in there. But it wasn't a 15-minute break. It would be an hour and a half or so while we struggled with the phrasing we were going to use.

A thumb drive containing documents Cox worked on for the 2014 campaign, showing that the documents were modified during work hours, was admitted into evidence at the formal hearing (Exhibit 11-1). Sharpe's and Cox's testimony that Respondent was in the room, performing the campaign work along with them, showed that Respondent was aware that her staff members were performing the campaign task during work hours. On another occasion, Sharpe and Cox, along with Respondent, conducted online research in the courtroom regarding "what kind of swag" would be used at a campaign party. On the basis of Sharpe's and Cox's

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[6] The Commission does not adopt the master's finding that "the judge went to the corner of the courthouse to use the wi-fi of an adjoining business so that it wouldn't show up on the county system." The Commission finds no evidence in the record supporting a finding that Respondent's purpose in using the wi-fi of an adjoining building was to avoid the computer use showing up on the county system. The attempt to use the wi-fi of an adjoining building also could have been an attempt to comply with Michigan's Campaign Finance Act by not using the county's wi-fi.

testimony, the Commission concludes that Respondent committed misconduct by allowing her staff to perform campaign tasks during work hours.

The Commission is not persuaded by Respondent's argument that she did not violate Michigan's Campaign Finance Act because she was not "a public body or a person acting for a public body." Section 57 of the Campaign Finance Act, MCL 169.257(1), provides, in part, as follows:

> A public body or a person acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage, vehicles, equipment, supplies, or other public resources to make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of contribution under section 4(3)(a).

MCL 169.211(7) defines a "public body" to include "[a]ny other body that is created by state or local authority or is primarily funded by or through state or local authority, if the body exercises governmental or proprietary authority or performs a governmental or proprietary function." The 53rd District Court was created by state authority, MCL 600.8101. In addition, the district court performs a governmental function authorized by Const 1963, Article VI, §1. Accordingly, the district court is a "public body" within the meaning of the Act.

Count VII

Conduct During Depositions

Respondent improperly interrupted two depositions that she attended during her divorce case. On January 18, 2017, when Detective Furlong, the deponent, testified that that he and respondent had not exchanged any texts or telephone messages during the *Kowalski* trial, Respondent interjected, "We did once." On March 9, 2017, when deponent Francine Zysk began to answer a question regarding an allegation that Respondent was intoxicated in her office, Respondent interrupted, stating "Okay, you need to stop for a minute." She then added, "You are lying. You're such a liar."

Respondent's Gender Bias Argument

Respondent argues that the Master's findings should be disregarded because they reflect a gender bias. As one example, Respondent cites the Master's use of the term "hottest" to describe a part of the relationship between Respondent and Detective Furlong. While the Commission believes that the Master's choice of words was unfortunate, the issue whether the relationship was of a romantic nature or simply a close friendship does not change the relevant analysis, as noted above. Under either scenario, Respondent did not take actions she was required to take to fulfill her judicial duties. Having considered Respondent's argument, the

Commission concludes that the allegations of gender bias do not change the evidentiary record, which supports the bulk of the Master's findings.

V. Conclusions of Law

Respondent's conduct breached the standards of judicial conduct, and she is responsible for the following:

a. Misconduct in office, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.505;

b. Conduct clearly prejudicial to the administration of justice, as defined by the Michigan Constitution of 1963, as amended, Article 6, Section 30, and MCR 9.205(B);

c. Failure to establish, maintain, enforce, and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, contrary to MCJC, Canon 1;

d. Irresponsible or improper conduct that erodes public confidence in the judiciary, in violation of MCJC, Canon 2A;

e. Conduct involving impropriety and appearance of impropriety, contrary to MCJC, Canon 2A;

f. Failure to respect and observe the law and to conduct oneself at all times in a manner which would enhance the public's confidence in the integrity and impartiality of the judiciary contrary to the Code of Judicial Conduct, Canon 2B;

g. Failure to prohibit public employees subject to the judge's direction from doing for the judge what the judge is prohibited from doing under this canon, contrary to Canon 7B(1)(b);

h. Conduct that is prejudicial to the proper administration of justice, in violation of MCR 9.104(1);

i. Conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach, contrary to MCR 9.104(2);

j. Conduct that is contrary to justice, ethics, honesty or good morals, contrary to MCR 9.104(3); and

k. Conduct that violates the standards or rules of professional conduct, specifically MRPC 3.3(a)(1), adopted by the Supreme Court, contrary to MCR 9.104(4);

VI. Disciplinary Analysis

The Commission concludes that Respondent committed judicial misconduct by failing to disclose the relevant facts regarding her relationship with Detective Furlong and Shari Pollesch and/or failing to disqualify herself, failing to immediately disqualify herself from her own divorce case, tampering with evidence in her divorce case, making false and material misrepresentations to the Commission, testifying falsely under oath in her divorce case, making false statements on the record in cases over which she presided, directing staff to perform campaign activities during work hours, directing staff to perform personal tasks for her during work hours, persistently maintaining an improper demeanor on the bench, and improperly interfering in depositions during her divorce case. Based on its finding of misconduct, the Commission recommends that Respondent

be removed from judicial office. This recommendation is based on the following evaluation of the factors set forth in *In re Brown*, 461 Mich 1291, 1292-1293; 625 NW2d 744 (1999).

A. The *Brown* Factors

(1) *Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct.*

The evidence showed that Respondent engaged in a pattern of deceit. Respondent made material misrepresentations during her deposition in her divorce case and in sworn statements to the Commission. In addition, Respondent engaged in deceitful conduct by failing to disclose material facts regarding her relationships with Detective Furlong and Shari Pollesch to parties appearing before her. Respondent attempted to conceal evidence in her divorce proceeding by deleting all data from the cell phone that she turned over to her attorney. Respondent's dishonesty was not an isolated incident, but pervaded her conduct both on and off the bench.

In *In re Gorcyca*, 500 Mich 588, 637; 902 NW2d 828 (2017), the Court noted "[t]he fact that a statement may be incorrect does not, by itself, render the statement 'false' within the context of a legal proceeding." The *Gorcyca* decision involved a judge's representation regarding the meaning of a gesture she made with her finger. The representation at issue in *Gorcyca* was isolated and finite in

nature. By contrast, the record in the instant case reveals a series of misrepresentations that appear to have been made intentionally as part of a pattern of deceit.

In addition to a pattern of deceit, the evidence showed a pattern of Respondent abusing staff, attorneys, and litigants. The first *Brown* factor weighs heavily in favor of a more serious sanction.

(2) *Misconduct on the bench is usually more serious than the same misconduct off the bench.*

The evidence showed that Respondent engaged in misconduct on the bench. Respondent's failure to disclose the facts of her relationships with Detective Sean Furlong and attorney Shari Pollesch to the parties appearing before her was misconduct on the bench. In addition, Respondent repeatedly mistreated attorneys and litigants appearing before her. The Commission concurs with the Examiner's contention that, while Respondent's failure to promptly disqualify her self from her own divorce proceeding was not misconduct that occurred on the bench, "it is so closely related to her judicial duties as to be inseparable from on-bench conduct." The second *Brown* factor weighs heavily in favor of a more serious sanction.

(3) ***Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety.***

"[T]here is not much, if anything, that is more prejudicial to the actual administration of justice than testifying falsely under oath." *In re Adams,* 494 Mich 162, 182; 833 NW2d 897 (2013). Again, the evidence showed that Respondent lied under oath during her divorce proceeding and in sworn statements to the Commission. In addition, Respondent's failure to disclose her relationship with Detective Furlong, including the fact that she told a staff member that Furlong had convinced her of the *Kowalski* defendant's guilt, prevented the parties from addressing any bias earlier in the case. Similarly, Respondent's failure to disclose her personal relationship with Shari Pollesch to parties appearing before her denied the parties the opportunity to challenge her ability to be impartial. The third *Brown* factor weighs in favor of a more serious sanction.

(4) ***Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does.***

As discussed above, Respondent's misconduct implicated the actual administration of justice and, therefore, weighs in favor of a more serious sanction.

(5) ***Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated.***

In many cases, Respondent's misconduct was premeditated and deliberate rather than spontaneous. Respondent's attempts to tamper with evidence in her divorce case did not occur spontaneously but took place over a period of days. While, after learning of the motion to preserve evidence, Respondent initially asked her staff to attempt to delete an email account from her cell phone, her staff was ultimately unsuccessful in doing so. Respondent eventually succeeded in having all data deleted from the cell phone, and transferred to a new phone, before giving the original phone, which contained no data, to her attorney. As the parties stipulated on November 2, 2018, it is likely that some data was lost during the transfer. From the time she was made aware of her husband's motion to preserve evidence to the time she asked the AT&T store employee to delete all date from the original telephone, Respondent had time to reflect on her actions.

Further, Respondent's attempts to mislead the Commission do not appear to have been made spontaneously. Almost certainly, Respondent would have given herself time to reflect on her written responses before submitting them to the Commission. Therefore, it cannot be said that these misrepresentations were made spontaneously. While it is not known whether Respondent's false testimony during her divorce deposition and her false statements on the record in cases over

which she presided were spontaneous or deliberate, it is likely that Respondent had time to consider her statements and knew that they were false when made.

Respondent's failure to disclose her personal relationships with Sean Furlong and Shari Pollesch also appears to have been deliberate. Respondent had the time and opportunity to consider disclosing the relevant information but repeatedly failed to do so. The fifth *Brown* factor weighs heavily in favor of a more serious sanction.

> **(6)** ***Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery.***

Respondent failed to disqualify herself from presiding over a murder trial despite having a close, personal relationship with Detective Furlong, and despite having told a staff member before she was assigned to the case that she believed the defendant to be guilty based on a conversation she had with Detective Furlong. Respondent's failure to disclose her close, personal relationships with Detective Furlong and Shari Pollesch undermined the parties' ability to discover or challenge any bias or partiality.

Respondent caused information to be deleted from her cell phone after learning that her husband had filed a motion for preservation of evidence in her divorce case. While Respondent's divorce case ultimately settled, Respondent's

destruction of potential evidence in the divorce case with knowledge that a motion for preservation of evidence was pending is a stunning example of misconduct that undermined the ability of the justice system to discover the truth of what occurred in a controversy.

Respondent's false and misleading statements made under oath in her divorce proceeding and in these disciplinary proceedings undermined the ability of the justice system to discover the truth of what occurred. The sixth *Brown* factor weighs heavily in favor of a more serious sanction.

> **(7)** ***Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.***

The evidence does not show that Respondent's actions caused the unequal application of justice on the basis of a class of citizenship. Accordingly, this factor does not weigh in favor of a more severe sanction.

In sum, our consideration of the totality of all seven *Brown* factors weighs in support of the imposition of a more severe sanction.

In addition to the *Brown* factors, the Michigan Supreme Court has consistently concluded that "dishonest or selfish conduct warrants greater discipline than conduct lacking such characteristics." *In re Morrow,* 496 Mich 291, 302-303; 854 NW2d 89 (2014). Further, in *In re Adams*, 494 Mich 162, 833

NW2d 897 (2013), the Court reasoned that a sanction may be less severe where a respondent acknowledges his or her misconduct and is truthful throughout the disciplinary proceedings, but "where a respondent is not repentant, but engages in deceitful behavior during the course of a Judicial Tenure Commission disciplinary investigation, the sanction must be measurably greater." (Citing *In re Noecker*, 472 Mich 1, 18; 691 NW2d 440 (2005) (Young, J., concurring)). This principle further supports our conclusion that Respondent's dishonest conduct warrants a more severe sanction where the record shows that Respondent has failed to take responsibility for her misconduct and has attempted to minimize, and to provide false explanations for, her conduct throughout these proceedings.

B. The Basis for the Level of Discipline and Proportionality

The primary concern in determining an appropriate sanction is to "restore and maintain the dignity and impartiality of the judiciary and protect the public." *In re Ferrara*, 458 Mich 350, 372, 582 NW2d 817 (1998). In determining an appropriate sanction in this matter, the Commission is mindful of the Michigan Supreme Court's call for "proportionality" based on comparable conduct. Based on the facts, the Commission believes that removal from office is an appropriate and proportional sanction for Respondent's misconduct.

The Court has consistently concluded that lying under oath warrants removal from office. See *In re Ryman*, 394 Mich 637, 642–643; 232 NW2d 178 (1975); *In*

re Loyd, 424 Mich 514, 516, 535–536; 384 NW2d 9 (1986); *In re Ferrara*, 458 Mich 350, 372–373; 582 NW2d 817 (1998); *In re Noecker*, 472 Mich 1, 3, 12–13; 691 NW2d 440 (2005); *In re Nettles–Nickerson*, 481 Mich 321, 322; 750 NW2d 560 (2008); *In re Justin*, 490 Mich 394, 396–397; 809 NW2d 126 (2012); *In re James*, 492 Mich 553, 568–570; 821 NW2d 144 (2012). In *In re Adams*, 494 Mich 162, 173; 833 NW2d 897 (2013), the respondent signed her attorney's name to a pleading without permission and then filed the pleading in the respondent's divorce case. In addition, the respondent lied under oath in her divorce proceedings and made misrepresentations to the Commission during its investigation. *Id.* at 171, 175. While the Commission recommended that the respondent be suspended without pay for 180 days and be ordered to pay costs, the Court "[did] not believe that such a sanction would sufficiently address the harm done to the integrity of the judiciary." *Id.* at 184. Rather, the Court concluded that "because testifying falsely under oath is 'antithetical to the role of a Judge who is sworn to uphold the law and seek the truth,' (citation omitted), and also because respondent has not demonstrated any apparent remorse for her misconduct and continues to deny responsibility for her actions, we believe that the only proportionate sanction is to remove respondent from office." *Id.* at 186-187.

The Court's statements in *Adams* leave little doubt that removal from office is the appropriate sanction in this case. In addition to other misconduct,

Respondent made intentional and false representations, under oath, during her divorce deposition and during the Commission's investigation and proceedings. Dishonesty in these circumstances erodes the public's confidence in the judiciary, *In re Noecker,* 472 Mich 1, 13; 691 NW2d 440 (2005), and renders a judge a judge "unfit to sit in judgment of others," *In re Justin,* 490 Mich 394, 424; 809 NW2d 126 (2012). Further, Respondent has continued to deny and to minimize her misconduct throughout these proceedings.[7] The Commission therefore concludes that Respondent's misconduct warrants removal from office.

VII. Assessment of Costs, Fees, and Expenses

As noted, the Commission finds that Respondent made intentional misrepresentations and misleading statements to the Commission in her written responses to the Commission and during her testimony at the public hearing. Accordingly, the Commission requests that Respondent be ordered to pay the costs, fees, and expenses incurred by the Commission in prosecuting the complaint. See MCR 9.205(B). The Examiner has submitted an affidavit showing costs, fees, and expenses incurred by the Commission in the amount of $35,570.36. Therefore, the Commission requests an assessment of costs, fees, and expenses in the total amount of $35,570.36.

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[7] Indeed, Respondent argues in her objections to the Master's report that "every finding by the Master is demonstrably wrong."

VIII. Conclusion and Recommendation

The Commission concludes that Respondent committed misconduct in office by, among other actions, failing to disclose the facts of her relationships with Detective Furlong and Shari Pollesch when warranted, by failing to immediately disqualify herself from her own divorce case, by tampering with evidence in her divorce case, and by making intentionally false and misleading statements on the record in cases over which she presided and during her divorce deposition. In addition, Respondent committed judicial misconduct by making intentional misrepresentations or misleading statements to the Commission in her written responses to the Commission and in her testimony at the public hearing. On the basis of her judicial misconduct, the Commission recommends that Respondent be removed from office and that the removal extend through the next judicial term. In addition, on the basis of the Commission's findings that Respondent made intentional misrepresentations or misleading statements to the Commission and to the Master, the Commission recommends that Respondent be ordered to pay an assessment of costs, fees, and expenses in the total amount $35,570.36.

JUDICIAL TENURE COMMISSION

HON. MONTE J. BURMEISTER
Chairperson

THOMAS J. RYAN, ESQ.
Vice-Chairperson

HON. KAREN FORT HOOD
Secretary

ARI ADLER

HON. JON H. HULSING

HON. BRIAN R. SULLVAN

MELISSA B. SPICKLER

CLEMENT, J. (*concurring*). I agree with the majority's factual findings, conclusion of misconduct, and decision to remove respondent, Theresa M. Brennan, from office. I write separately to express my concerns regarding this Court's authority to also impose a conditional suspension upon respondent.

Under Const 1963, art 6, § 30(2), this Court may "censure, suspend with or without salary, retire or remove a judge" for misconduct in office. These potential sanctions escalate in severity, leading to the ultimate sanction wherein the respondent is completely divorced from judicial office: removal. Given the arrangement of § 30(2) as an escalating list of sanction options, I question whether § 30(2) was intended to grant this Court the power to impose *both* a removal *and* a conditional suspension upon a respondent. See *In re McCree*, 495 Mich 51, 88-89; 845 NW2d 458 (2014) (CAVANAGH, J., concurring in part and dissenting in part).[1]

That being said, I concede that this challenge appears to be foreclosed by this Court's decision in *In re McCree*. There, this Court removed the respondent from his then-current office and imposed a conditional suspension. *Id*. at 56 (opinion of the Court). It also expressly rejected the respondent's argument that this Court lacked the constitutional authority to impose such a sanction. *Id*. at 82-86. In reaching this conclusion, this Court relied on its earlier decision in *In re Probert*, 411 Mich 210, 224; 308 NW2d 773 (1981),

[1] To the extent that the additional imposition of suspension on a removed judge is designed to impose continuing consequences on that respondent, I submit that the Attorney Grievance Commission holds authority and discretion to impose such consequences by determining whether discipline such as the suspension or revocation of a respondent's law license is warranted.

wherein this Court held that it was empowered to impose a conditional suspension upon a nonincumbent respondent because "it is immaterial to a [conditional] suspension . . . whether or not the disciplined party holds judicial office when the suspension is imposed." *In re Probert* did not identify the source of its authority to impose a conditional suspension; it merely stated that "we have on at least three occasions issued conditional suspensions . . . ." *Id*. at 223-224. Those other occasions include *In re Bennett*, 403 Mich 178, 200; 267 NW2d 914 (1978); *In re Del Rio*, 400 Mich 665, 672; 256 NW2d 727 (1977); and *In re Mikesell*, 396 Mich 517, 549; 243 NW2d 86 (1976), wherein this Court imposed suspensions on the respondent judges and indicated that the suspensions would apply regardless of the respondents' election or appointment to other judicial offices. In each of these cases, the suspensions occurred during the respondent's current term of office and precluded judicial service if the respondent obtained another judicial seat during the term of the suspension. As stated, although those cases all involved active judges, this Court found that the fact that the respondent in *In re Probert* had already left office was "immaterial" to its authority to impose a conditional suspension without further discussion of its constitutional authority to do so. *In re Probert*, 411 Mich at 224. In *In re McCree*, 495 Mich at 56, this Court again expanded its suspension power by applying it to an active judge (unlike in *In re Probert*), whom the Court also removed (unlike in *In re Bennett*, *In re Del Rio*, *In re Mikesell*, and *In re Probert*). While I concede that this Court is bound by *In re McCree*'s determination that this Court has the authority to impose both a removal and a conditional suspension on a respondent judge, I am troubled by the constitutional analysis applied in *McCree* and its reliance on distinguishable

caselaw to arrive at that determination. Given that respondent does not seek to have *McCree* overruled or provide any basis to distinguish *McCree*, I concur in the result of the majority's decision.

CAVANAGH, J., concurred with CLEMENT, J.

PAQUIN v CITY OF ST IGNACE

Docket No. 156823. Argued on application for leave to appeal April 10, 2019. Decided July 8, 2019.

Fred Paquin brought a declaratory action in the Mackinac Circuit Court, seeking a ruling that his position in tribal government did not constitute employment in "local, state, or federal government" under Const 1963, art 11, § 8. Plaintiff served the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe), a federally recognized Indian tribe, in two capacities: as the chief of police for the tribal police department and as an elected member of the board of directors, the governing body of the Tribe. In 2010, plaintiff pleaded guilty to a single count of conspiracy to defraud the United States by dishonest means in violation of 18 USC 371, for which he was sentenced to a year and a day in prison. The underlying conduct involved the misuse of federal funds granted to the tribal police department. In both 2013 and 2015, plaintiff sought to run for a position on the city council of defendant, the city of St. Ignace, in the November general election. Plaintiff was rebuffed each time by defendant's city manager, who denied plaintiff's request to be placed on the ballot. In each instance, defendant's city manager relied on Const 1963, art 11, § 8 to conclude that plaintiff's prior felony conviction barred him from running for city council. Plaintiff brought the declaratory action and moved for summary disposition. The Attorney General moved to submit an amicus brief and to participate in oral argument in support of defendant, which the court granted. Following oral argument, the court, William W. Carmody, J., denied plaintiff's motion for summary disposition and dismissed his complaint with prejudice. Plaintiff appealed, and the Court of Appeals, K. F. KELLY, P.J., and BECKERING and RIORDAN, JJ., affirmed, holding that the Tribe qualified as a "local government" under the plain meaning of Const 1963, art 11, § 8. 321 Mich App 673 (2017). Plaintiff sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1076 (2018).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justices ZAHRA, VIVIANO, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Article 11, § 8 of the 1963 Michigan Constitution provides, in pertinent part, that a person is ineligible for election or appointment to any state or local elective office of this state if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government. In this case, the narrow issue was whether the tribal government qualified as "local, state, or federal government" under Const 1963, art 11, § 8. An Indian tribe does not constitute "federal government" because, when read in context, the term "federal government" as used in Const 1963, art 11, § 8 specifically refers to the United States federal government. The constitutional provision does not use a modifier preceding the term "federal government," and coupled with the understanding that "federal government" refers to a particular form of government, the term "federal government" as used in Const 1963, art 11, § 8 refers to the United States federal government. And because "federal government" refers to the United States federal government specifically, neither "state government" nor "local government" has a broader application. Whatever local governmental functions a tribal government might fulfill, a tribal government is different in kind from a city's local government, which does not have inherent sovereign authority. Additionally, the mere existence of the unique relationship between the United States federal government and tribal governments highlights the difference between tribal governments and local subunits of state government: tribal governments are domestic dependent nations that exercise inherent sovereign authority over their members and territories and therefore cannot be characterized as either entirely domestic or entirely sovereign. Accordingly, the tribal government of a federally recognized Indian tribe does not constitute "local government" as that term is used in Const 1963, art 11, § 8.

Court of Appeals judgment reversed; circuit court order denying plaintiff's motion for summary disposition vacated; case remanded to the Mackinac Circuit Court.

Justice MARKMAN, dissenting, would have held that this case was rendered moot by the November 2015 election and that the "likely to recur yet evade review" element of the mootness doctrine was inapplicable because the underlying dispute in this case was not predestined to evade judicial review. Therefore, Justice MARKMAN would not have addressed the substantive

merits of the case. In this case, once the November 2015 election for city council occurred, plaintiff could no longer maintain a candidacy for a position on the city council in 2015. Consequently, the only question was whether a fraud-related conviction sustained while serving in tribal government triggered the prohibitions of Const 1963, art 11, § 8, and this was precisely the type of abstract and academic question of law that is the hallmark of a moot case. Furthermore, the "likely to recur yet evade review" element of the mootness doctrine was inapplicable. A court does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case unless the issue is one of public significance that is likely to recur yet evade judicial review. Under Michigan law concerning the "likely to recur yet evade review" element of the mootness doctrine, it is unclear whether the issue must be likely to recur as to the particular party involved in the case; however, under federal law, a case is not moot if the issue is capable of repetition yet evading review and the issue generally must be capable of repetition as to the same complaining party. Accordingly, federal caselaw was instructive. Applying this federal framework, the dispositive inquiry was whether the challenged action was in its duration too short to be fully litigated prior to cessation or expiration. In this case, the challenged action was defendant's decision concerning ballot access and the relevant time frame for evading review was two years or slightly less, given the time required to prepare the ballots. Two years was more than sufficient time for plaintiff to have obtained judicial review of his case and would be more than sufficient time for a future litigant to obtain judicial review of his or her case. Had plaintiff not waited until a few months before the November 2015 election to bring his declaratory-judgment action and instead promptly sought relief from the trial court at an earlier juncture, and perhaps sought expedited consideration of his claim pursuant to MCR 2.605(D), MCR 7.211(C)(6), and MCR 7.311(E), he could have secured judicial review of his case; thus, plaintiff's declaratory-judgment claim was not predestined to evade judicial review. The question here was not one of prudence or propriety, but rather one of threshold constitutional authority.

CONSTITUTIONAL LAW — INDIANS — ELIGIBILITY FOR STATE OR LOCAL ELECTIVE OFFICE — WORDS AND PHRASES — "LOCAL GOVERNMENT."

Article 11, § 8 of the 1963 Michigan Constitution provides, in pertinent part, that a person is ineligible for election or appointment to any state or local elective office of this state if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public

trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government; the tribal government of a federally recognized Indian tribe does not constitute "local . . . government" as that term is used in Const 1963, art 11, § 8.

Patrick, Kwiatkowski & Hesselink, PLLC (by *Joseph P. Kwiatkowski*) for Fred Paquin.

Charles J. Palmer, PC (by *Charles J. Palmer*) for the city of St. Ignace.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, and *Heather S. Meingast*, Assistant Attorney General, for the Attorney General.

BERNSTEIN, J. This case requires us to examine the language of our state Constitution; specifically, we are concerned with whether a tribal government constitutes "local . . . government" under Const 1963, art 11, § 8. We hold that it does not. Accordingly, we reverse the judgment of the Court of Appeals and remand to the circuit court for further proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

Plaintiff Fred Paquin served the Sault Ste. Marie Tribe of Chippewa Indians (the Tribe), a federally recognized Indian tribe whose territory is located within the geographic boundaries of Michigan, in two capacities: as the chief of police for the tribal police department and as an elected member of the board of directors, the governing body of the Tribe. In 2010, plaintiff pleaded guilty to a single count of conspiracy to defraud the United States by dishonest means in violation of 18 USC 371, for which he was sentenced to

a year and a day in prison. The underlying conduct involved the misuse of federal funds granted to the tribal police department.

In both 2013 and 2015, plaintiff sought to run for a position on defendant's city council in the November general election. Plaintiff was rebuffed each time by defendant's city manager, who denied plaintiff's request to be placed on the ballot. In each instance, defendant's city manager relied on Const 1963, art 11, § 8 to conclude that plaintiff's prior felony conviction barred him from running for city council. Of particular note is the fact that defendant's city manager specifically relied on a formal Attorney General opinion that had concluded that this constitutional provision "applies to a person convicted of a crime based on that person's conduct as a governmental employee or elected official of a federally recognized Indian Tribe." OAG, 2013-2014, No. 7273, p 30, at 30 (August 15, 2013).[1]

Following the denial of his second request, plaintiff filed a declaratory action on July 20, 2015, seeking a ruling that the constitutional provision did not apply to him because his positions had been in tribal government, not "local, state, or federal government" under Const 1963, art 11, § 8. Plaintiff moved for summary disposition pursuant to MCR 2.116(C)(10). The Attorney General moved to submit an amicus brief and to participate in oral argument in support of defendant, which the circuit court granted. After oral argument,

[1] Although the Attorney General opinion does not mention plaintiff by name, the Attorney General wrote the opinion at the request of State Representative Frank Foster, who at the time represented the district that includes St. Ignace. The Attorney General opinion was dated August 15, 2013, and defendant's city manager first rejected plaintiff's request to be put on the ballot on August 16, 2013.

the circuit court denied plaintiff's motion for summary disposition and dismissed his complaint with prejudice.

On October 19, 2017, the Court of Appeals affirmed in a published per curiam opinion. *Paquin v City of St Ignace*, 321 Mich App 673; 909 NW2d 884 (2017). The Court of Appeals noted that the only issue before it was whether plaintiff's position of employment in tribal government constituted employment in "local, state, or federal government" under Const 1963, art 11, § 8.[2] *Id*. at 681. Specifically, the Court of Appeals held that "the Tribe qualifies as a 'local government' under the plain meaning of the text of Const 1963, art 11, § 8." *Id*.

Plaintiff timely sought leave to appeal in this Court. On May 23, 2018, we ordered oral argument on the application. *Paquin v City of St Ignace*, 501 Mich 1076 (2018).

II. STANDARD OF REVIEW

The interpretation of a constitutional provision is a question of law, which we review de novo. *Bonner v City of Brighton*, 495 Mich 209, 221; 848 NW2d 380 (2014). "[T]he primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified." *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 652; 698 NW2d 350 (2005) (quotation marks and citation omitted). Accordingly, "we seek the common understanding of the people at the time the constitu-

[2] Although plaintiff had made an argument regarding the self-executing nature of the constitutional provision in his complaint for declaratory relief, no such argument was presented on appeal, and the Court of Appeals held that the argument was waived. *Paquin*, 321 Mich App at 680 n 3. We similarly hold that the argument was abandoned on appeal and accordingly decline to address this issue.

tion was ratified. This involves applying the plain meaning of each term used at the time of ratification, unless technical, legal terms are used." *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 558-559; 737 NW2d 476 (2007) (quotation marks and citations omitted).[3]

III. ANALYSIS

Article 11, § 8 was added to the Michigan Constitution by amendment after a statewide vote in the November 2010 general election. In relevant part, the provision states:

> A person is ineligible for election or appointment to any state or local elective office of this state . . . if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in *local, state, or federal government*. This requirement is in addition to any other qualification required under this constitution or by law.

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[3] This Court has described the rule of "common understanding" as follows:

> A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed. [*Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting 1 Cooley, Constitutional Limitations (6th ed), p 81 (quotation marks and emphasis omitted).]

> The legislature shall prescribe by law for the implementation of this section. [Emphasis added.]

The issue before us is narrowly presented.[4] The parties agree that the material facts are not in dispute and

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[4] As an initial matter, we disagree with the dissent's conclusion that we should declare sua sponte that this case is moot. A case is moot if the court's ruling " 'cannot have any practical legal effect upon a then existing controversy.' " *TM v MZ*, 501 Mich 312, 317; 916 NW2d 473 (2018), quoting *Anway v Grand Rapids R Co*, 211 Mich 592, 610; 179 NW 350 (1920). Although mootness may be raised sua sponte by the court "[w]here the facts of a case make clear that a litigated issue has become moot," we find that "[t]his is not such a case." *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 255 n 12; 701 NW2d 144 (2005). In *City of Novi,* we described how mootness is raised and analyzed by a court in a typical case:

> When a complaint is filed and an actual injury is alleged, a rebuttable presumption is created that there is a genuine case or controversy. The case may be dismissed as moot if the moving party satisfies the heavy burden required to demonstrate mootness. If such a motion is brought, the plaintiff must further support the allegations of injury with documentation and must sufficiently support its claim if it goes to trial. [*Id*. at 256 (citations and quotation marks omitted).]

See also *MGM Grand Detroit, LLC v Community Coalition for Empowerment, Inc*, 465 Mich 303, 306-307; 633 NW2d 357 (2001) ("[T]o get an appeal dismissed as moot, thus depriving a party seeking redress of a day in court, the party urging mootness on the court must make a very convincing showing that the opportunity for an appellate court to review the matter should be denied. Not surprisingly, it is rare for a court to grant such a motion."). Like in *City of Novi*, "[t]hese procedural requirements are entirely lacking in this case at this time. No motion or other pleading has claimed mootness and there has been no 'support' so as to meet *any* burden, much less the 'heavy burden' required to demonstrate mootness." *City of Novi*, 473 Mich at 256. Indeed, not only has the issue not been raised by the parties, but the Attorney General specifically disclaimed it at oral argument.

We do not agree with the dissent that the record here is sufficient to proceed with a sua sponte mootness analysis. Under the city's interpretation of Const 1963, art 11, § 8, plaintiff is "ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policy-making or that has discretionary authority over public assets" for

that most of the language of Const 1963, art 11, § 8 is satisfied. There is, for example, no dispute that tribal government is *a* government; instead, the question is limited to whether the Tribe qualifies as "local, state, or federal government."

The Court of Appeals and the Attorney General opinions focused exclusively on whether the Tribe constitutes "local government." The Court of Appeals specifically defined "local government," in relevant part, as follows: "*Merriam-Webster's Collegiate Dictionary* (2007), p 730, defines 'local government' as: '1. the government of a specific local area constituting a major political unit (as a nation or a state)[.]' " *Paquin*, 321 Mich App at 682. As an initial matter, we note that this quotation appears to be incomplete, as the relied-upon dictionary actually defines "local government" as "the government of a specific local area constituting *a subdivision of* a major political unit (as a nation or state)[.]" *Merriam-Webster's Collegiate Dictionary* (2007), p 730 (emphasis added). See also *Black's Law Dictionary* (10th ed), p 811 (defining "local government," in relevant part, as "[t]he government of a particular locality, such as a city, county, or parish; a governing body at a lower level than the state government"). This error significantly undermines the Court

20 years following his 2010 felony conviction. In his complaint, plaintiff requested a declaratory judgment that Const 1963, art 11, § 8 does not apply to his former conviction. Thus, contrary to the dissent's assertion, plaintiff's request for relief was not limited to his placement on the ballot for the November 2015 election. And, when questioned about mootness at oral argument, plaintiff's counsel stated that plaintiff intends to seek office in the future, an assertion that is not unfounded in light of the fact that plaintiff attempted to run for office in 2013 and 2015 and has spent the last four years litigating this action at every level of our court system. Under these circumstances, we cannot conclude that this is a case in which the facts make clear that a litigated issue has become moot.

of Appeals' textual analysis of Const 1963, art 11, § 8. This omitted language strongly suggests that "local . . . government" be understood as a subdivision of another body of government. Significantly, the erroneous definition would also render into needless surplusage the additional language in the list, which refers to both "state . . . government" and "federal government."

Although it has not been argued that the Tribe constitutes either "state . . . government" or "federal government," parsing those two terms further helps to discern the intent of the people of Michigan. We begin with the term "federal government." We note that the term is commonly used as shorthand for a country's government in general; indeed, under the entry for "federal government," *Black's Law Dictionary* simply directs the reader to consult the definition of "government." *Black's Law Dictionary* (10th ed), p 728.[5] But this reading of "federal government" is overly simplistic. Although our national government is *a* federal government, "federal" government necessarily implies that there is a union, or a federation, of smaller political entities; in contrast, there are many examples of *unitary* governments that do not take the same form.[6] A reading of "federal government" to include only those foreign governments that are structured in the same manner as our federal government would seem to be less than obvious or common.

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[5] We acknowledge that, under the entry for "government," *Black's Law Dictionary* does include a specific entry for "federal government," which it defines, in relevant part, either as "[a] national government that exercises some degree of control over smaller political units that have surrendered some degree of power in exchange for the right to participate in national political matters" or "[*t*]*he U.S. government*." *Black's Law Dictionary* (10th ed), pp 810-811 (emphasis added).

[6] Vatican City State comes to mind.

Instead, it is instructive to note the lack of determiners or articles preceding the list "local, state, or federal government." Although "any" is used to modify the phrase "elective office or position of employment," no such modifier is included before "local, state, or federal government." When read in context, the constitutional provision refers to a person who "was holding any elective office or position of employment in . . . federal government." Const 1963, art 11, § 8. The provision does *not* state "a federal government" or "any federal government," both of which might suggest an intent to include other federal governments. When no modifier is used at all, coupled with our understanding of "federal government" as referring to a particular form of government, it is clear that the common understanding of the phrase is that it specifically refers to the United States federal government.

This understanding of "federal government" necessarily impacts our reading of the terms "state . . . government" and "local . . . government," because these terms must be read in context. See *Lapeer Co Clerk v Lapeer Circuit Court*, 469 Mich 146, 156; 665 NW2d 452 (2003) ("[E]very provision must be interpreted in the light of the document as a whole, and no provision should be construed to nullify or impair another."). If "federal government" here refers to the United States federal government specifically, it does not follow that either "state . . . government" or "local . . . government" would have broader application.

Nonetheless, that "local government" must here refer to *domestic* local government does not end our inquiry. The Supreme Court of the United States has attempted to describe tribal governments as "domestic dependent nations," *Cherokee Nation v Georgia*, 30 US 1, 17; 8 L Ed 25 (1831), albeit ones that "exercise inherent sovereign

authority over their members and territories," *Oklahoma Tax Comm v Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 US 505, 509; 111 S Ct 905; 112 L Ed 2d 1112 (1991). Given the difficulty inherent in characterizing tribal government as either entirely domestic or entirely sovereign, we decline to explore the relationship between tribes and our federal government in further detail.

However, the mere existence of this unique relationship between the United States federal government and tribal governments highlights the difference between tribal governments and local subunits of state government.[7] The Attorney General argues that, because the Tribe *functions* as a local government, the Tribe *is* a local government under Const 1963, art 11, § 8. To agree would be to write language into our Constitution that is not there and that the people of this state did not choose to include. Nowhere in our Constitution does it state that local-government equivalency suffices; the provision simply states "local . . . government." It is thus irrelevant to note all of the functions that the Tribe provides that are similar to that of, for example, the city of St. Ignace—that the two entities function similarly in some respects does not make them the same.[8]

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[7] The Attorney General conceded in the circuit court that the Tribe is not a local subunit of state government. The Court of Appeals noted that a local governmental entity need not be a political subdivision of the state of Michigan under Const 1963, art 11, § 8, relying on its incomplete dictionary definition. *Paquin*, 321 Mich App at 684. However, given our understanding that Const 1963, art 11, § 8 refers only to units of domestic government and that states are political subunits of our federal government, it follows that "local government" should also be understood to refer to political subunits of state or federal government.

[8] Under this same logic, it would follow that many unitary national governments, being small in size, would also be considered "local" governments. To find that clearly sovereign, foreign nations are *local*

To the extent that the Court of Appeals relied on language from the Supreme Court of the United States stating that tribes "retain[] their original natural rights in matters of local self-government," this language merely recognizes that tribes retain *the right to self-governance*, not that they are *local governments*. *Santa Clara Pueblo v Martinez*, 436 US 49, 55; 98 S Ct 1670; 56 L Ed 2d 106 (1978) (quotation marks and citation omitted). Whatever local governmental functions the Tribe might fulfill, the Tribe is different in kind from a local government like the city of St. Ignace, which does not have inherent sovereign authority. Tribal government is simply not local government, as that term is used in Const 1963, art 11, § 8.

That the Tribe defies easy characterization lends further support to the finding that its inclusion under the term "local . . . government" would be to reach for a strained interpretation of that term. Because the cornerstone of constitutional interpretation is to seek the common understanding of the people, we therefore find that the Tribe is not a "local . . . government" as that term is used in Const 1963, art 11, § 8.

IV. CONCLUSION

Because we hold that a federally recognized Indian tribe is not "local . . . government" under Const 1963, art 11, § 8, we reverse the judgment of the Court of Appeals. We also vacate the circuit court order denying plaintiff's motion for summary disposition and remand to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

MCCORMACK, C.J., and ZAHRA, VIVIANO, CLEMENT, and CAVANAGH, JJ., concurred with BERNSTEIN, J.

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governments under Const 1963, art 11, § 8 would truly be an exercise in creative interpretation.

MARKMAN, J. (*dissenting*). I respectfully dissent. While the majority presents a thoughtful analysis explaining why tribal governments are not "local governments" for purposes of Const 1963, art 11, § 8—one in which I might otherwise agree because tribal governments exist outside the "local, state, and federal" American constitutional hierarchy—I believe that this case was rendered moot by the November 2015 election. Consequently, the lower courts and now this Court have erred, in my judgment, in resolving the substantive merits of this case. Accordingly, I would vacate the judgments of the lower courts.[1]

I. FACTS AND PROCEEDINGS

In 2010, plaintiff, Fred Paquin, pleaded guilty to conspiracy to defraud the United States by dishonest means, 18 USC 371, and was sentenced to a year and a day in prison. The criminal conduct occurred in his capacity as the chief of police for the Sault Ste. Marie Tribe of Chippewa Indians. He sought to run for a position on the city council of defendant, the city of St. Ignace, in the November elections of both 2013 and 2015. On each occasion, plaintiff was denied the opportunity to do so by defendant's city manager, who concluded that plaintiff was prohibited from holding such position under Const 1963, art 11, § 8 because the tribal government comprised a "local government" for

[1] See *Mich Chiropractic Council v Office of Fin & Ins Servs Comm'r*, 475 Mich 363, 374; 716 NW2d 561 (2006) (opinion by YOUNG, J.), overruled on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010) ("Where a lower court has erroneously exercised its judicial power, an appellate court has 'jurisdiction on appeal, not of the merits, but merely for the purpose of correcting the error of the lower court in entertaining the suit.' "), quoting *United States v Corrick*, 298 US 435, 440; 56 S Ct 829; 80 L Ed 1263 (1936).

purposes of that constitutional provision.[2] After the second denial, plaintiff filed his complaint for a declaratory judgment against defendant in July 2015. He requested a declaratory judgment providing that Const 1963, art 11, § 8 "does not apply to his former conviction as an appointed police chief of a sovereign Michigan Indian Tribe" and sought the following relief:

> The City of St. Ignace has an election that is scheduled to occur on or about November 3rd, 2015, and the Plaintiff, Fred Paquin, seeks to have his name placed on said [ballot] as a write in for consideration by the electorate.

In July 2016, well after the November 2015 election, the trial court ruled that plaintiff was not eligible to hold office under Const 1963, art 11, § 8, and in October 2017, the Court of Appeals affirmed. *Paquin v City of St Ignace*, 321 Mich App 673; 909 NW2d 884 (2017). In May 2018, this Court scheduled oral argument on the application, directing the parties to address "whether the plaintiff's holding elective office with and being employed by an Indian tribe constitutes 'any elective office or position of employment in local, state, or federal government' under Const 1963, art 11, § 8." *Paquin v City of St Ignace*, 501 Mich 1076, 1076 (2018).

II. ANALYSIS

"The Michigan Constitution provides that the Legislature is to exercise the 'legislative power' of the

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[2] Const 1963, art 11, § 8 provides, in relevant part:

> A person is ineligible for election or appointment to any state or local elective office of this state and ineligible to hold a position in public employment in this state that is policy-making or that has discretionary authority over public assets if, within the immediately preceding 20 years, the person was convicted of a felony involving dishonesty, deceit, fraud, or a breach of the public trust and the conviction was related to the person's official capacity while the person was holding any elective office or position of employment in local, state, or federal government.

state, Const 1963, art 4, § 1, the Governor is to exercise the 'executive power,' Const 1963, art 5, § 1, and the judiciary is to exercise the 'judicial power,' Const 1963, art 6, § 1." *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 613; 684 NW2d 800 (2004), overruled on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010). Consequently, "[t]his Court only [possesses] the constitutional authority to exercise the 'judicial power.' " *Johnson v Recca*, 492 Mich 169, 187; 821 NW2d 520 (2012), quoting Const 1963, art 6, § 1. "By separating the powers of government, the framers of the Michigan Constitution sought to disperse governmental power and thereby to limit its exercise." *Nat'l Wildlife Federation*, 471 Mich at 613. "As a term that both defines the role of the judicial branch and limits the role of the legislative and executive branches, it is clear that the scope of the 'judicial power' is a matter of considerable constitutional significance." *Id*. at 613-614.

The " 'judicial power . . . [pertains to] the right to determine actual controversies arising between adverse litigants, duly instituted in courts of proper jurisdiction.' " *Anway v Grand Rapids R Co*, 211 Mich 592, 616; 179 NW 350 (1920), quoting *Muskrat v United States*, 219 US 346, 361; 31 S Ct 250; 55 L Ed 246 (1911). "In seeking to make certain that the judiciary does not usurp the power of coordinate branches of government, and exercises only 'judicial power,' both this Court and the federal courts have developed justiciability doctrines to ensure that cases before the courts are appropriate for judicial action." *Mich Chiropractic Council v Office of Fin & Ins Servs Comm'r*, 475 Mich 363, 370; 716 NW2d 561 (2006) (opinion by YOUNG, J.), overruled on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010). "These include the doctrines of

standing, ripeness, and mootness." *Mich Chiropractic Council*, 475 Mich at 370-371 (opinion by YOUNG, J.). "Because these doctrines are jurisdictional in nature, they may be raised at any time and may not be waived by the parties." *Id*. at 371-372. "[T]he doctrines of justiciability . . . affect[] 'judicial power,' the absence of which renders the judiciary constitutionally powerless to adjudicate the claim." *Id*. at 372.

> "It is universally understood by the bench and bar . . . that a moot case is one which seeks to get a judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has been actually asserted and contested, or a judgment upon some matter which, when rendered, for any reason, cannot have any practical legal effect upon a then existing controversy." [*Anway*, 211 Mich at 610, quoting *Ex parte Steele*, 162 F 694, 701 (ND Ala, 1908).]

" '[T]he court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which *cannot affect the result* as to the thing in issue in the case before it.' " *Anway*, 211 Mich at 615, quoting *California v San Pablo & T R Co*, 149 US 308, 313; 13 S Ct 876; 37 L Ed 747 (1893) (emphasis added). "[B]ecause reviewing a moot question would be a purposeless proceeding, appellate courts will sua sponte refuse to hear cases that they do not have the power to decide, including cases that are moot." *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010) (quotation marks and citations omitted). "Whether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself." *Id*.

MCR 2.605(A)(1) sets forth the court's authority to issue a declaratory judgment:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.

"[T]he rule requires that there be 'a case of actual controversy' and that a party seeking a declaratory judgment be an 'interested party,' thereby incorporating traditional restrictions on justiciability such as standing, ripeness, and mootness." *Associated Builders & Contractors v Dep't of Consumer & Indus Servs Dir*, 472 Mich 117, 125; 693 NW2d 374 (2005), overruled on other grounds by *Lansing Sch Ed Ass'n, MEA/NEA v Lansing Bd of Ed*, 487 Mich 349 (2010).[3] "In general, 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). "This requirement of an 'actual controversy' prevents a court from deciding hypothetical issues." *Id*. at 589.

Here, once the November 2015 election for city council occurred, plaintiff could obviously no longer maintain a candidacy for a position on the city council in 2015. Consequently, the only question before the trial court, the Court of Appeals, and this Court was whether a fraud-related conviction sustained while serving in tribal government triggered the prohibitions of Const 1963, art 11, § 8. This is precisely the type of abstract and academic question of law that is the hallmark of a moot case. That is, after the November 2015 election occurred, a declaratory judgment pertaining to that

[3] Indeed, MCR 2.605(A)(1) necessarily *must* limit declaratory judgment actions to cases that are justiciable because "the judicial branch cannot arrogate to itself governmental authority that is beyond the scope of the 'judicial power' under the constitution." *Nat'l Wildlife Federation*, 471 Mich at 637.

election could not have affected plaintiff's rights and thus could not have had "any practical legal effect upon a then existing controversy." *Anway*, 211 Mich at 610 (quotation marks and citation omitted). See also *Tierney v Bay City Union Sch Dist*, 210 Mich 424, 425; 177 NW 955 (1920) ("[T]he election having occurred many months ago, the granting of the injunction prayed for would be an idle act. The case presents simply abstract questions of law which do not rest on existing facts or rights, and is therefore a moot case.").

Nonetheless, there is a limited category of disputes that are not considered moot despite the existence of facts that would otherwise render them moot.[4] This Court has recognized that it "does not reach moot questions or declare principles or rules of law that have no practical legal effect in the case before us *unless* the issue is one of public significance that is likely to recur, yet evade judicial review." *Federated Publications, Inc v Lansing*, 467 Mich 98, 112; 649 NW2d 383 (2002), abrogated on other grounds by *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463 (2006) (emphasis added). Unfortunately, our caselaw has been somewhat unclear in addressing the "likely to recur yet evade review" element of the mootness doctrine. In *In re Midland Publishing Co, Inc*, 420 Mich 148; 362 NW2d 580 (1985), this Court suggested that if the legal issue that would otherwise be moot is "likely

[4] Although some decisions have suggested that this category of disputes is best understood as an "exception" to the mootness doctrine, I believe it is better understood as a fundamental element of the doctrine itself, such that a case that falls within this category is simply not moot. See *Turner v Rogers*, 564 US 431, 439; 131 S Ct 2507; 180 L Ed 2d 452 (2011), quoting *Southern Pacific Terminal Co v Interstate Commerce Comm*, 219 US 498, 515; 31 S Ct 279; 55 L Ed 310 (1911) ("[T]his case is not moot because it falls within a special category of disputes that are 'capable of repetition' while 'evading review.' ").

to recur yet evade review" and might arise with regard to *any* person, then it may nonetheless be reviewed. See *id*. at 152 n 2 ("[I]t appears undisputed that the defendants in the two criminal actions were arraigned on informations on August 1, 1980. Although the issues presented in this appeal thus appear moot, this Court will consider them because they are of public significance and are likely to recur, yet may evade judicial review."). This Court similarly suggested as much in *People v Kaczmarek*, 464 Mich 478, 481; 628 NW2d 484 (2001): "The question in this case is significant because it involves appellate rights provided by the state constitution and statutes. Yet, it will evade review because others who may raise it, like defendant, also are likely to be on parole by the time their cases reach this Court." However, in *Mead v Batchlor*, 435 Mich 480, 487; 460 NW2d 493 (1990), abrogated on other grounds by *Turner v Rogers*, 564 US 431 (2011), we suggested that the legal issue must be "likely to recur yet evade review" for the *particular* party involved in the case: "Even if it might be said that the contempt order is no longer valid, *defendant* faces the possibility of future contempt proceedings. A disposition based on mootness is not required where the underlying conduct is capable of repetition, yet evades review." (Emphasis added.)

In the absence of clear authority from this Court concerning the proper application of the "likely to recur yet evade review" element of the mootness doctrine, federal caselaw may be instructive. The United States Supreme Court has explained that its own "precedents recognize an exception to the mootness doctrine for a controversy that is 'capable of repetition, yet evading review.' " *Kingdomware Technologies, Inc v United States*, 579 US ___, ___; 136 S Ct 1969, 1976; 195 L Ed 2d 334 (2016), quoting *Spencer v Kemna*, 523 US 1, 17;

118 S Ct 978; 140 L Ed 2d 43 (1998) (quotation marks omitted).[5] "That exception applies 'only in exceptional situations,' " in which "(1) 'the challenged action is in its duration too short to be fully litigated prior to cessation or expiration,' and (2) 'there is a reasonable expectation that the *same complaining party* will be subject to the same action again.' " *Kingdomware Technologies*, 579 US at ___; 136 S Ct at 1976, quoting *Spencer*, 523 US at 17 (emphasis added; brackets omitted). See also *Murphy v Hunt*, 455 US 478, 482; 102 S Ct 1181; 71 L Ed 2d 353 (1982) ("[T]here must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party.") (citation omitted).[6] This

[5] In particular, federal courts have consistently held that when a party seeks a declaratory judgment concerning an election law and the election date has passed, the question is ordinarily whether the "capable of repetition yet evading review" aspect of the mootness doctrine applies. See, e.g., *Fed Election Comm v Wisconsin Right to Life, Inc*, 551 US 449; 127 S Ct 2652; 168 L Ed 2d 329 (2007) (addressing in the context of a declaratory-judgment action the "capable of repetition yet evading review" element of the mootness doctrine after the election date passed); *Hall v Alabama Secretary of State*, 902 F3d 1294 (CA 11, 2018) (same); *Missourians for Fiscal Accountability v Klahr*, 830 F3d 789 (CA 8, 2016) (same); *Nat'l Org for Marriage, Inc v Walsh*, 714 F3d 682 (CA 2, 2013) (same); *Libertarian Party v Dardenne*, 595 F3d 215 (CA 5, 2010) (same). Although Const 1963, art 11, § 8 is not necessarily an "election law" in the usual sense, it effectively operates as an election law in the instant case.

[6] Even the United States Supreme Court had not been entirely consistent in its historical application of the "same complaining party" rule, although in more recent years it has more consistently applied the rule. As explained by Justice Scalia:

> In *Roe* v. *Wade*, 410 U. S. 113, 125 [93 S Ct 705; 35 L Ed 2d 147 (1973)], we found that the "human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete," so that "pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied." *Roe*, at least one other abortion

"same complaining party" rule is part of the "capable of repetition" prong. See *California Coastal Comm v Granite Rock Co*, 480 US 572, 607 n 1; 107 S Ct 1419; 94 L Ed 2d 577 (1987) (Scalia, J., dissenting) ("[F]or a dispute to be 'capable of repetition,' there must be a 'reasonable expectation that the same complaining party [will] be subjected to the same action again.' "), quoting *Weinstein v Bradford*, 423 US 147, 149; 96 S Ct 347; 46 L Ed 2d 350 (1975).

To summarize, under Michigan law, a case is not moot if the issue is likely to recur yet evade review, and it is unclear whether the issue must be likely to recur as to the particular party involved in the case. By contrast, under federal law, a case is not moot if the issue is capable of repetition yet evading review, and the issue generally must be capable of repetition as to the same complaining party.[7] A straightforward com-

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case, see *Doe* v. *Bolton*, 410 U. S. 179, 187 [93 S Ct 739; 35 L Ed 2d 201] (1973), and some of our election law decisions, see *Rosario* v. *Rockefeller*, 410 U. S. 752, 756, n. 5 [93 S Ct 1245; 36 L Ed 2d 1] (1973); *Dunn* v. *Blumstein*, 405 U. S. 330, 333, n. 2 [92 S Ct 995; 31 L Ed 2d 274] (1972), differ from the body of our mootness jurisprudence *not* in accepting less than a probability that the issue will recur, in a manner evading review, between the same parties; but in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and other members of the public at large* without ever reaching us. Arguably those cases have been limited to their facts, or to the narrow areas of abortion and election rights, by our more recent insistence that, at least in the absence of a class action, the "capable of repetition" doctrine applies only where "there [is] a 'reasonable expectation' " that the "*same complaining party*" would be subjected to the same action again. [*Honig v Doe*, 484 US 305, 335-336; 108 S Ct 592; 98 L Ed 2d 686 (1988) (Scalia, J., dissenting) (citations omitted; fifth alteration in original).]

[7] There is some authority to suggest that the "same complaining party" rule in the federal courts may be "relaxed" in the election context. See *Hall*, 902 F3d at 1304 (observing that the United States Court of

parison of these standards shows that the "likely to recur" prong is the Michigan analogue to the federal "capable of repetition" prong, and the "evading review" prongs are also substantially identical.

In the end, I do not believe it is necessary to resolve whether and to what extent the "same complaining party" rule should apply in the instant case.[8] If the "same complaining party" rule does apply, it is arguable that there might be a reasonable expectation that the "same complaining party"—namely, plaintiff—will be subject to the same challenged action in the future. That is, because plaintiff has twice sought an elected position on the city council and twice been denied the

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Appeals for the Sixth Circuit and "[o]ther courts have interpreted the same complaining party rule in a . . . relaxed manner" in the election context). In *Hall*, the United States Court of Appeals for the Eleventh Circuit concluded that the plaintiff's request for a declaratory judgment concerning the constitutionality of an election law was moot after the election occurred. *Id*. at 1296-1297. After acknowledging that some federal circuits have held that the "same complaining party" rule is "relaxed" in the election context, the Eleventh Circuit concluded that "this case is not capable of repetition with regards to [the plaintiff] under any reasonable application of the same complaining party rule." *Id*. at 1305. In April 2019, the *Hall* plaintiff filed a petition for a writ of certiorari in the United States Supreme Court, asserting that "[t]he courts of appeals are intractably divided over whether plaintiffs challenging ballot-access restrictions must satisfy a same-plaintiff requirement to avoid mootness—that is, whether the plaintiffs must show 'a reasonable expectation' that they personally will 'be subjected to the same action again.' " Petition for Writ of Certiorari, *Hall v Alabama Secretary of State*, Docket No. 18-1362 (CA 11, April 29, 2019), p 11 (citation omitted). In any event, regardless of whether and to what extent the federal "same complaining party" rule does or does not apply in the election context, the "evading review" analysis is unaffected because, as noted previously, the "same complaining party" rule governs the "capable of repetition" analysis.

[8] In a future case, however, our application of a "same complaining party" rule may be dispositive. Therefore, in such a case, whether to adopt a "same complaining party" rule in our state may warrant this Court's careful consideration.

opportunity to be placed on the ballot, there is a reasonable expectation that he will again seek that same elected position and again be denied the opportunity to be placed on the ballot. On the other hand, if the "same complaining party" rule does not apply, then it is of course still true that there is a reasonable expectation that *someone*, including plaintiff himself, will be subject to the same challenged action in the future.

I believe that the dispositive inquiry here is whether the "challenged action is in its duration too short to be fully litigated prior to cessation or expiration . . . ." See *Kingdomware Technologies*, 579 US at ___; 136 S Ct at 1976 (quotation marks, citation, and brackets omitted). In this regard, I understand the "challenged action" to be the exclusion from the ballot for a position on defendant's city council, whether the individual excluded is defendant or any other person who might otherwise be eligible, but for the impact of Const 1963, art 11, § 8. That is, because plaintiff is challenging defendant's decision to exclude him from the ballot for city council, the "challenged action" is that decision which concerns ballot access. Elections to the city council are conducted once every two years, and each position is for a four-year term.[9] At a minimum, therefore, the relevant time frame for the "evading review" analysis is two years or perhaps slightly less, given the time required to prepare the ballots. That is, once an election cycle for city council has been completed, a new election cycle begins, and at that point plaintiff or

[9] The St. Ignace website provides: "Each Council Member serves for a four-year period, alternating elections every two years in conjunction with the Mayoral election. Every two years, one-half (3) of the Council seats are vacated." See City of St. Ignace, *St. Ignace City Council* <https://www.cityofstignace.com/index.php?page=City_Council_General_Info> (accessed June 4, 2019) [https://perma.cc/2AP7-MC3R].

any other person may seek a declaratory judgment concerning his or her right to seek an elected position on the city council in the new election cycle. And two years, in my judgment, is more than sufficient time for such an individual to obtain judicial review of his or her case. An individual may request expedited consideration of the case in the trial court, see MCR 2.605(D), as well as expedited consideration of the case in the Court of Appeals, see MCR 7.211(C)(6), and in this Court, see MCR 7.311(E). Here, for example, had plaintiff not waited until a few months before the November 2015 election to bring his declaratory-judgment action and instead promptly sought relief from the trial court at an earlier juncture, and perhaps sought expedited consideration of his claim, he could, doubtlessly, in my judgment, have secured judicial review of his case.[10] It can hardly be said, in my

[10] Federal courts have also recognized that the fact that an expedited review process was available is appropriately considered in the "evading review" analysis. See, e.g., *Minnesota Humane Society v Clark*, 184 F3d 795, 797 (CA 8, 1999) ("The Humane Society also could have sought an expedited appeal, a remedy which this court has granted in the past. . . . When a party has these legal avenues available, but does not utilize them, the action is not one that evades review."); *In re Kurtzman*, 194 F3d 54, 59 (CA 2, 1999) ("Because the Trustee has the ability to seek a stay and an expedited appeal, the retention issue presented by this appeal did not inevitably—and, if it arises again, will not inevitably—lapse into mootness prior to review."); *Disability Law Ctr v Millcreek Health Ctr*, 428 F3d 992, 997 (CA 10, 2005) ("Nor can [the plaintiff's] need for speedy access to records justify the application of the exception to the mootness doctrine. If in a future dispute [the plaintiff] is concerned its case will become moot because events are moving too quickly, it can request expedited review."); *Hamamoto v Ige*, 881 F3d 719, 723 (CA 9, 2018) ("Plaintiffs have not demonstrated that expedited review would have been unavailable in a case like theirs. . . . Because we are not convinced that two years and five months is 'almost certain[ly]' inadequate time for a case of this type to receive plenary review by the federal courts, we hold that the 'capable of repetition, yet evading review' exception to mootness does not apply."). But see *Ralls Corp v*

judgment, that no matter what reasonable alternatives plaintiff might have pursued, his declaratory-judgment claim would forever have "evaded review." Therefore, this case was moot in the trial court, moot in the Court of Appeals, and moot in this Court, and it is not saved by the "likely to recur yet evade review" element.[11]

Comm on Foreign Investment in the US, 758 F3d 296, 323 (CA DC, 2014) ("Absent an expedited appeal, which we do not consider in conducting the 'evading review' analysis, a [Committee on Foreign Investment in the United States] order is too short-lived to obtain Supreme Court review and therefore evades review.") (citation omitted). See also, e.g., in the state context, *Laity v State*, 153 App Div 3d 1079, 1080; 60 NYS3d 572 (2017) ("The exception to the mootness doctrine does not apply inasmuch as this case does not present the type of issue that would typically evade review . . . . The substantive issue presented would not have evaded judicial review had petitioner timely commenced this proceeding, which would have enabled [the] Supreme Court to hear the case before the presidential primary election and petitioner to take an expedited appeal therefrom."); *Gartner v Missouri Ethics Comm*, 323 SW3d 439, 442 (Mo App, 2010) ("This case does not fall within the public interest exception because the [Missouri Ethics Commission] has failed to show that the issue in this case will likely evade review in a future controversy. . . . An expedited appellate process is . . . available if timely requested, . . . as is the writ process.").

[11] In its response to this dissent, the majority suggests that I am acting in a "sua sponte" manner; that I am depriving plaintiff of his "day in court"; that I am disregarding the appropriate "burden" of proof; that I am overlooking that it is "rare" to grant motions for mootness; that I am failing to recognize that the present record is insufficient to conclusively establish mootness; and that I am oblivious that the Attorney General herself has specifically "disclaimed" any issue of mootness. Absent, however, from these observations is any serious acknowledgment that this Court simply lacks the constitutional *authority* to exercise its judicial power when a case or controversy is moot. "Our authority to hear only cases containing a genuine controversy . . . flows from the structural boundaries delineated in our constitution." *Mich Chiropractic Council*, 475 Mich at 374 n 24 (opinion by YOUNG, J.); see also *Iron Arrow Honor Society v Heckler*, 464 US 67, 70; 104 S Ct 373; 78 L Ed 2d 58 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies."). That is, it matters *not* that objections of mootness from this dissent have been raised "sua sponte"; that plaintiff would thereby

Although there is no question that it is the role of this Court to resolve legal issues of importance to our state,

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be denied his "day in court" (to which, of course, he would no longer be entitled); that the supposed "burden" of proof has not been satisfied; that it is "rare" to grant, much less sua sponte, a motion for mootness; that the record is allegedly inconclusive (which, even if true, would warrant *further* action by this Court to ascertain whether this case is or is not justiciable); or that the Attorney General or any other party has not on its own raised the same issue. The question here is not one of prudence or propriety but rather one of threshold authority.

Furthermore, the majority observes that "plaintiff requested a declaratory judgment that Const 1963, art 11, § 8 does not apply to his former conviction," so his "request for relief was not limited to his placement on the ballot for the November 2015 election." Presumably, the relevance of this observation is to suggest that plaintiff's request for relief is in some manner severable, such that relief may still be granted notwithstanding the occurrence and passing of the November 2015 election, and that this case therefore remains a live dispute. If so, I respectfully disagree that the purely legal question presented by plaintiff concerning his conviction is logically severable from the fact of the November 2015 election itself and that meaningful relief may still be granted. To illustrate, consider *Meyer v Grant*, 486 US 414; 108 S Ct 1886; 100 L Ed 2d 425 (1988). The facts of the case were described by the United States Supreme Court as follows:

> Appellees are proponents of an amendment to the Colorado Constitution that would remove motor carriers from the jurisdiction of the Colorado Public Utilities Commission. In early 1984 they obtained approval of a title, submission clause, and summary for a measure proposing the amendment and began the process of obtaining the 46,737 signatures necessary to have the proposal appear on the November 1984 ballot. Based on their own experience as petition circulators, as well as that of other unpaid circulators, appellees concluded that they would need the assistance of paid personnel to obtain the required number of signatures within the allotted time. *They then brought this action under 42 U.S.C. § 1983 against the Secretary of State and the Attorney General of Colorado seeking a declaration that the statutory prohibition against the use of paid circulators violates their rights under the First Amendment*. [*Id*. at 417 (emphasis added).]

As the highlighted sentence shows, the Court in *Meyer* understood that the appellees sought declaratory relief concerning the validity of an election law under the First Amendment, a purely legal question that transcended the specific occurrence of the November 1984 election. Yet

and this Court does so today, the absence of a properly justiciable case "renders the judiciary *constitutionally powerless* to adjudicate" the case. *Mich Chiropractic Council*, 475 Mich at 372 (opinion by YOUNG, J.) (emphasis added). In the absence of the constitutional power to resolve this case, the only proper course of action is to refrain from deciding it.

III. CONCLUSION

To summarize, I believe that this case was rendered moot by the November 2015 election, and the "likely to recur yet evade review" element of the mootness doctrine is inapplicable because the underlying dispute here is simply not predestined to "evade review." Rather, plaintiff originally could have availed himself of expedited review procedures, and he or any other person may do so in the future. This case is therefore simply not properly justiciable. Because courts are constitutionally limited to exercising only the "judicial power," I would not address the substantive merits of this case but would instead vacate the judgments of the lower courts and restore the *status quo ante*.

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in a footnote to that same sentence, the Court applied the "capable of repetition yet evading review" element of the mootness doctrine to the case, explaining that "[a]lthough the November 1984 election . . . is long past," "it is reasonable to expect that the same controversy will recur between these two parties, yet evade meaningful judicial review." *Id*. at 417 n 2. If a case is not moot because the purely legal question presented in the request for declaratory relief is severable from the election itself, as the majority suggests, then it would have been unnecessary for the Court to address the "capable of repetition yet evading review" element of the mootness doctrine in *Meyer*. And perhaps even more fundamentally, the majority errs by supposing that a justiciable case or controversy can be constructed from a purely abstract legal question—whether Const 1963, art 11, § 8 is applicable to a conviction sustained while serving in a tribal government—a matter entirely disconnected from the underlying real-world dispute—whether plaintiff in his specific circumstances was eligible to run for a position on defendant's city council in November 2015.

EL-KHALIL v OAKWOOD HEALTHCARE, INC

Docket No. 157846. Decided July 10, 2019.

Ali A. El-Khalil brought an action in the Wayne Circuit Court against Oakwood Healthcare, Inc.; Oakwood Hospital–Southshore; Oakwood Hospital–Dearborn; Dr. Roderick Boyes, M.D.; and Dr. Iqbal Nasir, M.D., alleging breach of contract based on an alleged breach of medical staff bylaws that were part of plaintiff's employment agreement. Plaintiff amended the complaint, adding a claim of unlawful retaliation in violation of the Elliott-Larsen Civil Rights Act (ELCRA), MCL 37.2101 *et seq*. Plaintiff alleged that defendants unlawfully retaliated against him by failing to renew his hospital privileges because of a previous lawsuit that plaintiff had brought in August 2014 in which plaintiff had alleged racial discrimination on the basis of his Arabic ethnicity in violation of the ELCRA, tortious interference with an advantageous business relationship, and defamation. Defendants moved for summary disposition under MCR 2.116(C)(7) and (C)(8), and the court, Annette J. Berry, J., granted summary disposition to defendants without specifically identifying which rule supported its decision. Plaintiff appealed, and the Court of Appeals, STEPHENS, P.J., and SERVITTO and SHAPIRO, JJ., affirmed in an unpublished per curiam opinion issued on April 4, 2017 (Docket No. 329986) (*El-Khalil I*). The Court of Appeals determined that the trial court reviewed the summary-disposition motion under MCR 2.116(C)(10), affirmed the decision under that subrule, and found it unnecessary to reach the issues of immunity or release under Subrule (C)(7). Plaintiff sought leave to appeal in the Supreme Court, and the Supreme Court vacated the Court of Appeals opinion and remanded for review under MCR 2.116(C)(7) and (C)(8). 501 Mich 940 (2017). On remand, the Court of Appeals held in an unpublished per curiam opinion issued on April 17, 2018 (Docket No. 329986) (*El-Khalil II*), that summary disposition of plaintiff's ELCRA-retaliation and breach-of-contract claims was appropriate under MCR 2.116(C)(8) and found it unnecessary to address whether summary disposition of either claim was appropriate under MCR 2.116(C)(7) based on immunity or release. Plaintiff again sought leave to appeal in the Supreme Court.

In a unanimous per curiam opinion, the Supreme Court, in lieu of granting leave to appeal and without hearing oral argument, *held*:

A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot.

1. The distinction between MCR 2.116(C)(8) and (C)(10) is one with an important difference: a claim's legal sufficiency as opposed to a claim's factual sufficiency. A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the factual allegations in the complaint. When considering a motion under MCR 2.116(C)(8), a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. On the other hand, a motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. When considering a motion under MCR 2.116(C)(10), a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact.

2. To establish a prima facie case of unlawful retaliation under the ELCRA, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action. In this case, there was no dispute that plaintiff's first amended complaint sufficiently pleaded the first two elements, and defendants did not dispute that suspension of or failure to renew plaintiff's hospital privileges in retaliation for the prior lawsuit was materially adverse to plaintiff. The disputed element was whether plaintiff adequately pleaded a causal connection between his 2014 lawsuit and the nonrenewal of his hospital privileges. Plaintiff's allegation in his first amended complaint that defendants violated the ELCRA because they denied his reappointment in retaliation for the lawsuit he previously filed against defendants under the ELCRA was sufficient under MCR 2.116(C)(8) to satisfy the fourth element of an ELCRA-retaliation claim. While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot. Plaintiff's allegation that the adverse employment action

resulted from his protected activity was enough to withstand challenge under MCR 2.116(C)(8). The Court of Appeals' conclusion that summary disposition was appropriate because plaintiff "failed to present a prima facie case of retaliation" showed that it applied the wrong standard. Accordingly, the Court of Appeals erroneously evaluated plaintiff's causation allegations under MCR 2.116(C)(10).

3. A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in injury to the party claiming breach. In this case, plaintiff argued that defendants breached the medical staff bylaws by denying him a renewal of staff privileges for reasons unrelated to the efficient delivery of quality patient care and professional ability and judgment. The Court of Appeals concluded that plaintiff's colleagues' complaints against him served as a sufficient basis to deny him a renewal of staff privileges under the bylaws and therefore held that dismissal of plaintiff's breach-of-contract claim under MCR 2.116(C)(8) was appropriate. Summary disposition under MCR 2.116(C)(8) was improper for the breach-of-contract claim for the same reasons summary disposition was improper for the ELCRA claim. Plaintiff's assertion that denial of his privileges was in breach of the bylaws was legally sufficient for his breach-of-contract claim to survive MCR 2.116(C)(8). Accordingly, the Court of Appeals erroneously conducted what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for plaintiff's allegations rather than accepting them as true.

Reversed and remanded to the Court of Appeals for consideration of plaintiff's ELCRA and breach-of-contract claims under MCR 2.116(C)(7).

Mark Granzotto, PC (by *Philip Mariani* and *Mark Granzotto*) and *Law Offices of Ben M. Gonek, PLLC* (by *Ben M. Gonek*) for plaintiff.

Dykema Gossett PLLC (by *Jill M. Wheaton*, *Thomas M. Schehr*, and *Jong-Ju Chang*) for defendants.

PER CURIAM. The issue in this case is the proper analysis of a motion for summary disposition under MCR 2.116(C)(8). We emphasize that a motion for

summary disposition under MCR 2.116(C)(8) must be decided on the pleadings alone and that all factual allegations must be taken as true. In this case, the Court of Appeals erroneously conducted an MCR 2.116(C)(10) analysis instead of a (C)(8) analysis because it considered evidence beyond the pleadings and required evidentiary support for plaintiff's allegations rather than accepting them as true. We reverse the judgment of the Court of Appeals, which had affirmed under MCR 2.116(C)(8) the trial court's order granting summary disposition of plaintiff's Elliott-Larsen Civil Rights Act (ELCRA) and breach-of-contract claims, and we remand to that Court for consideration of those claims under MCR 2.116(C)(7).

I. FACTS AND PROCEDURAL HISTORY

A. PLAINTIFF'S FIRST LAWSUIT

Plaintiff Ali El-Khalil, a podiatrist, was employed by Oakwood Hospital–Dearborn (Oakwood Dearborn) from 2008 until 2011, when he was granted staff privileges at various Oakwood hospitals. His privileges were renewed for one- or two-year periods thereafter until June 2015. In August 2014, plaintiff sued Oakwood Healthcare, Inc., Dr. Roderick Boyes, and others, alleging racial discrimination on the basis of his Arabic ethnicity in violation of the ELCRA, tortious interference with an advantageous business relationship, and defamation. Plaintiff claimed that Oakwood and various physicians made false allegations against him in retaliation for his allegations of incompetency and criminality against other physicians. As a result of these allegations, the hospital had initiated administrative proceedings against plaintiff, and after a peer-review process, plaintiff was required to attend an anger-management program, which he successfully

completed. Plaintiff asserted that the peer-review process and resulting actions were conducted with malice and in bad faith.

The trial court granted defendants summary disposition of the discrimination and tortious-interference claims under MCR 2.116(C)(7) and (C)(8), and plaintiff later stipulated to dismissal of his defamation claim.[1] After plaintiff's claims were dismissed, the vice chief of staff at Oakwood Dearborn notified plaintiff that the Medical Staff Peer Review Committee had recently reviewed complaints from plaintiff's peers about plaintiff's behavior. Several e-mails, dated February through May 2015, were attached to the notice. Plaintiff was required to attend the committee's next meeting. Plaintiff responded to the hospital that the complaints were part of an organized plan against him because of racial prejudice and because of his 2014 lawsuit.

On June 2, 2015, Oakwood Dearborn denied plaintiff's reappointment application, citing the complaints about his behavior. The same month, Oakwood Dearborn, Oakwood Hospital–Southshore, and Oakwood Hospital–Wayne followed suit. At that time, plaintiff still had privileges at Oakwood Hospital–Taylor and six other hospitals.

B. PLAINTIFF'S SECOND LAWSUIT

On June 24, 2015, plaintiff filed the lawsuit that is the subject of this appeal, initially alleging only breach of contract based on an alleged breach of the Medical

[1] The Court of Appeals denied plaintiff's delayed application for leave to appeal. *El-Khalil v Oakwood Health Care Sys Inc*, unpublished order of the Court of Appeals, entered January 8, 2016 (Docket No. 328569). Plaintiff did not seek leave to appeal that decision in this Court.

Staff Bylaws, which were part of plaintiff's employment agreement. Plaintiff alleged that his privileges were not set to expire until November 2015 and that they had been suspended without appropriate procedures and notice. On July 6, 2015, plaintiff amended the complaint, adding a claim of unlawful retaliation in violation of the ELCRA, MCL 37.2101 *et seq*. Plaintiff alleged that defendants unlawfully retaliated against him because of his previous lawsuit. Along with his amended complaint, plaintiff attached the e-mails from physicians complaining about his behavior. Plaintiff also attached his response, in which he had denied the allegations made in the e-mails and argued that the complaints arose from racial prejudice and in retaliation for his first lawsuit.

In lieu of filing an answer, defendants moved for summary disposition under MCR 2.116(C)(7) (immunity and release) and (C)(8) (failure to state a claim on which relief can be granted). The trial court granted summary disposition to defendants without specifically identifying which rule supported its decision. With respect to plaintiff's ELCRA claim, the trial court concluded that defendants had "produced significant evidence that Plaintiff has committed a series of abusive, hostile and otherwise unprofessional behaviors," that any adverse action was connected to plaintiff's behavior rather than his protected activity, and that "Plaintiff has offered no support for his retaliation claims beyond his assertions." Regarding the contract claim,[2] the trial court held that while the bylaws were

[2] Plaintiff's first amended complaint alleged that defendants breached Article V of the bylaws by terminating his staff privileges before the end of his appointment term. In response to defendants' motion, plaintiff also argued that his breach-of-contract claim was based on defendants' alleged violation of Article II, § 2(C)—i.e., that defendants denied him renewal of staff privileges because of discrimination and retaliation,

an enforceable contract, plaintiff offered no support beyond his bare assertions that defendants' actions were contrary to the bylaws, and the bylaws contained a release from liability. And the trial court further held regarding the breach-of-contract claim that Drs. Boyes and Nasir were entitled to qualified immunity under the Healthcare Quality Improvement Act, 42 USC 11111(a), and under the healthcare peer-review statute, MCL 331.531(2)(a), and that plaintiff offered no evidentiary support for his claim that defendants were not entitled to qualified immunity.

The Court of Appeals affirmed in an unpublished per curiam opinion. *El-Khalil v Oakwood Health Care Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 4, 2017 (Docket No. 329986) (*El-Khalil I*). The Court of Appeals determined that the trial court reviewed the summary-disposition motion under MCR 2.116(C)(10), affirmed the decision under that subrule, and found it unnecessary to reach the issues of immunity or release under Subrule (C)(7). *Id*. at 4.[3]

This Court vacated the Court of Appeals opinion and remanded for review under MCR 2.116(C)(7) and (C)(8). *El-Khalil v Oakwood Health Care, Inc*, 501 Mich

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rather than because of criteria related to the efficient delivery of quality patient care in the hospital or because of criteria related to professional ability and judgment. Plaintiff acknowledges that this second theory was not specifically pleaded in his first amended complaint, but he argues that the bylaws were attached to the pleading and defendants addressed the argument in their reply. The trial court rejected both theories in granting defendants summary disposition.

[3] On appeal, plaintiff did not challenge the trial court's dismissal of his breach-of-contract claim based on Article V of the bylaws; instead, plaintiff argued only that he had sufficiently alleged a breach of Article II, § 2(C) of the bylaws. The Court of Appeals acknowledged that plaintiff abandoned his Article V claim and addressed only the Article II theory.

940 (2017). On remand, the Court of Appeals held in an unpublished per curiam opinion that summary disposition of plaintiff's ELCRA-retaliation and breach-of-contract claims was appropriate under MCR 2.116(C)(8) and found it unnecessary to address whether summary disposition of either claim was appropriate under MCR 2.116(C)(7) based on immunity or release. *El-Khalil v Oakwood Health Care Inc*, unpublished per curiam opinion of the Court of Appeals, issued April 17, 2018 (Docket No. 329986) (*El-Khalil II*). Plaintiff filed an application for leave to appeal in this Court, asking us to peremptorily reverse the Court of Appeals or grant leave to appeal, contending that the Court of Appeals simply gave an MCR 2.116(C)(8) label to what was essentially its (C)(10) analysis.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Winkler v Marist Fathers of Detroit, Inc*, 500 Mich 327, 333; 901 NW2d 566 (2017).

III. ANALYSIS

The standards governing summary disposition are cited so often and have become such a part of the fabric of our caselaw that the reader of judicial opinions is likely to skim ahead to the analysis. But this case reveals the dangers in doing so. The distinction between MCR 2.116(C)(8) and (C)(10) is one with an important difference: a claim's legal sufficiency as opposed to a claim's factual sufficiency.

A motion under MCR 2.116(C)(8) tests the *legal sufficiency* of a claim based on the factual allegations in the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663,

672; 719 NW2d 1 (2006). When considering such a motion, a trial court must accept all factual allegations as true, deciding the motion on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013); MCR 2.116(G)(5). A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004).

A motion under MCR 2.116(C)(10), on the other hand, tests the *factual sufficiency* of a claim. *Johnson v VanderKooi*, 502 Mich 751, 761; 918 NW2d 785 (2018). When considering such a motion, a trial court must consider all evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id*. A motion under MCR 2.116(C)(10) may only be granted when there is no genuine issue of material fact. *Lowrey v LMPS & LMPJ, Inc*, 500 Mich 1, 5; 890 NW2d 344 (2016). "A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ." *Johnson*, 502 Mich at 761 (quotation marks, citation, and brackets omitted).

A. PLAINTIFF'S ELCRA CLAIM

Plaintiff alleged that defendants retaliated against him in violation of MCL 37.2701 of the ELCRA, which states, in part:

> Two or more persons shall not conspire to, or a person shall not:
>
> (a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

"[T]o establish a prima facie case of unlawful retaliation under the Civil Rights Act, a plaintiff must show (1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." *Rymal v Baergen*, 262 Mich App 274, 300; 686 NW2d 241 (2004) (quotation marks and citation omitted).

As correctly noted by the Court of Appeals, there is no dispute that plaintiff's first amended complaint sufficiently pleaded the first two elements by alleging that plaintiff's 2014 lawsuit was a protected activity and that defendants had notice of the lawsuit. MCL 37.2701. Regarding the third element, defendants don't dispute that suspension of or failure to renew plaintiff's hospital privileges in retaliation for the prior lawsuit was materially adverse to plaintiff. See *Chen v Wayne State Univ*, 284 Mich App 172, 201-202; 771 NW2d 820 (2009); *Haynes v Neshewat*, 477 Mich 29, 36; 729 NW2d 488 (2007). The disputed element is whether plaintiff adequately pleaded a causal connection between his 2014 lawsuit and the nonrenewal of his hospital privileges. Plaintiff alleged in his first amended complaint that defendants violated the ELCRA because they denied his reappointment in retaliation for the lawsuit he previously filed against defendants under the ELCRA. This allegation was sufficient under MCR 2.116(C)(8) to satisfy the fourth element of an ELCRA-retaliation claim.[4]

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[4] MCL 37.2701(a) prohibits an employer from "[r]etaliat[ing] against a person *because* the person has opposed a violation of this act . . . ." (Emphasis added.) We have interpreted the "because" causation language in MCL 37.2701(a) as requiring " 'a causal connection between the protected activity and the adverse employment action.' " *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696

The Court of Appeals concluded that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiff failed to present evidence of a causal connection between his protected activity and the adverse employment action and, therefore, he failed to present a prima facie case of retaliation. *El-Khalil II*, unpub op at 6. According to the panel, plaintiff "provided no evidence to show that retaliation was a motivating factor" in the adverse employment action. *Id*. This inquiry was beyond the scope of appropriate review, as whether the elements of a prima facie case of discrimination have been established constitutes an evidentiary standard, not a pleading requirement. *Swierkiewicz v Sorema NA*, 534 US 506, 510-511; 122 S Ct 992; 152 L Ed 2d 1 (2002).

While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot. Plaintiff alleged that the adverse employment action resulted from his protected activity. That is enough to withstand challenge under MCR 2.116(C)(8). The relative strength of the evidence offered by plaintiff and defendants will matter if the court is asked to decide whether the record contains a genuine issue of material fact. But that is only a question under MCR 2.116(C)(10).

NW2d 646 (2005), quoting *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). We need not explore today the precise contours of the "causal connection" standard for purposes of MCL 37.2701(a). However, we note that in *West v Gen Motors Corp*, 469 Mich 177; 665 NW2d 468 (2003), we indicated that the "causal connection" standard for purposes of MCL 15.362 of the Whistleblowers' Protection Act, MCL 15.361 *et seq*., requires "because of" causation. See *id*. at 185 ("To prevail, plaintiff had to show that his employer took adverse employment action *because of* plaintiff's protected activity . . . ."). And "whistleblower statutes are analogous to antiretaliation provisions of other employment discrimination statutes." *Garg*, 472 Mich at 277 n 5 (quotation marks, citation, and brackets omitted). Again, however, we need not reach this question today.

Defendants argue that because plaintiff had attached to his first amended complaint several e-mails from his colleagues alleging threatening behavior by plaintiff, it was proper for the trial court to consider those e-mails in support of defendants' argument that plaintiff failed to plead a viable ELCRA claim under MCR 2.116(C)(8). We do not disagree that the trial court could properly consider the e-mails under MCR 2.116(C)(8) because they were part of the pleadings. MCR 2.113(C). But plaintiff did not adopt those e-mails and the assertions levied against him in them as true. Rather, plaintiff alleged that the e-mail assertions were evidence of defendants' retaliatory conduct. The trial court's error was not in considering the e-mails as part of the pleadings; the trial court erred by considering the content of the e-mails as substantive evidence sufficient to dismiss plaintiff's claim under MCR 2.116(C)(8).[5]

We hold that the Court of Appeals erroneously evaluated plaintiff's causation allegations under MCR 2.116(C)(10). The Court of Appeals' conclusion that

[5] The trial court and the Court of Appeals relied on other evidence as well, including affidavits that had been attached by both parties to their summary-disposition motions. While consideration of these documents may have been appropriate in evaluating defendants' motion under MCR 2.116(C)(7), if relevant, they were not properly considered under MCR 2.116(C)(8). Because the Court of Appeals did not address defendants' arguments under MCR 2.116(C)(7), and because we remand this case to the Court of Appeals for consideration under MCR 2.116(C)(7), we do not decide whether these documents were sufficient to entitle defendants to summary disposition under MCR 2.116(C)(7).

We also note that the Court of Appeals has held in the past that "where a party brings a summary-disposition motion under the wrong subrule, the trial court may proceed under the appropriate subrule as long as neither party is misled." *Blair v Checker Cab Co*, 219 Mich App 667, 670-671; 558 NW2d 439 (1996). Because neither the parties nor the lower courts have argued that this rule applies, we decline to address whether we would adopt this rule or how it would apply in this case.

summary disposition was appropriate because plaintiff "failed to present a prima facie case of retaliation," *El-Khalil II*, unpub op at 6, shows that it applied the wrong standard. Plaintiff adequately pleaded causation by alleging that defendants decided not to reappoint him after and *because of* his 2014 lawsuit. See *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995) (stating that a motion for summary disposition under MCR 2.116(C)(8) "is tested on the pleadings alone, and all factual allegations contained in the complaint must be accepted as true"). While plaintiff will need to factually establish the causal-connection element of retaliation if defendants move for summary disposition under MCR 2.116(C)(10), i.e., show more than temporal proximity between the adverse employment action and the lawsuit, it was premature for the Court of Appeals to affirm dismissal on that basis under MCR 2.116(C)(8).

B. PLAINTIFF'S BREACH-OF-CONTRACT CLAIM

Similarly, plaintiff sufficiently pleaded a claim for breach of contract. "A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in [injury] to the party claiming breach." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 178; 848 NW2d 95 (2014). Plaintiff argues that defendants breached Article II, § 2(C) of the bylaws by denying him a renewal of staff privileges for reasons unrelated to the efficient delivery of quality patient care and professional ability and judgment.[6] Section 2(C) provides:

[6] As discussed earlier, plaintiff's first amended complaint alleged breach of Article V but, in response to defendants' motion, plaintiff argued that defendants also breached Article II when they declined to

> Medical Staff membership or particular clinical privileges shall not be denied on the basis of any criteria unrelated to the efficient delivery of quality patient care in the hospital, to professional ability and judgment, or to the community need, including but not limited to sex, race, creed, color, sexual orientation and national origin.

The Court of Appeals concluded that plaintiff's colleagues' complaints against him served as a sufficient basis to deny him a renewal of staff privileges under § 2(C) and therefore held that dismissal of plaintiff's breach-of-contract claim under MCR 2.116(C)(8) was appropriate. *El-Khalil II*, unpub op at 6-7. According to the panel, the colleagues' complaints about plaintiff's unprofessional interactions with staff at the hospital supported the finding of a violation of § 2(C) because unprofessional interactions with hospital staff can negatively affect the quality of healthcare provided to patients. *Id*. at 7.

Summary disposition under MCR 2.116(C)(8) was improper for the breach-of-contract claim for the same reasons summary disposition was improper for the

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reappoint him, allegedly in retaliation for his prior lawsuit. Defendants responded to that claim in their reply, and the trial court granted summary disposition in favor of defendants based on both theories. On appeal, plaintiff abandoned the Article V theory and argued only that defendants breached Article II. The Court of Appeals addressed the Article II theory in both of its opinions. Prior to their response to plaintiff's application in this appeal, defendants did not challenge plaintiff's failure to include the Article II theory in his first amended complaint. In fact, in their response to plaintiff's prior application for leave to appeal in this Court, defendants specifically stated that the Court of Appeals "properly decided" plaintiff's breach-of-contract claim under the Article II theory. Accordingly, because defendants did not preserve a challenge to plaintiff's failure to raise this theory in his first amended complaint, we consider this theory as if it had been pleaded in the first amended complaint. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008) ("Under our jurisprudence, a litigant must preserve an issue for appellate review by raising it in the trial court.").

ELCRA claim. Plaintiff asserts that the denial of his privileges was in breach of the bylaws, not for unprofessional conduct as defendants argued. Plaintiff's assertion is legally sufficient for his breach-of-contract claim to survive MCR 2.116(C)(8). The factual dispute as to whether his colleagues' complaints were true or whether they were falsely leveled against him because of discrimination and retaliation is a determination to be made under MCR 2.116(C)(10).

IV. CONCLUSION

Because the Court of Appeals erroneously conducted what amounted to analysis under MCR 2.116(C)(10) in deciding a motion under MCR 2.116(C)(8) by requiring evidentiary support for plaintiff's allegations rather than accepting them as true, we reverse the judgment of the Court of Appeals and remand to that Court for consideration of plaintiff's ELCRA and breach-of-contract claims under MCR 2.116(C)(7).

We do not retain jurisdiction.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred.

DYE v ESURANCE PROPERTY &
CASUALTY INSURANCE COMPANY

Docket No. 155784. Argued October 9, 2018 (Calendar No. 1). Decided July 11, 2019.

Matthew Dye brought an action in the Washtenaw Circuit Court against Esurance Property and Casualty Insurance Company and GEICO Indemnity Company, seeking personal protection insurance (PIP) benefits under the no-fault act, MCL 500.3101 *et seq*., for injuries he sustained in a motor vehicle accident while driving a vehicle he had recently purchased. At plaintiff's request, plaintiff's father had registered the vehicle in plaintiff's name at the Secretary of State's office and obtained a no-fault insurance policy from Esurance. The declarations page of the policy identified only plaintiff's father as the named insured. At the time of the accident, plaintiff was living with his wife, who owned a vehicle that was insured by GEICO. After Esurance and GEICO refused to cover plaintiff's claim, plaintiff filed a breach-of-contract claim against both insurers along with a declaratory action, alleging that either Esurance or GEICO was obligated to pay his no-fault PIP benefits and requesting that the trial court determine the parties' respective rights and duties. Eventually, Esurance paid plaintiff more than $388,000 in PIP benefits, but it continued to maintain that GEICO was the responsible insurer. GEICO acknowledged that it was the primary insurer and began settlement negotiations with plaintiff and Esurance. Then, on November 13, 2014, the Court of Appeals' opinion in *Barnes v Farmers Ins Exch*, 308 Mich App 1 (2014), was published. *Barnes* held that under MCL 500.3113(b), when none of the owners of a vehicle maintains the requisite coverage, no owner may recover PIP benefits. After *Barnes* was published, GEICO reevaluated its legal position and ceased settlement discussions. Esurance filed a cross-claim against GEICO, arguing that GEICO had breached a settlement agreement. GEICO moved for summary disposition of plaintiff's claim, arguing that plaintiff was not entitled to PIP benefits in light of *Barnes*. Plaintiff also moved for summary disposition, arguing that *Barnes* was wrongly decided and, regardless, that his father was an owner and registrant for purposes of the no-fault act. The trial court, Timothy C. Connors, J.,

granted Esurance summary disposition on its cross-claim, ruling that GEICO and Esurance had entered into a valid settlement agreement and that GEICO had priority over plaintiff's claim. The court denied GEICO's motion for summary disposition and granted plaintiff's motion for summary disposition, thus determining that GEICO was required to provide no-fault benefits to plaintiff. The court granted plaintiff's motion against GEICO with regard to no-fault coverage and priority, stating that it did not need to address *Barnes* because plaintiff's father was an owner and registrant of the vehicle and ruling that the only issue remaining between plaintiff and GEICO was the amount of damages. GEICO filed an interlocutory application for leave to appeal, which the Court of Appeals granted. In an unpublished per curiam opinion issued April 4, 2017 (Docket No. 330308), the Court of Appeals, BECKERING, P.J., and BORRELLO, J. (O'CONNELL, J., concurring in part and dissenting in part), held that the trial court had erred by granting summary disposition to Esurance because the parties had not yet reached a meeting of the minds on all the essential terms of the settlement agreement. The majority agreed with *Barnes*'s interpretation of MCL 500.3101(1), and it held that the trial court had erred as a matter of law by finding that plaintiff's father was a "registrant" of the vehicle for purposes of MCL 500.3101(1). However, the majority held that there remained genuine issues of material fact as to whether plaintiff's father was an "owner" of the vehicle, and it therefore remanded the case to the trial court for further proceedings. Esurance applied for leave to appeal in the Supreme Court, and both plaintiff and GEICO filed cross-appeals. The Supreme Court granted plaintiff's cross-application for leave to appeal and denied Esurance's application and GEICO's cross-application. 501 Mich 944 (2017).[1]

In an opinion by Justice ZAHRA, joined by Chief Justice MCCORMACK and Justices MARKMAN, VIVIANO, and BERNSTEIN, the Supreme Court *held*:

An owner or registrant of a motor vehicle is not required to personally purchase no-fault insurance for his or her vehicle in order to avoid the statutory bar to PIP benefits. MCL 500.3101(1) does not prescribe any particular manner by which no-fault insurance must be maintained, and it contains no requirement

[1] The Legislature recently made substantial amendments to the no-fault act. See 2019 PAs 21 and 22. The opinions do not address those amendments, and all references in the opinions and this syllabus are to the preamendment version of the act.

that the insurance be purchased or obtained by a vehicle's owner or registrant. *Barnes* and other cases suggesting to the contrary were overruled to the extent that they were inconsistent with this holding. The Court of Appeals judgment was reversed in part. The part of the Court of Appeals judgment regarding the purported settlement agreement between Esurance and GEICO was left undisturbed.

1. Under the no-fault act, an insurer is liable to pay PIP benefits to any Michigan resident for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. These statutory benefits arise regardless of whether an injured person has obtained a no-fault insurance policy. Therefore, determining whether no-fault benefits are available to an injured person does not depend on who purchased, obtained, or otherwise procured no-fault insurance. The only relevant inquiry is whether the injured person can establish an accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle. This relatively low threshold for statutory no-fault coverage was enacted to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. Given that these benefits would be available to all Michigan residents, the Legislature sought to achieve this purpose by enacting the system of compulsory insurance set forth in MCL 500.3101(1). To ensure compliance with MCL 500.3101(1), the Legislature excluded persons from receiving PIP benefits under various circumstances listed in MCL 500.3113, including if the person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by MCL 500.3101 was not in effect.

2. MCL 500.3101(1) provides that "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." MCL 500.3101(1) requires only that the owner or registrant "maintain" no-fault insurance, which means to keep in an existing state. MCL 500.3101(1) does not prescribe any particular manner by which a registrant or owner must keep no-fault insurance in an existing state, and MCL 500.3101(4) expressly contemplates that the security required by MCL 500.3101(1) may be provided by any other method approved by the Secretary of State as affording security equivalent to that afforded by a policy of insurance. If MCL 500.3101(1) were to be interpreted so that only a registrant or owner could obtain insurance on a vehicle, it

would limit the Secretary of State's power under MCL 500.3101(4) to allow security by any other method, and it would effectively read a requirement into MCL 500.3101(1) that the Legislature did not manifest through the words of MCL 500.3101(1) itself. When read together, MCL 500.3101(1) and MCL 500.3113(b) did not preclude plaintiff from receiving PIP benefits. *Iqbal v Bristol West Ins Group*, 278 Mich App 31 (2008), did not hold that at least one owner must obtain no-fault insurance; instead, it held that MCL 500.3113(b) refers to the required security or insurance under MCL 500.3101 only as it relates to the vehicle and therefore a plaintiff may be entitled to PIP benefits if the vehicle was insured, regardless of whether that plaintiff was the owner of the vehicle. Thus, the factual distinctions between *Barnes* and *Iqbal* did not place *Barnes* outside the ambit of *Iqbal*'s holding.

3. MCL 500.3113(b) provides that a person is not entitled to PIP benefits if at the time of the accident "[t]he person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." The term "which" in this context represents one of two possible antecedents: the first is a person, and the last is a vehicle. The last-antecedent rule provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation, and nothing in MCL 500.3113(b) requires a different result. Moreover, the usage notes for the definition of "which" state that the term regularly refers to inanimate objects and never to individual persons. Accordingly, the phrase "with respect to which the security required by section 3101 or 3103 was not in effect" refers to the vehicle, not the person. Because the conclusion in *Barnes* that "when none of the owners maintains the requisite coverage, no owner may recover PIP benefits" was contrary to the plain language of the no-fault act, *Barnes* was overruled.

Reversed in part and remanded to the Washtenaw Circuit Court for further proceedings.

Justice CLEMENT, dissenting, would have held that the no-fault act disqualifies an owner from PIP benefits if the owner is injured in his or her own vehicle and no owner has maintained security. While she agreed with the majority that MCL 500.3113(b) contemplates a relationship between "security" and "vehicle," she disagreed with the majority's conclusion that security "with respect to" a vehicle is the same as insurance "for" or "on" that

vehicle, given that nothing in the no-fault act requires a vehicle to be insured. Rather, she concluded that MCL 500.3113(b) requires a certain person—namely, the vehicle's owner or registrant—to maintain security against liability as provided in MCL 500.3101, and the phrase "with respect to" connects the security to the vehicle by way of the person. Justice CLEMENT stated that the critical nexus among owner, security, and vehicle was of a whole with the rest of the no-fault act, including the priority schemes set out in MCL 500.3114 and MCL 500.3115, and that the purpose of the no-fault act would fall apart if an owner named in no policy was nonetheless understood to have maintained security through a nonowner third party's policy. Accordingly, she concluded that plaintiff's statutory duty to maintain security was not met merely by asking his father to get no-fault insurance. Because the record did not reveal whether plaintiff's father was an owner of plaintiff's car, she would have remanded the case to the trial court to determine whether plaintiff was disqualified from PIP benefits.

Justice CAVANAGH did not participate in the disposition of this case because the Court considered it before she assumed office.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — ELIGIBILITY — PURCHASER OF INSURANCE POLICY.

An owner or registrant of a motor vehicle is not required to personally purchase no-fault insurance under MCL 500.3101(1) for his or her vehicle in order to avoid the bar to personal protection insurance benefits set forth in MCL 500.3113(b).

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Kitch Drutchas Wagner Valitutti & Sherbrook (by *Christina A. Ginter* and *Marcy Tayler*) for Esurance Property & Casualty Insurance Co.

Zausmer, August & Caldwell, PC (by *Amy S. Applin*) for GEICO Indemnity Co.

Amici Curiae:

Speaker Law Firm, PLLC (by *Liisa R. Speaker* and *Jennifer M. Alberts*) for the Coalition Protecting Auto No-Fault.

Hewson & Van Hellemont, PC (by *Nicholas S. Ayoub*) for Michigan Defense Trial Counsel.

Plunkett Cooney (by *Robert G. Kamenec* and *Josephine A. DeLorenzo*) for the Property Casualty Insurers Association of America.

Anselmi Mierzejewski Ruth & Sowle PC (by *Michael D. Phillips*) for the Michigan Automobile Insurance Placement Facility.

ZAHRA, J. This case presents the significant question of whether an owner or registrant of a motor vehicle involved in an accident is excluded from receiving statutory no-fault insurance benefits under the no-fault act, MCL 500.3101 *et seq*., when someone other than an owner or registrant purchased no-fault insurance for that vehicle.[1] Relying on *Barnes v Farmers Ins Exch*,[2] the Court of Appeals concluded that "[a]t least one owner or registrant must have the insurance required by MCL 500.3101(1), and 'when none of the owners maintains the requisite coverage, no owner may recover [personal injury protection (PIP)] benefits.' "[3] The insured sought leave to appeal in this Court, and we granted the application in part to consider this question.[4]

We conclude that an owner or registrant of a motor vehicle is not required to personally purchase no-fault

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[1] The Legislature recently made substantial amendments to the no-fault act. 2019 PAs 21 and 22. This opinion does not address those amendments and quotes the preamendment version of the act.

[2] *Barnes v Farmers Ins Exch*, 308 Mich App 1; 862 NW2d 681 (2014).

[3] *Dye v Esurance Prop & Cas Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued April 4, 2017 (Docket No. 330308), p 6, quoting *Barnes*, 308 Mich App at 8-9.

[4] *Dye v Esurance Prop & Cas Ins Co*, 501 Mich 944 (2017).

insurance for his or her vehicle in order to avoid the statutory bar to PIP benefits. Rather, MCL 500.3101(1) only requires that the owner or registrant "maintain" no-fault insurance, and the term "maintain," as commonly understood, means to keep in an existing state. Because MCL 500.3101(1) does not prescribe any particular manner by which no-fault insurance must be maintained, we will not read into the statute a requirement that the insurance be purchased or obtained by a vehicle's owner or registrant. Further, the grammatical composition of the MCL 500.3113(b) benefits exclusion, including the use of the term "which" within that provision, signifies that the exclusion does not apply if the security required by MCL 500.3101(1) was "in effect" at the time of the accident.[5] Though defendant maintains that the term "which" in this provision refers to the owner or operator of the motor vehicle, the usage of "which" at the time the no-fault act was enacted, as well as currently, reflects that this term is not properly used to refer to individual persons.

We therefore hold that an owner or registrant of a motor vehicle involved in an accident is not excluded from receiving no-fault benefits when someone other than that owner or registrant purchased no-fault insurance for that vehicle because the owner or registrant of the vehicle may "maintain" the insurance coverage required under the no-fault act even if he or she did not purchase the insurance. The Court of Appeals' decision in *Barnes* and other caselaw suggesting to the contrary are overruled to the extent that

[5] MCL 500.3113(b) states that "[a] person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident . . . [t]he person was the owner or registrant of a motor vehicle . . . involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect."

they are inconsistent with our holding.[6] We reverse in part the judgment of the Court of Appeals and remand this case to the Washtenaw Circuit Court for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

On September 26, 2013, plaintiff Matthew Dye was involved in a motor vehicle accident and suffered serious injuries that included a traumatic brain injury. At that time, plaintiff was 32 years old, fully employed, a member of the National Guard who had spent time in Afghanistan, and recently married. At some point before the accident, plaintiff had granted his father power of attorney "to do bussiness [sic] at the secretary of state on [plaintiff's] behalf." At the time of the accident, plaintiff was driving a 1997 BMW that he had purchased two months earlier. After the purchase,

[6] This Court stated in *Citizens Ins Co of America v Federated Mut Ins Co*, 448 Mich 225, 228; 531 NW2d 138 (1995), that "Michigan's no-fault act requires the *owner* or *registrant* of a motor vehicle to purchase an automobile insurance policy . . . ." The Court apparently used the word "purchase" because owners commonly are the persons who maintain insurance on their vehicles, but in so using the word "purchase" the Court strayed from the actual text of the no-fault act. The use of the word "purchase" instead of the word "maintain" was inconsequential to the analysis in *Citizens*, because the word "maintain" had no particular significance to the issue addressed in that case. The question decided in *Citizens* was whether an insurance policy could shift residual liability insurance from the owner or registrant of a motor vehicle to the driver of the vehicle. *Citizens* held that the policy was essentially unenforceable in this respect because "the no-fault act unambiguously requires that a policy of automobile insurance, sold to a vehicle owner pursuant to the act, must provide coverage for residual liability arising from use of the vehicle so insured." *Id*. at 230. Unlike this case, there was no dispute in *Citizens* about whether insurance was properly maintained on the vehicles at issue. Accordingly, we clarify that *Citizens* should not be read to suggest that *only* the owner or registrant of a motor vehicle may "maintain" an automobile insurance policy.

plaintiff asked his father to register the vehicle for him and to obtain no-fault insurance. His father registered the vehicle in plaintiff's name at the Secretary of State's office and obtained a no-fault insurance policy from Esurance via the Internet. The declarations page of the policy identified only plaintiff's father as the named insured. At the time of the accident, plaintiff was living with his wife, who owned a Dodge Caravan that was insured by GEICO.

After Esurance and GEICO refused to cover plaintiff's claim, plaintiff filed a breach-of-contract claim against both insurers along with a declaratory action, alleging that either Esurance or GEICO was obligated to pay his no-fault PIP benefits and requesting that the trial court determine the parties' respective rights and duties. A priority dispute between Esurance and GEICO ensued.[7] Eventually, Esurance paid plaintiff more than $388,000 in PIP benefits, but Esurance continued to maintain that GEICO was the responsible insurer. GEICO acknowledged that it was the primary insurer and began settlement negotiations with plaintiff and Esurance.

Then, on November 13, 2014, the Court of Appeals' opinion in *Barnes v Farmers Ins Exch* was redesignated "for publication."[8] In *Barnes*, the panel held that

[7] A personal protection insurance policy applies to accidental bodily injury that occurs "to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household, if the injury arises from a motor vehicle accident." MCL 500.3114(1). In this case, Esurance maintained that because plaintiff was not a named insured under the no-fault policy on his own car and because plaintiff was living with his wife—not his father—at the time of the accident, plaintiff should look to GEICO rather than Esurance for the payment of PIP benefits.

[8] *Barnes* was originally released as an unpublished opinion having no precedential value in the Court of Appeals or lower courts. But pursuant

"under the plain language of MCL 500.3113(b), when none of the owners maintains the requisite coverage, no owner may recover PIP benefits."[9] After *Barnes* was published, GEICO reevaluated its legal position and ceased settlement discussions. Essentially, what had been—before *Barnes*—merely a priority dispute among potential insurers over who had to pay plaintiff's claim turned into a dispute about whether plaintiff was covered under the no-fault act.

Esurance filed a cross-claim against GEICO arguing that GEICO had breached a settlement agreement. GEICO moved for summary disposition of plaintiff's claim, arguing that plaintiff was not entitled to PIP benefits in light of the now-published decision in *Barnes* because plaintiff owned the subject vehicle but had not insured it and the person who had insured it (plaintiff's father) was not an "owner" as defined in MCL 500.3101. Plaintiff, in turn, moved for summary disposition, arguing that *Barnes* was wrongly decided and, regardless, that his father was an owner and registrant for purposes of the no-fault act because he had the right to use the BMW and because he had physically registered the vehicle.

The trial court granted Esurance summary disposition on its cross-claim, ruling that GEICO and Esurance had entered into a valid settlement agreement and that GEICO had priority over plaintiff's claim. The trial court denied GEICO's motion for summary disposition and granted plaintiff's motion for summary disposition, thus determining that GEICO was required to provide no-fault benefits to plaintiff. The trial

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to MCR 7.215(D)(3), the panel granted the defendant's request to publish the opinion, providing *Barnes* precedential effect under the rule of stare decisis. MCR 7.215(C)(2).

[9] *Barnes*, 308 Mich App at 8-9.

court stated that it did not need to address the decision in *Barnes* because plaintiff's father was an owner and registrant of the BMW. According to the trial court, the only issue remaining between plaintiff and GEICO was the amount of damages. The trial court thus entered an order granting Esurance summary disposition on its cross-claim, denying GEICO's motion for summary disposition with regard to plaintiff, and granting plaintiff's motion against GEICO with regard to no-fault coverage and priority.

GEICO filed an interlocutory application for leave to appeal, which the Court of Appeals granted.[10] In an unpublished per curiam opinion, the Court of Appeals reversed the trial court's decision that granted summary disposition to Esurance.[11] The panel held that the trial court erred by enforcing the settlement agreement. The panel explained that "[a]lthough the issuance of *Barnes* promptly snuffed out what appears to have been a 'nearly done' deal, the parties had not yet reached a meeting of the minds on all of the essential terms, and the trial court erred in granting Esurance's motion for summary disposition on its cross-claim for enforcement of the alleged agreement."[12]

In regard to the trial court's decision denying GEICO summary disposition against plaintiff on the basis of *Barnes*, the panel embraced *Barnes*'s interpretation of MCL 500.3101(1) without reservation, stating:

> Although a motor vehicle may have more than one owner for purposes of the no fault act, it is not sufficient

[10] *Dye v Esurance Prop & Cas Ins Co*, unpublished order of the Court of Appeals, entered April 5, 2016 (Docket No. 330308).

[11] *Dye*, unpub op at 1.

[12] *Id*. at 11.

> that a vehicle is insured by just anyone. At least one owner or registrant must have the insurance required by MCL 500.3101(1), and "when none of the owners maintains the requisite coverage, no owner may recover PIP benefits."[13]

The Court of Appeals then held that the trial court erred as a matter of law by finding that plaintiff's father was a "registrant" for purposes of MCL 500.3101(1).[14] A majority of the panel, however, agreed with the trial court that there remained genuine issues of material fact as to whether plaintiff's father was an "owner" of the BMW plaintiff was driving at the time of the accident.[15] Therefore, the Court of Appeals remanded this case to the trial court for further proceedings.[16]

Esurance filed an application in this Court arguing that the Court of Appeals improperly reversed the trial court's decision to enforce the purported settlement agreement by granting Esurance summary disposition on its cross-claim against GEICO. Plaintiff filed a cross-appeal arguing that *Barnes* was improperly decided and that Esurance could not deny liability simply because plaintiff himself did not obtain no-fault insurance. GEICO filed a cross-appeal arguing that the Court of Appeals erred by ruling that a question of fact precluded summary disposition in favor of GEICO on the issue of whether plaintiff's father was a co-owner of the BMW that plaintiff, in GEICO's view, failed to insure. This Court granted plaintiff's cross-application

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[13] *Id*. at 6, quoting *Barnes*, 308 Mich App at 8-9 (citations omitted).

[14] *Dye*, unpub op at 6.

[15] *Id*. at 9. Judge O'CONNELL dissented from the majority's conclusion that there were questions of fact about whether plaintiff's father was an "owner" of the vehicle but agreed with the panel in all other respects. *Id*. (O'CONNELL, J., concurring in part and dissenting in part) at 1.

[16] *Id*. (opinion of the Court) at 12.

for leave to appeal and denied Esurance's application and GEICO's cross-application.[17] Accordingly, the sole issue before the Court is "whether an owner or registrant of a motor vehicle involved in an accident may be entitled to personal protection insurance benefits for accidental bodily injury where no owner or registrant of the motor vehicle maintains security for payment of benefits under personal protection insurance."[18]

II. STANDARD OF REVIEW AND APPLICABLE RULES OF STATUTORY INTERPRETATION

This Court reviews de novo a trial court's decision on a motion for summary disposition.[19] The parties brought their respective summary disposition motions under MCR 2.116(C)(10), which tests the factual sufficiency of a claim.[20] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion."[21] If, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, . . . the moving party is entitled to judgment or partial judgment as a matter of law,"[22] and the trial court must grant the motion without delay.[23]

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[17] *Dye*, 501 Mich 944.

[18] *Id*.

[19] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[20] *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[21] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[22] MCR 2.116(C)(10).

[23] MCR 2.116(I)(1).

This Court also reviews de novo questions of statutory interpretation.[24] "The role of this Court in interpreting statutory language is to 'ascertain the legislative intent that may reasonably be inferred from the words in a statute.' "[25] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent."[26] " '[W]here the statutory language is clear and unambiguous, the statute must be applied as written.' "[27] " '[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' "[28] Neither will this Court "rewrite the plain statutory language and substitute our own policy decisions for those already made by the Legislature."[29]

III. ANALYSIS

A. LEGAL BACKGROUND

Under the no-fault act, "an insurer is liable to pay [PIP] benefits [to any Michigan resident] for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ."[30] Although designated as "personal protection insurance" under the no-fault act, PIP benefits

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[24] *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).

[25] *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (citation omitted).

[26] *Badeen*, 496 Mich at 81.

[27] *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018) (citation omitted).

[28] *Id*., quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002) (alteration in original).

[29] *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000).

[30] MCL 500.3105(1).

are in fact statutory benefits, arising regardless of whether an injured person has obtained a no-fault insurance policy. Indeed, a no-fault insurance carrier can be liable for no-fault benefits even if the motor vehicle it insures was not the actual motor vehicle involved in the accident.[31] PIP benefits are paid to injured persons solely by insurers who are authorized to write no-fault insurance policies in this state or who have voluntarily filed a certificate complying with MCL 500.3163.[32]

For these reasons, determining whether no-fault benefits are available to an injured person does not depend on "who" purchased, obtained, or otherwise procured no-fault insurance. The only relevant inquiry is whether the injured person can establish an "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle . . . ."[33] By establishing this relatively low threshold for statutory no-fault coverage, the no-fault act seeks to "provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses."[34]

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[31] See *Detroit Auto Inter-Ins Exch v Home Ins Co*, 428 Mich 43, 49; 405 NW2d 85 (1987). Amicus Michigan Defense Trial Counsel agrees, acknowledging that "[e]ligibility to claim no-fault benefits for motor-vehicle-related injuries that occur in the state is not contingent upon the injured person having his or her own no-fault insurance policy."

[32] The grand scope of these insurers' obligations became evident soon after the no-fault act was enacted. In response to concerns that "Michigan's no-fault law provision for unlimited personal injury protection benefits placed too great a burden on insurers, particularly small insurers, in the event of 'catastrophic' injury claims," *In re Certified Question*, 433 Mich 710, 714; 449 NW2d 660 (1989), the Legislature created the Michigan Catastrophic Claims Association through Public Act 136 of 1978, codified at MCL 500.3104.

[33] MCL 500.3105(1).

[34] *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978).

And given that these statutory benefits would be available to all Michigan residents, "[t]he Legislature believed this . . . could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state."[35] Accordingly, the Legislature enacted MCL 500.3101(1), which provides, in part, that "[t]he owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance . . . ." And to ensure compliance with MCL 500.3101(1), the Legislature excluded persons from receiving PIP benefits under various circumstances listed in MCL 500.3113. In this case, GEICO maintains that MCL 500.3113(b) precludes plaintiff from obtaining PIP benefits because, in its view, plaintiff "was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect." In GEICO's view, "the security required by section 3101 . . . was not in effect" because, as emphasized by GEICO, MCL 500.3101(1) mandates that an "*owner* or *registrant* of a motor vehicle required to be registered in this state *shall maintain* security for payment of benefits under personal protection insurance . . . ." (Emphasis added.)

Against this backdrop, the legal issue before the Court, as aptly stated by amicus Property Casualty Insurers Association of America,

> hinges on whether the phrase "the owner or registrant of a motor vehicle required to be registered in this state shall maintain security," means that the owner (or at least *an* owner) must be the one to acquire the insurance policy, or whether it suffices for *any* person to provide the required

[35] *Id*. at 579 (emphasis omitted).

> security such that all that matters is that the vehicle is insured.[36]

GEICO maintains that the former interpretation is correct, and accordingly argues that plaintiff is excluded from receiving PIP benefits because he owned the BMW and was not the one to obtain the no-fault insurance policy. Plaintiff maintains that the latter interpretation is correct, and he argues that he is not excluded from coverage because he owned the BMW and the BMW was insured. While this Court has not yet addressed this issue, the Court of Appeals has considered very similar arguments in two published opinions, which we now review.

B. COURT OF APPEALS CASELAW

In *Iqbal v Bristol West Ins Group*,[37] the Court of Appeals first addressed in a published decision whether every owner of a vehicle is "required to maintain insurance on the vehicle under the no-fault act . . . ." In that case, the plaintiff did not have title to any vehicle, but he frequently used his brother's BMW.[38] The plaintiff was injured while driving the BMW and requested no-fault benefits. In his answers to interrogatories, the plaintiff indicated that the BMW " 'belonged to my brother but I had primary possession.' "[39] The insurer claimed that the plaintiff should also be considered an owner of the car and that as an owner, the plaintiff must have obtained the insurance policy to obtain PIP benefits. The panel rejected this argument, stating:

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[36] Some emphasis omitted.

[37] *Iqbal v Bristol West Ins Group*, 278 Mich App 31, 33; 748 NW2d 574 (2008).

[38] *Id*. at 34.

[39] *Id*.

> Viewing the statutory language in the context of the given facts, the statute would preclude plaintiff from being entitled to PIP benefits if plaintiff "was the owner . . . of [the BMW] . . . involved in the accident with respect to which the security required by section 3101 . . . was not in effect." As part of the process of construing MCL 500.3113(b), we shall make the assumption that plaintiff was an "owner" of the BMW, as that term is defined in MCL 500.3101(2)(g)(i). Next, the phrase "with respect to which the security required by section 3101 . . . was not in effect," § 3113(b), when read in proper grammatical context, defines or modifies the preceding reference to the *motor vehicle involved in the accident*, here the BMW, and not the person standing in the shoes of an owner or registrant. The statutory language links the required security or insurance solely to the vehicle. Thus, the question becomes whether the BMW, and not plaintiff, had the coverage or security required by MCL 500.3101. As indicated above, the coverage mandated by MCL 500.3101(1) consists of "personal protection insurance, property protection insurance, and residual liability insurance." While plaintiff did not obtain this coverage, there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b), making it irrelevant whether it was plaintiff's brother who procured the vehicle's coverage or plaintiff. Stated differently, the security required by MCL 500.3101(1) was in effect for purposes of MCL 500.3113(b) as it related to the BMW.[40]

In sum, *Iqbal* held that the only requirement under MCL 500.3113(b) was that there be no-fault insurance on the vehicle—who purchased the policy was irrelevant. Plaintiff's position is in accordance with *Iqbal*.

In *Barnes v Farmers Ins Exch*,[41] the Court of Appeals was presented with a very similar question. In that case, the plaintiff and her mother were the titled

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[40] *Id*. at 39-40 (alteration in original).

[41] *Barnes*, 308 Mich App 1.

owners of a vehicle.[42] The plaintiff's mother gave a friend from church, Richard Huling, money to obtain insurance for the vehicle.[43] Huling purchased a policy.[44] The plaintiff was later injured in an accident, and requested PIP benefits under Huling's policy.[45] The insurer denied the request, and the plaintiff brought suit.[46] The insurer moved for summary disposition, contending that the "plaintiff could not recover PIP benefits from it under the policy because the policy only covered the named insured, Huling, and was never intended to benefit plaintiff."[47]

In *Barnes*, after hearing arguments, "the trial court ruled that the no-fault act required at least one of the 'owners' to have insurance. It reasoned that because neither plaintiff nor [her mother] had insurance, plaintiff was barred from seeking benefits under the no-fault act."[48] The trial court granted summary disposition to the insurer.[49]

The plaintiff in *Barnes* appealed, arguing that *Iqbal* required the opposite result. The Court of Appeals stated:

> In the present case, plaintiff cites *Iqbal* and argues that the fact that neither she nor [her mother] insured the Cavalier does not matter because Huling did. Plaintiff contends that this is so regardless of whether Huling was an owner of the Cavalier. *Iqbal* should not be read so broadly as to apply to even nonowners. The Court made it

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[42] *Id*. at 2-3.

[43] *Id*. at 3.

[44] *Id*.

[45] *Id*.

[46] *Id*.

[47] *Id*. at 3-4.

[48] *Id*. at 5.

[49] *Id*.

> clear that it was addressing the problem of whether the statute required "each and every owner" to maintain insurance on a vehicle. The Court opined that to so hold would preclude an owner who obtained insurance from receiving PIP benefits as long as any other co-owner did not maintain coverage as well.[50]

Thus, *Barnes* distinguished *Iqbal*, stating that "while *Iqbal* held that each and every owner need not obtain insurance, it did not allow for owners to avoid the consequences of MCL 500.3113(b) if no owner obtained the required insurance."[51] In sum, *Barnes* held that only a registrant or owner may procure no-fault insurance for a vehicle. *Barnes* is consistent with GEICO's position, and plaintiff argues that *Barnes* improperly distinguished *Iqbal*.

C. APPLICATION

While the Court of Appeals in *Iqbal* and *Barnes* focused primarily on the language of MCL 500.3113(b), our analysis primarily concerns the language of MCL 500.3101(1). After examining this provision, we conclude that the Legislature carefully chose its words when it prescribed that "[t]he owner or registrant of a motor vehicle required to be registered in this state shall *maintain* security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance."[52] The first and most relevant definition of "maintain" is: "to keep in an existing state (as of repair, efficiency, or validity): preserve from failure or decline[.]"[53] MCL 500.3101(1)

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[50] *Id*. at 7-8 (citations omitted).

[51] *Id*. at 8.

[52] MCL 500.3101(1) (emphasis added).

[53] *Merriam-Webster's Collegiate Dictionary* (11th ed). See also Oxford University Press, *English Oxford Living Dictionaries*,

only requires that the owner or registrant "maintain" no-fault insurance, which, as commonly understood, simply means to keep in an existing state. Further, MCL 500.3101(1) does not prescribe any particular manner by which a registrant or owner must keep no-fault insurance in an existing state. Indeed, MCL 500.3101(4) expressly contemplates that the "[s]ecurity required by subsection (1) may be provided by any other method approved by the secretary of state as affording security equivalent to that afforded by a policy of insurance, if proof of the security is filed and continuously maintained with the secretary of state throughout the period the motor vehicle is driven or moved on a highway." If we were to accept GEICO's interpretation that only a registrant or owner may obtain insurance on a vehicle, we would limit the Secretary of State's power to allow security "by any other method" and we would also have effectively read a requirement into MCL 500.3101(1) that the Legislature did not manifest through the words of MCL 500.3101(1) itself.[54]

<https://en.oxforddictionaries.com/definition/maintain> (accessed November 30, 2018) [https://perma.cc/T3A8-8EDR], which defines "maintain," in part, as follows:

> **1** Cause or enable (a condition or situation) to continue.
>
> *'the need to maintain close links between industry and schools'*
>
> * * *
>
> **1.1** Keep (something) at the same level or rate.
>
> *'agricultural prices will have to be maintained'*
>
> * * *
>
> **1.2** Keep (a building, machine, or road) in good condition by checking or repairing it regularly.
>
> *'the Department for Transport is responsible for maintaining the main roads in England*[.]'

[54] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 207-208; 895 NW2d 490 (2017), citing *Roberts*, 466 Mich at 63.

GEICO argues that "the common thread in all of these definitions [of maintenance] is that some affirmative act is necessary *by the person required to* 'maintain' the insurance." We conclude that this argument lacks merit. Even if the word "maintain" were to imply an affirmative act, plaintiff here undeniably undertook an affirmative act when he instructed his father to obtain no-fault insurance, the same way any person instructs a mechanic to "maintain" his vehicle or a father instructs his son to "maintain" the lawn. Thus, we conclude that the language of MCL 500.3101(1) does not require an owner or a registrant of a motor vehicle to personally obtain no-fault insurance.

We further conclude, contrary to *Barnes*, that when read together, MCL 500.3101(1) and MCL 500.3113(b) do not preclude plaintiff from receiving PIP benefits. Again, MCL 500.3113 provides:

> A person is not entitled to be paid personal protection insurance benefits for accidental bodily injury if at the time of the accident any of the following circumstances existed:
>
> * * *
>
> (b) The person was the owner or registrant of a motor vehicle or motorcycle involved in the accident with respect to which the security required by section 3101 or 3103 was not in effect.

As previously discussed, the Court of Appeals in *Iqbal* opined that "the phrase 'with respect to which the security required by section 3101 . . . was not in effect,' § 3113(b), when read in proper grammatical context, defines or modifies the preceding reference to the *motor vehicle involved in the accident*, here the BMW, and not the person standing in the shoes of an

owner or registrant. The statutory language links the required security or insurance solely to the vehicle."[55] Despite acknowledging that *Iqbal* also stated that " 'there is no dispute that the BMW had the coverage, and that is the only requirement under MCL 500.3113(b),' "[56] the *Barnes* panel nonetheless concluded that "*Iqbal* does not protect owners of vehicles if no *owner* provides the insurance . . . ."[57] In our view, a fair reading of *Iqbal* does not indicate that at least one owner must obtain no-fault insurance. Indeed, *Iqbal* concludes that

> [b]ecause the language in MCL 500.3113(b) precluding recovery of PIP benefits links the security or insurance requirement to the vehicle *only* and not the person, the trial court correctly ruled that plaintiff was entitled to PIP benefits because the vehicle was in fact insured, regardless of whether plaintiff was the "owner" of the vehicle.[58]

Thus, while *Barnes* may be distinguishable from *Iqbal* on its facts, we conclude that those factual distinctions did not place *Barnes* outside the ambit of *Iqbal*'s holding.

In sum, we agree with *Iqbal* that MCL 500.3113(b) refers to the required security or insurance under MCL 500.3101 only as it relates to the vehicle. GEICO acknowledges that "[p]laintiff may be partially correct that [MCL 500.3113(b)] ties 'security' to the motor vehicle itself . . . ." Yet, GEICO contends that the reference in MCL 500.3113(b) to the " 'security required by section 3101—and [that section's] use of the mandatory term 'shall' in reference to '[t]he owner or

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[55] *Iqbal*, 278 Mich App at 39-40.

[56] *Barnes*, 308 Mich App at 7, quoting *Iqbal*, 278 Mich App at 40.

[57] *Barnes*, 308 Mich App at 8.

[58] *Iqbal*, 278 Mich App at 46 (emphasis added).

registrant'—means that the vehicle is not properly insured unless that security is maintained *by* an 'owner or registrant.' "[59] We disagree.

Initially, we iterate that GEICO's interpretation would ignore that MCL 500.3101(1) does not expressly prescribe any particular manner by which a registrant or an owner must keep no-fault insurance in an existing state.[60] In regard to MCL 500.3113(b), there is no dispute that the phrase "the security required by section 3101 or 3103 was not in effect" refers to either the "owner or registrant" or the "vehicle." Obviously, plaintiff believes that the phrase refers to the vehicle, and the dissent and defendant believe that the phrase refers to the owner or registrant.[61] In our view, the

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[59] Second alteration in original.

[60] GEICO also argues that "the only approach that carries out the legislative intent embodied in [MCL 500.3101(1)] is to equate 'shall maintain security' with being a named insured on a policy of automobile no-fault insurance." In something of a "plain folks" appeal (at least for a legal brief in an insurance case), GEICO explains that "anyone who owns a vehicle in Michigan knows that it is the named insured who applies for auto insurance. That's the person who fills out the form developed by the insurer to obtain the information needed to accurately underwrite the coverage."

The shortcoming of this argument is that statutory coverage under the no-fault act does not depend on whether a person is a "named insured" in a no-fault policy. The phrase "named insured" is not even contained in MCL 500.3101 or, for that matter, in MCL 500.3113. Rather, whether a person is a "named insured" under a no-fault insurance policy is generally only relevant in deciding which potential insurer is liable for the claim. The only notable exception is MCL 500.3111, which pertains to Michigan residents involved in out-of-state accidents. Under those circumstances, coverage is predicated on whether "the person whose injury is the basis of the claim was at the time of the accident a named insured under a personal protection insurance policy . . . ." MCL 500.3111. But this provision is not applicable in this case.

[61] The dissent states that MCL 500.3113(b) contemplates a relationship between the security and the vehicle but questions the basis for our "conclusion that security 'with respect to' a vehicle is the same as

dispute is best resolved by examining the use of the term "which" in MCL 500.3113(b). The term "which," as applied in this context, is "used relatively in restrictive and nonrestrictive clauses to represent a specified antecedent[]: *This book, which I read last night, was exciting. The socialism which Owen preached was unpalatable to many. The lawyer represented five families, of which ours was the largest*."[62] Here, two possible antecedents precede the phrase "the security required by section 3101 or 3103 was not in effect": the first possible antecedent mentioned is a person, and the last possible antecedent mentioned is a vehicle. Plaintiff relies on the last-antecedent rule, "a rule of statutory construction that provides that 'a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation.' "[63]

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insurance 'for' or 'on' that vehicle . . . ." *Post* at 198. While we agree that many provisions of the no-fault act are inartfully drafted and require interpretation, there is no statutory basis to conclude that the owner of an insured vehicle who is not a "named insured" in the policy is ineligible for PIP benefits. If this were the case, the Legislature could have readily predicated coverage on whether "the person whose injury is the basis of the claim was at the time of the accident a *named insured* under a personal protection insurance policy," as in MCL 500.3111.

The dissenting justice argues that her interpretation "is consistent with, and therefore supported by, the act's other sections, like the priority schemes set out in MCL 500.3114 and MCL 500.3115." *Post* at 199. She claims that "the priority scheme reflects the prenominate nexus among owner, security, and vehicle." *Post* at 200. In our view, the dissent has improperly conflated coverage under the no-fault act with priority under the no-fault act. Priority provisions do not expand coverage under the no-fault act. The priority provisions do not provide additional coverage; they merely dictate which insurer will pay claims that have already been established. For this reason, the dissent's reliance on the priority provisions is misplaced.

[62] *Random House Webster's College Dictionary* (2000).

[63] *Hardaway v Wayne Co*, 494 Mich 423, 427; 835 NW2d 336 (2013), quoting *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508

"As we have warned before, the last antecedent rule should not be applied if 'something in the statute requires a different interpretation' than the one that would result from applying the rule."[64] But here, nothing in the statute requires a different result. Moreover, the use of the term "which" plainly favors plaintiff's interpretation. The usage notes for the definition of "which" state that the term "is used regularly in referring to inanimate objects and, usually, animals and never, in modern usage, to individual persons . . . ."[65] Given that the term "which" by the time the no-fault system was enacted no longer referred to individual persons, we conclude that the phrase "with respect to which the security required by section 3101 or 3103 was not in effect" refers to the vehicle, not the person. Because the conclusion in *Barnes* that "when none of the owners maintains the requisite coverage, no owner may recover PIP benefits" is contrary to the plain language of the no-fault act, we overrule *Barnes*.[66]

IV. CONCLUSION

We hold that an owner or a registrant of a motor vehicle involved in an accident is not excluded from

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(2002). See also Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 144-146.

[64] *Hardaway*, 494 Mich at 428, quoting *Stanton*, 466 Mich at 416.

[65] *The Random House College Dictionary* (rev ed, 1975).

[66] *Barnes*, 308 Mich App at 8-9. GEICO also raises the specter of fraud to favor its interpretation by claiming that

> [f]or the system to work for all members of the pool, risk must be allocated and managed as accurately as possible. Through MCL 500.3101(1), the Michigan Legislature recognized that what matters most for no-fault insurance is the identity of the vehicle owner or registrant. Otherwise, vehicle owners with high risk factors would be able to avoid premiums applicable to the risk

receiving no-fault benefits when someone other than that owner or registrant purchased no-fault insurance for that vehicle because the owner or registrant of the motor vehicle has nonetheless "maintained" no-fault insurance. The Court of Appeals' decision in *Barnes* and caselaw suggesting to the contrary are overruled to the extent that they are inconsistent with this holding. We reverse in part[67] the judgment of the Court of Appeals in this case and remand the case to the

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> they present by adding their vehicles to the policies of others, including friends and even roommates. And the problem is not resolved by requiring owners of other vehicles to be listed as drivers because listed drivers do not fill out applications; they do not receive the same scrutiny as an applicant.

First, as plaintiff rightly points out, there is no indication of fraud in this case. Second, "[t]his Court has been clear that the policy behind a statute cannot prevail over what the text actually says. The text must prevail." *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005). In other words, the specter of fraud does not distract us from our goal of interpreting the applicable statutory language to determine the rule of law. Third, the Legislature clearly understands how to enact laws to mitigate fraud within the no-fault act. In fact, the Legislature recently did so when it enacted 2016 PA 346, which is now codified at MCL 500.3009(2):

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. An exclusion under this subsection is not valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance:
>
> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

[67] Although Esurance filed an application in this Court seeking enforcement of its purported settlement agreement with GEICO, this Court was not persuaded that the questions presented should be reviewed by this Court. See *Dye*, 501 Mich 944. This opinion does not disturb the Court of Appeals' decision regarding the purported settlement agreement.

Washtenaw Circuit Court for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and MARKMAN, VIVIANO, and BERNSTEIN, JJ., concurred with ZAHRA, J.

CLEMENT, J. (*dissenting*). Plaintiff bought a car and asked his father to buy no-fault insurance. His father bought a policy naming the father, not plaintiff, as the insured. Under the no-fault act, as the owner of the car, plaintiff had to "maintain security for payment of benefits under" insurance for bodily injury and property damage. MCL 500.3101. Although the act provides for benefits for all persons injured in motor-vehicle accidents, it disqualifies from bodily-injury benefits a person injured in his or her own vehicle "with respect to which the security required by section 3101 . . . was not in effect." MCL 500.3113. Plaintiff was injured in his own car and sought benefits under his wife's policy, issued by defendant GEICO Indemnity Company.[1] See MCL 500.3114. Defendant denied benefits on the basis that plaintiff's car was one "with respect to which the security required by section 3101 . . . was not in effect." To decide the issue on appeal, we must determine whether that security was or was not in effect.

Plaintiff argues that the security was in effect because he instructed his father to take out a policy listing the car and his father did so. The majority agrees with plaintiff, reading the disqualification provision as operating only when an owner's vehicle is uninsured. But the no-fault act has very little to do with insuring vehicles as such; rather, it aims to create comprehensive insurer liability for bodily injury and property damage resulting from motor-vehicle acci-

[1] See generally *ante* at 175.

dents. The act's text, context, and purpose support that understanding. The majority gives short shrift to each of these, analyzing fractions of statutory text in isolation, and as a result announces a rule that undermines the act. For these reasons, and as explained below, I dissent.[2]

Defendant argues that it is not liable for plaintiff's PIP[3] claim because plaintiff's circumstances meet the statutory disqualification provision in MCL 500.3113(b):

> The person [seeking benefits] was the owner or registrant of a motor vehicle . . . involved in the accident with respect to which the security required by section 3101 . . . was not in effect.

All agree that plaintiff owned a vehicle "involved in the accident," so the question here is whether that vehicle was one "with respect to which the security required by section 3101 . . . was not in effect." To answer that question, we must understand what is meant by "the security required by section 3101."

"Section 3101" refers to MCL 500.3101, which says, in relevant part:

> (1) The owner or registrant of a motor vehicle required to be registered in this state shall maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance. . . .

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[2] As the majority notes, some of the statutes at issue in this case recently have been amended. See *ante* at n 169. Like the majority, I address the preamendment version of the act.

[3] PIP is common shorthand for "personal protection insurance" (a.k.a. "personal injury protection insurance").

> (3) Security required by subsection (1) may be provided under a policy issued by an authorized insurer that affords insurance for the payment of benefits described in subsection (1).

Subsection (1) requires a vehicle's owner to "maintain security for payment of benefits under personal protection insurance, property protection insurance, and residual liability insurance." There are two pieces here: first, the owner must "maintain security"; second, that security must ensure payment of benefits under PIP insurance (which pays for bodily injury) and property-protection insurance (which pays for property damage).[4] As Subsection (3) explains, security "may be provided under a policy issued by an authorized insurer that affords insurance for the payment of benefits described in subsection (1)"—put more simply, to maintain security under § 3101 is to have a no-fault policy with PIP and property-protection insurance.

According to the majority, as long as the vehicle is insured, MCL 500.3113(b)'s disqualification provision has not been triggered, no matter who is named in the policy. But in my view, the majority misreads that provision. Section 3113 requires security (i.e., a no-fault policy) "with respect to" the vehicle owned by the person claiming PIP benefits.[5] The majority assumes that a policy is "with respect to" a vehicle if the policy insures the vehicle. But § 3113(b) governs PIP coverage; it isn't aimed at vehicle coverage. Indeed, the

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[4] See, e.g., MCL 500.3105; MCL 500.3121; MCL 500.3131.

[5] The majority explains in detail why the "which" in § 3113(b)'s "with respect to which" refers to "motor vehicle" and not to "owner." See *ante* at 191. I generally agree. (I also observe that a similar "with respect to which" phrase is in MCL 500.3135(3), which affords limited immunity from "tort liability arising from the ownership, maintenance, or use within this state of a motor vehicle with respect to which the security required by section 3101 was in effect.")

no-fault act excludes damaged vehicles from coverage under property-protection insurance. See MCL 500.3123(1)(a). For that reason, I cannot credit the majority's assumption.[6]

The majority doesn't rely on the statute's phrase "with respect to"; indeed, it appears to toss out that language in favor of its own formulation, stating that insurance is "on the vehicle" or "for the vehicle."[7] That formulation lets the majority assume, contrary to the Legislature's text, that the statute connects only the security and the vehicle. I agree with the majority that § 3113(b) contemplates a relationship between "security" and "vehicle," but the majority's conclusion that security "with respect to" a vehicle is the same as insurance "for" or "on" that vehicle is not, in my view, correct since nothing in the no-fault act requires a vehicle to be insured. Rather, MCL 500.3101(1) requires a certain person (the vehicle's owner or registrant) to maintain security against liability, and "with respect to" connects the security to the vehicle by way of the person.[8] Throughout the no-fault act, and in

[6] The lapse is understandable—our own precedent has made the same assumption. See, e.g., *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 595; 648 NW2d 591 (2002) (the act was "designed to regulate the insurance of motor vehicles"). But to protect against accident damage to one's vehicle, one must have collision coverage, see MCL 500.3037, which is neither required nor regulated by the no-fault act. What's strange about the majority's focus on insuring the vehicle is that, as the record shows, collision coverage was absent from plaintiff's father's policy, and so that policy didn't insure plaintiff's car. And recall that plaintiff's claim was not for damage to his car but rather for PIP benefits.

[7] See *ante* at 175 n 6 ("insurance . . . on the vehicles"), 185 ("insurance on the vehicle," "insurance for the vehicle"), 187 ("insurance for a vehicle"), and 188 ("insurance on a vehicle").

[8] Cf. MCL 500.3101(1) (referring to "the *insured* owner or registrant") (emphasis added).

§ 3113(b) in particular, the owner or registrant is front and center. In sum, there exists security "with respect to" a vehicle not when that vehicle is insured but rather when that vehicle's owner "maintains security."[9]

This critical nexus among owner, security, and vehicle is of a whole with the rest of the no-fault act. While the majority hasn't grappled with this contextual consideration, my reading is consistent with, and therefore supported by, the act's other sections, like the priority schemes set out in MCL 500.3114 and MCL 500.3115. As those provisions explain, accident victims not otherwise covered by a personal or household[10] policy must submit claims to other insurers in accordance with a priority scheme. Under § 3114(4), an injured occupant of a vehicle must claim against insurers "in the following order of priority":

> (a) The insurer of the owner or registrant of the vehicle occupied.
>
> (b) The insurer of the operator of the vehicle occupied.

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[9] The majority determines that "maintain" means "to keep in an existing state (as of repair, efficiency, or validity) : preserve from failure or decline." That's an odd choice of definition for a few reasons. To start with, if "maintain" carries that meaning, it's not clear what "existing state" is being "kept." Before plaintiff bought the car, he lacked insurance (for himself and for the car), so under the majority's reasoning, plaintiff's father's buying insurance disrupted (rather than "kept") the existing state. And I'm not sure what it means for an insurance policy to be in a state "of repair, efficiency, or validity." Nor do I know what it means to "preserve" an insurance policy "from failure or decline." Still, the majority refers to its chosen meaning as "commonly understood" in this context. *Ante* at 187-188. By my lights, a better fit is the definition "to support or provide for." *Merriam-Webster's Collegiate Dictionary* (11th ed). In any event, the larger flaw in the majority's reasoning is its misunderstanding not of the meaning of "maintain" but rather of what's maintained, as explained throughout this opinion.

[10] Under MCL 500.3114(1), a "personal protection insurance policy" reaches "accidental bodily injury to the person named in the policy, the person's spouse, and a relative of either domiciled in the same household."

Similarly, under § 3115(1) an injured nonoccupant (e.g., a pedestrian) must claim in this order:

> (a) Insurers of owners or registrants of motor vehicles involved in the accident.
>
> (b) Insurers of operators of motor vehicles involved in the accident.

At the outset, note that these provisions refer as the object of no-fault coverage to persons (owners, registrants, operators), not to vehicles.[11] More crucially, the priority scheme reflects the prenominate nexus among owner, security, and vehicle.

That nexus is reflected too by the act's design and purpose, which fall apart if an owner named in no policy is nonetheless understood to have "maintained security" through a nonowner third party's policy. As we've said, the no-fault act created a "system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance . . . [and] victims of motor vehicle accidents would receive insurance benefits for their injuries as a substitute for their common-law remedy in tort." *Shavers v Attorney General*, 402 Mich 554, 579; 267 NW2d 72 (1978) (emphasis omitted). The Legislature thus struck a balance between "assured, adequate, and prompt reparation" for accident victims and "compulsory insurance" to cover owners' potential liability for claims by those victims. *Id*. We have described the PIP scheme as "comprehensive," *id*., which reflects the tight fit between the owners' compulsory insurance and the victims' assured reparation.

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[11] See also MCL 500.3125 (priority for property-protection claims: "insurers *of owners or registrants* of vehicles involved in the accident; and insurers *of operators* of vehicles involved in the accident") (emphasis added).

In other words, the no-fault scheme aims to assure (insofar as possible) a liable insurer for every victim. To meet that goal, the Legislature required two things: (1) that every owner (or registrant) "maintain security," MCL 500.3101(1), and (2) that certain injured persons submit their claims according to a priority scheme.[12] It's plain that the act's comprehensiveness—the tight fit between its means and its ends—falls apart under the majority's reading, which relieves an owner of the burden to "maintain security" for liability for bodily injury and property damage.

To illustrate, let's say plaintiff had hit a pedestrian not covered by a personal or household policy. The priority scheme, MCL 500.3115(1), directs the hypothetical pedestrian to submit a claim to the "insurers of owners . . . of motor vehicles involved in the accident," but since plaintiff has no insurer, the pedestrian's claim would be outside the priority scheme,[13] and he or

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[12] See MCL 500.3114(4); MCL 500.3115(1); see also *Royal Globe Ins Cos v Frankenmuth Mut Ins Co*, 419 Mich 565, 575; 357 NW2d 652 (1984) ("The priority provisions of the act are designed to help implement [the act's] goals.").

[13] Unless, of course, plaintiff's father were determined to be an owner, in which case his personal policy's issuer would be within the priority scheme. See MCL 500.3115(1). And as the Court of Appeals explained in *Iqbal v Bristol West Ins Group*, 278 Mich App 31; 748 NW2d 574 (2008), MCL 500.3113(b) doesn't disqualify an owner lacking insurance as long as another owner has a no-fault policy. In *Iqbal*, the Court of Appeals determined that the plaintiff, a vehicle owner lacking insurance, was not disqualified from PIP benefits under MCL 500.3113(b) because his co-owner had a no-fault policy. The Court observed that "the BMW had the coverage" and so appears at first blush to have made the same mistake as the majority here, that the no-fault act is concerned with insuring vehicles. *Id*. at 40. But the Court of Appeals' reasoning was more nuanced than that, recognizing that the issue was "whether the BMW, *and not plaintiff*, had the coverage or security required by MCL 500.3101." *Id*. at 39 (emphasis added). Although inartful, the Court of Appeals' framing of the issue reveals its understanding that security is

she would be limited to recovery through the assigned-claims plan.[14] The pedestrian's PIP benefits then would be funded through increased rates for all policyholders, as though the pedestrian were a hit-and-run victim.[15] This is how the majority understands the no-fault act. Yet under my reading, the act would require security for payment of PIP benefits to be maintained by an owner (or registrant), and so the pedestrian would be able to recover within the no-fault act's priority scheme, rather than through the assigned-claims plan.

Much puzzles me about the majority's interpretive approach. It makes some obvious lapses in its understanding of the no-fault act's text—I again point out the majority's insistence that the no-fault act concerns insurance "on" (or "for") a vehicle, despite the act's exclusion of damaged vehicles. And its interpretation of "maintain" in MCL 500.3101(1) lacks nuance because it analyzes the term in isolation from the rest of MCL 500.3101(1). According to the majority, plaintiff

related to a vehicle not because the security insures the vehicle but because of the nexus among owner, security, and vehicle.

[14] See MCL 500.3171 *et seq*.; see also *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 529; 502 NW2d 310 (1993) ("[E]ssentially all accidents are now covered by personal injury protection benefits or the assigned claims plan.").

[15] Note that under the majority's understanding of the security requirement, plaintiff in this hypothetical would enjoy limited immunity from tort liability because, according to the majority, plaintiff's car was one "with respect to which the security required by section 3101 was in effect." MCL 500.3135(3); see also note 5 of this opinion. In other words, unlike most Michigan vehicle owners, who merit this limited immunity by getting no-fault policies, plaintiff gets immunity while the cost of the injuries he's responsible for is spread, through the assigned-claims plan, across other policyholders' premiums. The majority now has charted the course for others to do the same.

"maintained security" (albeit indirectly) when "he instructed his father to obtain no-fault insurance."[16] *Ante* at 189. The majority suggests that plaintiff's instruction to his father met the duty to maintain security in the same way that a son's duty to maintain his lawn could be met by the son's instructing his father to mow the lawn.[17] But the son's duty in those circumstances would not be met if the father mowed only the father's own lawn. Likewise here, the son's statutory duty to "maintain security" is not met by asking his father to get no-fault insurance if his father insures only himself. For this reason, it is to me neither here nor there that plaintiff's father took out a no-fault policy in response to plaintiff's instruction because that policy named the father, not plaintiff.[18]

The majority's approach to statutory interpretation also gives short shrift to context and purpose. As I read the no-fault act, §§ 3101 and 3113 dovetail with other parts of the act, like the priority scheme; and my reading advances the act's purposes, which we recognized in *Shavers*. The majority's reading, on the other hand, barely acknowledges that we're interpreting a small part of a larger system, let alone contemplates how its reading affects that larger system and undermines its purposes. The majority's approach suggests

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[16] What, I wonder, stops a risky driver (like one with an OWI conviction) from saving money on insurance premiums by "instructing" a third party "to obtain no-fault insurance"?

[17] The majority actually uses the example of a father instructing his son to maintain the lawn. I've swapped the father and son, to better track the facts in this case.

[18] In other words, I don't get caught up, as the majority does, in whether MCL 500.3101(1) requires plaintiff to have engaged in an "affirmative act," *ante* at 189, because even if plaintiff's instructing his father was an affirmative act, that act didn't result in plaintiff's compliance with § 3101.

(albeit implicitly) that neither context nor purpose plays a role in statutory interpretation. Yet the light thrown by context and purpose can cast the text in sharper relief. Indeed, had the majority paused for a moment to consider the act's goals, it might have recognized that some of the premises underlying its decision are mistaken.

As explained above, I read the no-fault act as disqualifying an owner from PIP benefits if the owner is injured in his or her own vehicle and no owner (or co-owner) has "maintained security." But the record doesn't reveal whether plaintiff's father, who does have a no-fault policy, is an owner of plaintiff's car, and so I cannot determine whether plaintiff is disqualified from PIP benefits. For this reason, I favor the Court of Appeals' resolution—remand to the trial court for further proceedings.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

MICHIGAN ASSOCIATION OF HOME BUILDERS v CITY OF TROY

Docket No. 156737. Argued on application for leave to appeal March 7, 2019. Decided July 11, 2019.

The Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and the Michigan Plumbing and Mechanical Contractors Association filed a three-count complaint in the Oakland Circuit Court seeking declaratory and injunctive relief against the city of Troy, alleging that the building inspection fees generated under defendant's contract with SAFEbuilt Michigan, Inc., under which SAFEbuilt assumed the duties of defendant's building department, produced significant monthly surpluses that defendant used to augment its general fund in violation of the Construction Code Act, MCL 125.1501 *et seq*., and the Headlee Amendment, Const 1963, art 9, §§ 25 through 34. Specifically, plaintiffs alleged that this practice violated MCL 125.1522(1), which requires that fees be reasonable, intended to bear a reasonable relation to the cost of building department services, and used only for the operation of the building department. Following discovery, plaintiffs moved for summary disposition under MCR 2.116(C)(10), and defendant sought summary disposition under MCR 2.116(I)(2). After a hearing, the trial court, Shalina D. Kumar, J., granted summary disposition to defendant, ruling that the court did not have jurisdiction over plaintiffs' lawsuit because plaintiffs had failed to exhaust their administrative remedies under MCL 125.1509b. The Court of Appeals, JANSEN, P.J., and OWENS and SHAPIRO, JJ., agreed and affirmed in an unpublished per curiam opinion issued March 13, 2014 (Docket No. 313688). Plaintiffs were granted leave to appeal in the Supreme Court, which reversed the lower courts' decisions, held that the administrative procedure referred to in MCL 125.1509b did not apply, and remanded the case to the trial court for further proceedings. 497 Mich 281 (2015). On remand, after additional discovery, the parties filed cross-motions for summary disposition. The court granted defendant's motion, ruling that defendant's practice of depositing the fees it had retained into the general fund did not violate MCL 125.1522(1) because that money repaid loans from the general fund that were used to operate the building department in times of shortfalls. Plaintiffs appealed.

The Court of Appeals, O'BRIEN, P.J., and MURRAY, J. (JANSEN, J., dissenting), agreed with the trial court and affirmed its decision in an unpublished per curiam opinion issued September 28, 2017 (Docket No. 331708). Plaintiffs again applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 502 Mich 878 (2019).

In a unanimous opinion by Justice ZAHRA, in lieu of granting leave to appeal, the Supreme Court *held*:

The use of the revenue generated by defendant's building inspection fees to pay the building department's budgetary shortfalls in previous years violated MCL 125.1522(1) because it was not reasonably related to the cost of acts and services provided by the building department. However, because defendant presented evidence to justify the retention of a portion of these fees, the case was remanded for further proceedings. On remand, plaintiffs may attempt to establish representational standing to maintain a claim under the Headlee Amendment.

1. MCL 125.1522(1) places three restrictions on a municipality's authority to establish fees under the Construction Code Act: the amount of the fee must be reasonable, the amount of the fee must be reasonably related to the cost of providing the service, and the fees collected must only be used for the operation of the enforcing agency or the construction board of appeals, or both, and may not be used for any other purpose. Defendant's use of building inspection fees for the purpose of satisfying a historical deficit violated the second restriction in MCL 125.1522(1) because neither "overhead" nor the "cost . . . to the governmental subdivision" encompasses paying a general fund for a historical shortfall. Unlike MCL 125.1522(2), which concerns the creation of the state construction code fund, MCL 125.1522(1) does not expressly provide for a surplus. Further, there was evidence that defendant did not intend that the fees charged bear a reasonable relation to the cost of the services performed. While the law does not demand a precise correlation between costs and fees required, it does require a reasonable relation. Because defendant did present some evidence of direct and indirect costs incurred by the building department that may have been related to the services performed and overhead, the case was remanded to establish the amount of these costs.

2. MCL 125.1522(1) does not explicitly provide for a private cause of action that would allow plaintiffs to seek monetary damages, and there was no basis on which to find an implied cause of action. The cases plaintiffs cited to the contrary all

predated the enactment of the governmental tort liability act, MCL 691.1401 *et seq*., which abrogated the common-law claims on which plaintiffs relied and provided cities immunity from tort liability absent express legislative authorization. However, plaintiffs may maintain a cause of action for injunctive relief pursuant to MCR 3.310 or declaratory relief pursuant to MCR 2.605.

3. Generally, a taxpayer has no standing to challenge the expenditure of public funds if the threatened injury to him or her is no different than that to taxpayers generally. However, standing to pursue violations of the Headlee Amendment is given to all taxpayers in the state by Const 1963, art 9, § 32. Although plaintiffs alleged that their members included residents of and taxpayers in defendant city of Troy, plaintiffs failed to provide any record evidence that plaintiffs or their members paid taxes in the city of Troy and actually paid the fees at issue. Therefore, it could not be determined whether plaintiffs established standing.

Reversed and remanded for further proceedings.

1. STATUTES — CONSTRUCTION CODE ACT — MUNICIPALITIES — FEES.

Under MCL 125.1522(1), a municipality may establish fees under the Construction Code Act, MCL 125.1501 *et seq*., if the amount of the fee is reasonable, the amount of the fee is reasonably related to the cost of providing a service, and the fees collected are used only for the operation of the enforcing agency or the construction board of appeals, or both; a municipality may not use building inspection fees assessed under MCL 125.1522(1) for the purpose of satisfying a historical deficit.

2. STATUTES — CONSTRUCTION CODE ACT — PRIVATE CAUSES OF ACTION — MONETARY DAMAGES — EQUITABLE RELIEF.

A plaintiff may not maintain a private cause of action seeking monetary damages for a violation of MCL 125.1522(1); however, a plaintiff may maintain a cause of action for such a violation that seeks injunctive relief pursuant to MCR 3.310 or declaratory relief pursuant to MCR 2.605.

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*) for plaintiffs.

Lori Grigg Bluhm and *Allan T. Motzny* for defendant.

Amici Curiae:

Miller, Canfield, Paddock and Stone, PLC (by *Sonal Hope Mithani*) for the Government Law Section of the State Bar of Michigan, the Michigan Municipal League, and the Michigan Township Association.

McClelland & Anderson, LLP (by *Gregory L. McClelland* and *Melissa A. Hagen*) for Michigan Realtors.

McClelland & Anderson, LLP (by *Melissa A. Hagen*) for the Michigan Health and Hospital Association and the Michigan Society of Association Executives.

Honigman Miller Schwartz and Cohn LLP (by *Daniel L. Stanley*) for the Michigan Manufacturers Association.

Kickham Hanley PLLC (by *Gregory D. Hanley* and *Jamie Warrow*) for Kickham Hanley PLLC.

ZAHRA, J. The question presented in this case is whether the building inspection fees assessed by defendant, the city of Troy (the City), are "intended to bear a reasonable relation to the cost"[1] of acts and services provided by the City's Building Inspection Department (Building Department) under the Construction Code Act (CCA).[2] We hold that the City's use of the revenue generated by those fees to pay the Building Department's budgetary shortfalls in previous years violates MCL 125.1522(1). While fees imposed to satisfy the alleged historical deficit may arguably be for "the operation of the enforcing agency or the construction board of appeals," this does not mean that such fees "bear a reasonable relation" to the

[1] MCL 125.1522(1).

[2] MCL 125.1501 *et seq*.

costs of acts and services provided by the Building Department. Here, plaintiffs have presented sufficient evidence to conclude that the City established fees that were not intended to "bear a reasonable relation" to the costs of acts and services necessary to justify the City's retention of 25% of all the fees collected. We further conclude that there is no express or implied monetary remedy for a violation of MCL 125.1522(1). Nonetheless, we conclude that plaintiffs may seek declaratory and injunctive relief to redress present and future violations of MCL 125.1522(1). Because the City has presented evidence to justify the retention of a portion of these fees, we remand to the trial court for further proceedings.

Lastly, we conclude that there is no record evidence establishing that plaintiffs are "taxpayer[s]" with standing to file suit pursuant to the Headlee Amendment.[3] On remand, the trial court shall allow plaintiffs' members an opportunity to establish representational standing on plaintiffs' behalf. Accordingly, we reverse the Court of Appeals judgment and remand to the trial court for further proceedings not inconsistent with this opinion.

I. BASIC FACTS AND PROCEEDINGS

Since 2003, the Building Department allegedly had been operating with a yearly deficit which, in the aggregate, amounted to $6,707,216 in 2011. In July 2010, the City privatized the Building Department by entering into a contract with SAFEbuilt Michigan, Inc. (SAFEbuilt), under which SAFEbuilt assumed the duties of the Building Department. Under the terms of the contract, SAFEbuilt would receive 80% of the building inspection fees, and the City would retain the

[3] The Headlee Amendment added §§ 25 through 34 to Article 9 of the Michigan Constitution. The provision relating to standing is found in § 32.

remaining 20% of the fees. The contract also provided that if the fees totaled more than $1,000,000 for any fiscal year, then SAFEbuilt would only receive 75% of the fees and the City would retain 25% of the fees. The City has retained over $250,000 in fees every year since 2011, indicating that the fees totaled more than $1,000,000 in each of those years. While the Building Department operated at a $47,354 deficit in 2011, the City retained $269,483 in fees in 2012, $488,922 in 2013, and $325,512 in 2014. Over these three years, the City retained $1,083,917 in fees, and by 2016, the City had retained $2,326,061.

On December 15, 2010, plaintiffs, Michigan Association of Home Builders, Associated Builders and Contractors of Michigan, and Michigan Plumbing and Mechanical Contractors Association, filed a three-count verified complaint against the City. Plaintiffs alleged violations of the CCA and the Headlee Amendment,[4] and they sought declaratory and injunctive relief. They claimed that the building inspection fees generated under the City's contract with SAFEbuilt produced "significant monthly surpluses" that the City used to augment its general fund. Plaintiffs alleged that this practice violates MCL 125.1522(1), which requires that fees (1) be reasonable, (2) "be intended to bear a reasonable relation to the cost" of Building Department services, and (3) be used only for operation of the Building Department. They also claimed that the City's fee practice is unconstitutional under the Headlee Amendment, which prohibits taxation by local units of government without voter approval.

Following discovery, plaintiffs moved for summary disposition under MCR 2.116(C)(10), and the City sought summary disposition under MCR 2.116(I)(2).

[4] Const 1963, art 9, § 31.

After conducting a hearing, the trial court granted summary disposition to the City, ruling that the court did not have jurisdiction over plaintiffs' lawsuit because plaintiffs had failed to exhaust their administrative remedies under MCL 125.1509b before filing their complaint. The Court of Appeals agreed and affirmed.[5] Plaintiffs applied for leave to appeal in this Court, and we ordered and heard oral argument on whether to grant plaintiffs' application or take other preemptory action.[6] In a memorandum opinion, we reversed the lower courts' decisions and held that the administrative procedure referred to in MCL 125.1509b did not apply.[7] We remanded to the trial court for further proceedings.[8]

On remand, the trial court allowed additional discovery. The parties then filed cross-motions for summary disposition. The court granted the City's motion. The court determined as a matter of law that the City's practice of depositing the fees it had retained into the general fund does not violate MCL 125.1522(1) because that money repaid loans from the general fund that were used to operate the Building Department in times of shortfalls.

Plaintiffs appealed. The Court of Appeals agreed with the trial court and affirmed its decision in an unpublished opinion.[9]

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[5] *Mich Ass'n of Home Builders v City of Troy*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2014 (Docket No. 313688).

[6] *Mich Ass'n of Home Builders v City of Troy*, 497 Mich 862 (2014).

[7] *Mich Ass'n of Home Builders v City of Troy*, 497 Mich 281, 288; 871 NW2d 1 (2015).

[8] *Id*. at 283.

[9] *Mich Ass'n of Home Builders v City of Troy (After Remand)*, unpublished per curiam opinion of the Court of Appeals, issued September 28, 2017 (Docket No. 331708).

Plaintiffs again applied for leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument on whether to grant the application or take other action, and we ordered the parties to file supplemental briefing on the following issues:

> (1) whether the creation of a fee surplus generated by an enforcing agency under the Construction Code Act (CCA), MCL 125.1501 *et seq*., and the use of that surplus to pay for shortfalls in previous years by transfer of the surplus into the city's general fund, violates the constraints of § 22 that fees be reasonable, be intended to bear a reasonable relation to the cost of acts and services provided by the enforcing agency, and be used only for the operation of the enforcing agency or the construction board of appeals, or both; (2) if so, whether appellants have a private cause of action against a governmental subdivision for enforcement of the CCA, MCL 125.1508b(1); (3) whether appellants are "taxpayers" that have standing to file suit pursuant to the Headlee Amendment, Const 1963, art 9, § 32; and (4) if so, whether the challenged fees violate the Headlee Amendment, Const 1963, art 9, § 31.[10]

II. STANDARD OF REVIEW AND APPLICABLE RULES OF STATUTORY INTERPRETATION AND CONSTITUTIONAL INTERPRETATION

This Court reviews de novo a trial court's decision on a motion for summary disposition.[11] The parties brought their respective summary-disposition motions under MCR 2.116(C)(10), which tests the factual sufficiency of a claim.[12] "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the

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[10] *Mich Ass'n of Home Builders v City of Troy*, 502 Mich 878 (2019).

[11] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[12] *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

light most favorable to the party opposing the motion."[13] If, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, . . . the moving party is entitled to judgment or partial judgment as a matter of law,"[14] and the trial court must grant the motion without delay.[15] Whether a party has standing is a question of law that is reviewed de novo.[16]

This Court also reviews de novo questions of statutory interpretation.[17] "The role of this Court in interpreting statutory language is to 'ascertain the legislative intent that may reasonably be inferred from the words in a statute.' "[18] "The focus of our analysis must be the statute's express language, which offers the most reliable evidence of the Legislature's intent."[19] " '[W]here the statutory language is clear and unambiguous, the statute must be applied as written.' "[20] " '[A] court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.' "[21] Neither will this Court "rewrite the plain

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[13] *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

[14] MCR 2.116(C)(10).

[15] MCR 2.116(I)(1).

[16] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 734; 629 NW2d 900 (2001), overruled on other grounds by *Lansing Sch Ed Ass'n v Lansing Bd of Ed*, 487 Mich 349 (2010).

[17] *Badeen v PAR, Inc*, 496 Mich 75, 81; 853 NW2d 303 (2014).

[18] *Hannay v Dep't of Transp*, 497 Mich 45, 57; 860 NW2d 67 (2014) (citation omitted).

[19] *Badeen*, 496 Mich at 81.

[20] *McQueer v Perfect Fence Co*, 502 Mich 276, 286; 917 NW2d 584 (2018) (citation omitted).

[21] *Id*., quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 63; 642 NW2d 663 (2002).

statutory language and substitute our own policy decisions for those already made by the Legislature."[22]

"A primary rule in interpreting a constitutional provision such as the Headlee Amendment is the rule of 'common understanding[.]' "[23] As this Court has explained:

> A constitution is made for the people and by the people. *The interpretation that should be given it is that which reasonable minds, the great mass of people themselves, would give it.* "For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, *but rather that they have accepted them in the sense most obvious to the common understanding*, and ratified the instrument in the belief that that was the sense designed to be conveyed."[24]

III. ANALYSIS

A. THE CITY'S FEES VIOLATE MCL 125.1522(1)

MCL 125.1522(1) provides:

> The legislative body of a governmental subdivision shall establish reasonable fees to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals under this act, which fees shall be intended to bear a reasonable relation to the cost, including overhead, to the governmental subdivision of the acts and services, includ-

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[22] *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000).

[23] *Bolt v City of Lansing*, 459 Mich 152, 160; 587 NW2d 264 (1998).

[24] *Traverse City Sch Dist v Attorney General*, 384 Mich 390, 405; 185 NW2d 9 (1971), quoting Cooley, Constitutional Limitations (4th ed), p 81 (quotation marks and citation omitted).

> ing, without limitation, those services and acts as, in case of an enforcing agency, issuance of building permits, examination of plans and specifications, inspection of construction undertaken pursuant to a building permit, and the issuance of certificates of use and occupancy, and, in case of a board of appeals, hearing appeals in accordance with this act. The enforcing agency shall collect the fees established under this subsection. The legislative body of a governmental subdivision shall only use fees generated under this section for the operation of the enforcing agency or the construction board of appeals, or both, and shall not use the fees for any other purpose.

In interpreting this provision, the Court of Appeals majority wrote:

> [T]he first sentence of MCL 125.1522(1) provides for the establishment of fees "for acts and services performed . . . ." Our reading of the statutory language confirms that use of the term "performed" can be understood to mean future, current, and past services provided. We reach this conclusion where there is no restricting or limiting language preceding the word "performed" indicating a temporal constraint, such as "currently performed," "to be performed," or "previously performed." Moreover, the final sentence of MCL 125.1522(1), indicating "[t]he legislative body . . . shall only use fees generated under this section for the operation of the enforcing agency . . ." likewise fails to suggest a temporal restriction pertaining to the word "operation." Thus, we agree with [the City] that "the operation" of [its] Building Department can denote a current, past, or future action. Although the final sentence of MCL 125.1522(1) does restrict the use of "fees generated" to "the operation of the enforcing agency . . . and . . . not . . . for any other purpose[,]" we are not persuaded that [the City]'s action in applying surplus fees to past shortfalls is inconsistent with this language. Put another way, if the excess or surplus fees are used to cover expenses or costs incurred with the running or "operation" of the building department, currently or for

> past shortfalls incurred, [the City's] conduct remains in conformance with MCL 125.1522(1).[25]

The Court of Appeals majority acknowledged that "by indicating that the 'reasonable fees' are 'to bear a reasonable relation to the cost, including overhead, . . . of the acts and services[ ]' to be provided, there exists an implication that the fees should cover the cost of the services received in exchange for the fee being paid."[26] The Court of Appeals explained that "the existence of a surplus does not automatically result in a determination that the fees charged are unreasonable and, therefore, do not satisfy the dictates of MCL 125.1522(1)."[27] The Court of Appeals also acknowledged that "[i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect."[28] The Court of Appeals majority opined, however, that this "has not been demonstrated."[29]

Judge JANSEN dissented, disagreeing with the majority's interpretation of MCL 125.1522(1). In her view:

> The statute does not allow [the City] to charge current payers and permit applicants more than what is reasonable in order to make up for losses it chose to incur by failing to charge previous permit applicants appropriately under the statute. To hold that under MCL 125.1522(1), a city may engage in such creative budgeting would create a poor precedent. Under the majority's interpretation of the statute, a city might permissibly choose to create a short-

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[25] *Mich Ass'n of Home Builders (After Remand)*, unpub op at 4.

[26] *Id.* at 5.

[27] *Id.*

[28] *Id.*

[29] *Id.*

> fall in any given year and unfairly charge unreasonable rates in subsequent years, completely defeating the goal of ensuring that each individual fee-payer pays for the acts and services he or she is provided.[30]

The parties agree that MCL 125.1522(1) places three restrictions on a municipality's authority to establish fees under the CCA. One—the amount of the fee "shall" be reasonable. Two—the amount of the fee "shall" be reasonably related to the cost of providing the service. And three—the fees collected "shall" only be used for the operation of the enforcing agency or the construction board of appeals, or both, and "shall" not be used for any other purpose.

We conclude that the City's use of building inspection fees for the purpose of satisfying a historical deficit violates the second restriction in MCL 125.1522(1). MCL 125.1522(1) expressly ties fees to the "cost, including overhead, to the governmental subdivision of the acts and services . . . ." It is the third restriction that requires the fees generated to be used for "the operation of the enforcing agency or the construction board of appeals." We view "the cost . . . to the governmental subdivision" as only a component of "the operation of the enforcing agency or the construction board of appeals."[31] So too is the Building Department's "overhead," which relates to "the general cost of running a business" or more specifically "the general, fixed costs of running a business as rent, lighting, and heating expenses, that cannot be charged to a specific

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[30] *Id*. (JANSEN, J., dissenting) at 3.

[31] Further, the third restriction in MCL 125.1522(1) has nothing to do with the reasonableness of fees charged. Indeed, that restriction refers to "fees generated," which the municipality may only use "for the operation of the enforcing agency or the construction board of appeals, or both . . . ." The third restriction is a limitation on the municipality's use of fees generated under the CCA.

product,"[32] a component of "the operation of the enforcing agency or the construction board of appeals." Neither "overhead" nor the "cost . . . to the governmental subdivision" encompasses paying a general fund for a historical shortfall. While payments made to restore the historical deficit may arguably be for "the operation of the enforcing agency or the construction board of appeals," this does not mean those fees are related to the costs to the governmental subdivision.

Further, this reading is consistent with the notable differences between MCL 125.1522(1) and MCL 125.1522(2). Under the CCA, the director of the Department of Licensing and Regulatory Affairs (the Department) is initially vested with powers to enforce the CCA. Municipal governments, such as the City, may assume responsibility for enforcement of the CCA. MCL 125.1522(2) concerns the creation of the state construction code fund (the Fund) that allows the Department, with oversight by the Construction Code Commission (the Commission) and following a public hearing, to establish fees to be charged for acts and services performed by the Commission.[33] The state treasurer is made custodian of the Fund and "may invest the surplus of the fund in investments as in the state treasurer's judgment are in the best interest of the fund."[34] Earnings from those investments are credited to the Fund.

MCL 125.1522(1) requires that a municipality "establish reasonable fees to be charged by the governmental subdivision for acts and services performed by the enforcing agency or construction board of appeals

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[32] *Random House Webster's College Dictionary* (1997).

[33] MCL 125.1522(2).

[34] *Id*.

under this act . . . .” Similarly, MCL 125.1522(2) requires that the Commission “shall establish reasonable fees to be charged by the commission for acts and services performed by the commission . . . .” Further, MCL 125.1522(1) and MCL 125.1522(2) both require that the “fees shall be intended to bear a reasonable relation to the cost, including overhead.”

But MCL 125.1522(2) contains a provision that MCL 125.1522(1) does not. MCL 125.1522(2) states that “[t]he state treasurer shall be the custodian of the fund and may invest the surplus of the fund in investments as in the state treasurer’s judgment are in the best interest of the fund.” MCL 125.1522(1) has no such “surplus” provision, but instead contains an express limitation on the use of funds—“for the operation of the enforcing agency or the construction board of appeals” and not “for any other purpose.”[35] In plaintiffs’ view, the expression of a permissible “surplus” in MCL 125.1522(2) implies the exclusion of a permissible “surplus” in MCL 125.1522(1).

In stark contrast to plaintiffs’ argument, the City maintains that “the fact [that] the legislature included specific duties in [MCL 125.1522(2)] that were not included in [MCL 125.1522(1)] reveals . . . that the legislative intent was to provide local units of government broad discretion in deciding what constitutes ‘operation of the enforcing agency’ when establishing fees and how any fee surplus may be applied.” Again, while payments made to restore the historical deficit may arguably be for “the operation of the enforcing agency or the construction board of appeals,” this does not mean those payments are related to the costs for building inspection services performed or overhead.

[35] MCL 125.1522(1).

Further, the City's discretion under MCL 125.1522(1) is not unfettered; it is subject to a reasonableness component that ensures payments are related to the costs for building inspection services performed or overhead, not the overall operation of the Building Department. Accordingly, we agree with plaintiffs that MCL 125.1522(1) does not envision a "surplus" baked consistently into the fees.[36]

There is evidence that the City did not intend that the fees charged bear a reasonable relation to the cost of the services performed. Under the contract, the City retains at least 20% of the revenue from the building fees but allegedly retains only 8% of that amount to absorb the Building Department's indirect costs.[37] According to Thomas Darling, the City's interim director of financial and administrative services, the City's indirect costs include the salary of and the costs associated with the employment of one city employee, "the building code official." Even assuming the City's indirect costs amount to 8% of its revenue from its building fees, the City fails to account for the remaining 12% of the inspection-fee revenue it retains. More problematic yet is that the contract allows the City to retain an additional 5% of the fees when more than $1 million in fees is collected in a fiscal year. This provision is vexing for two reasons. First, the City has collected $1 million in fees in every year but one following the inception of the contract and has offered no explanation of any additional costs to justify the 5% increase. Second, there is simply no explanation as to how this contractual provision can be squared with the

[36] As later explained, exactitude is not required, and occasional and incidental surplus would not run afoul of MCL 125.1522(1).

[37] As we address in more detail later, according to the City, it uses an 8% estimate, which is derived from a study, for indirect costs.

statutory requirement that fees be reasonably related to the cost of the service. The increase is attributable only to the amount of fees collected in any given year and is completely unrelated to the cost of the services.

Even the Court of Appeals majority acknowledged that "[i]f the fees for a particular service consistently generate revenue exceeding the costs for the service, the reasonableness of the fee for that service would be suspect."[38] The majority, however, opined that "this has not been demonstrated."[39] We disagree. Rather, we agree with Judge JANSEN that

> [the City] used its building department fees to raise $269,483 in surplus funds in 2012, $488,922 in 2013, and $325,512 in 2014, for a total of $1,083,917 deposited directly into [the City]'s general fund over the course of only three years. This "surplus" is not negligible. Common sense indicates that it is not incidental.[40]

With that said, we also recognize that the City has presented some evidence of direct and indirect costs that may be related to the services performed and overhead.[41] Thomas Darling identified in detail the listing of expenses associated with the Building

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[38] *Mich Ass'n of Home Builders (After Remand)* (opinion of the Court), unpub op at 5.

[39] *Id*.

[40] *Id*. (JANSEN, J., dissenting) at 2.

[41] We cannot reconcile the City's claim that its retained fees are used to pay the Building Department's historical deficit with the City's claim that its retained fees are used to absorb the direct and indirect costs of the Building Department. These claims are, in part, mutually exclusive as the City can either use the funds to pay its deficit or to pay direct and indirect costs of the Building Department. The only potential for reconciling the two claims is if the City first pays direct and indirect costs of the Building Department and then uses the remaining funds to reduce its deficit. But the City has not taken this position, and thus, we consider these two claims as alternative theories to justify the reasonableness of its fees charged.

Department. Further, John Lamerato, the City's former assistant manager for finance and administration, testified that the City incurs additional expenses for operation of the Building Department that exceed those attributable to SAFEbuilt that are "offset with the revenue" generated. In the City's answer to the application, it notes that "[t]here are also indirect costs to enforce the CCA, and MCL 125.1522 expressly allows for the inclusion of these costs in the required accounting and reporting." The City acknowledged that it "did not and does not have financial software that can separately record each of these indirect costs of CCA enforcement, and the act of individually tracking each such expenditure on a spreadsheet would require a significant amount of manual inputting." So "the City employed a conservative 8% overhead allocation to use as the indirect cost of enforcement of the CCA, which is a practice that is routinely used in construction contracts." Lamerato explained the City's practice in his deposition as follows:

> Walsh College and graduate students performed the study for the City a number of years ago, and they came up with a—normal, I would say, for cities is around 10 percent for direct and over administrative costs, and they came up with a figure of 8 percent as a number, and that's what we've been using since it was done by an outside firm and outside agency.

We conclude that the City is entirely justified in retaining revenue to cover the direct and indirect costs of the services it provides. MCL 125.1522(1) expressly allows the City to establish fees that cover overhead, i.e., indirect costs. But, because there is conflicting evidence in regard to the amount of indirect costs incurred by the Building Department, we remand to the trial court for further proceedings.

Lastly, we agree with the City that "the State statute vests discretion with the City Council, and there is no mandate to set fees that exactly match the expenditures, especially since the fee setting process can only be a best estimate of what the future revenue and expenses will be in the coming year." Indeed, "[t]he law does not demand a precise correlation between costs and fees required, but, rather, a reasonable relation."[42] More importantly, MCL 125.1522(1) requires only that the "fees shall be *intended* to bear a reasonable relation to the cost, including overhead." Exactitude is not required. In sum, we agree with plaintiffs that the City cannot establish fees that result in surpluses to pay the historical deficits of its Building Department, but we remand to the trial court for further findings in regard to the amount of direct and indirect costs incurred by the Building Department for the services it has performed.

B. PRIVATE CAUSE OF ACTION TO REDRESS A VIOLATION OF MCL 125.1522(1)

Having concluded that defendant's use of the fees generated violates MCL 125.1522(1), we next address whether plaintiffs may maintain a statutory cause of action to redress this violation. As explained in Michigan Pleading & Practice:

> Where a statute imposes on any person a specific duty for the protection or benefit of others, but a civil remedy for securing the beneficial right given is not specified, the common law provides a remedy, and if the neglect or refusal to perform the duty results in injury or detriment to another, that person has a cause of action, if the injury or detriment is of the kind that the statute was intended

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[42] *Merrelli v City of St Clair Shores*, 355 Mich 575, 588; 96 NW2d 144 (1959).

> to prevent. On the other hand, even though an alleged violation of a statute constitutes a tort, a private cause of action does not exist where the statute provides a comprehensive, exclusive scheme of enforcement of the rights and duties it creates.[43]

Plaintiffs do not possess, nor do they claim to possess, an *express* private cause of action to enforce MCL 125.1522(1), which would allow them to seek monetary damages, because the statute does not explicitly provide for a private cause of action.[44] Plaintiffs instead

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[43] Michigan Pleading & Practice (2d ed), § 6.12, pp 452-453.

[44] The City first argues that only the Director may enforce MCL 125.1522(1). The City states that "MCL 125.1508b(1) contains the only provision regarding enforcement of the statute." That provision states, in part, "Except as otherwise provided in this section, the director is responsible for administration and enforcement of this act and the code."

According to the City, "this statutory provision vests only the Director of the [Department of] Licensing and Regulatory Affairs with enforcement powers." But the City fails to consider the remainder of that provision:

> A governmental subdivision may by ordinance assume responsibility for administration and enforcement of this act within its political boundary. A county ordinance adopted pursuant to this act shall be adopted by the county board of commissioners and shall be signed by the chairperson of the county board of commissioners and certified by the county clerk.

Troy Ordinances, Chapter 79, § 8.1, states, in relevant part, as follows:

> Pursuant to the provisions of Section 3(k) of Act 270 of 1909, State of Michigan, as amended, Michigan Complied [sic] Laws 117.3(k) and Section 8a of Act 230 of 1972, State of Michigan, as amended, Michigan Complied [sic] Laws 125.1508a, the State of Michigan Building Code is hereby adopted by reference by the City of Troy for the purpose of regulating the erection, construction, alteration, addition, repair, removal, demolition, use, location, occupancy and maintenance of all buildings and structures, and shall apply to existing or proposed buildings and structures in the City of Troy.

Here, the City expressly assumed responsibility for administration and enforcement of the CCA by enacting an ordinance. Since the City assumed this responsibility, the Director may no longer enforce MCL

argue that a cause of action should be inferred, because MCL 125.1522(1) merely codifies a common-law claim and remedy under Michigan law for unreasonable fees, fees that are not reasonably related to the cost of service, and fees that are not spent for the regulatory purpose claimed. In support, plaintiffs cite *Detroit Retail Druggists' Ass'n v Detroit*,[45] *Fletcher Oil Co v Bay City*,[46] and *Vernor v Secretary of State*.[47] Plaintiffs conclude that because MCL 125.1522(1) does not create "a right or duty not found at common law," a statutory cause of action may be implied. We disagree. Plaintiffs fail to appreciate that cases on which they rely all predate the enactment of the governmental tort liability act (GTLA),[48] which was passed in 1964 and abrogated those common-law claims.

Further, because the City is a "public employer," which expressly includes cities under MCL 15.601(a), the City enjoys immunity from tort liability under the GTLA.[49] That is, "without 'express legislative authorization,' a cause of action cannot be created 'in contra-

125.1522(1). We acknowledge that the CCA does provide that the Director "may conduct a performance evaluation of an enforcing agency to assure that the administration and enforcement of this act and the code is being done pursuant to either section 8a or 8b." MCL 125.1509b. But the City's establishment of fees under the CCA is not "done pursuant to either section 8a or 8b" but, rather, MCL 125.1522. While the Director may review the building inspection services that the City performs, there is no statutory basis for the Department to review the City's fees for reasonableness. Thus, the City's argument that only the Director is empowered to enforce MCL 125.1522 lacks merit.

[45] *Detroit Retail Druggists' Ass'n v Detroit*, 267 Mich 405; 255 NW 217 (1934).

[46] *Fletcher Oil Co v Bay City*, 247 Mich 572; 266 NW 248 (1929).

[47] *Vernor v Secretary of State*, 179 Mich 157; 146 NW 338 (1914).

[48] MCL 691.1401 *et seq*.

[49] *Lash v Traverse City*, 479 Mich 180, 194-195; 735 NW2d 628 (2007).

vention of the broad scope of governmental immunity . . . .' "[50] And here, not only is there no express legislative authorization, but there is simply no indication that the Legislature intended a monetary remedy for a violation of MCL 125.1522(1). Thus, we conclude that plaintiffs cannot maintain an express or implied tort action under MCL 125.1522(1).

Even though a statutory private cause of action for monetary damages does not exist, a plaintiff may nonetheless maintain a cause of action for declaratory and equitable relief. In *Lash v Traverse City*, this Court rejected the plaintiff's claim that a private cause of action for monetary damages was the only mechanism by which the relevant statute could be enforced, noting that plaintiff could enforce the statute by seeking injunctive relief pursuant to MCR 3.310 or declaratory relief pursuant to MCR 2.605(A)(1).[51] Here, as in *Lash*, plaintiffs could enforce the statute by seeking injunctive or declaratory relief. A preliminary injunction may be granted under MCR 3.310(A) if a plaintiff "can make a particularized showing of irreparable harm that will occur before the merits of the claim are considered."[52] Further, an "actual controversy" exists for the purposes of a declaratory judgment where a plaintiff pleads and proves facts demonstrating an adverse interest necessitating a judgment to preserve the plaintiff's legal rights. In this case, plaintiffs' claim is that the City's building inspection fees, which affect

[50] *Id*. at 194 (citation omitted).

[51] *Lash*, 479 Mich at 196.

[52] *Lash*, 479 Mich at 196. MCR 2.605(A)(1) provides the following remedy: "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted."

plaintiffs' economic interests,[53] were assessed in violation of MCL 125.1522(1). Such a claim would constitute an "actual controversy" for the purposes of an action for a declaratory judgment. Therefore, although plaintiffs do not possess a private cause of action for monetary damages, they may maintain their cause of action for declaratory and equitable relief.

C. HEADLEE AMENDMENT

Traditionally, a private citizen has no standing to vindicate a public wrong or enforce a public right if he or she has not been injured in a manner that is different from the public at large.[54] Therefore, under general standing principles, a taxpayer has no standing to challenge the expenditure of public funds if the threatened injury to him or her is no different than that to taxpayers generally.[55] Standing to pursue violations of the Headlee Amendment is given to all taxpayers in the state. Const 1963, art 9, § 32 provides:

> Any taxpayer of the state shall have standing to bring suit in the Michigan State Court of Appeals to enforce the provisions of Sections 25 through 31, inclusive, of this Article and, if the suit is sustained, shall receive from the applicable unit of government his costs incurred in maintaining such suit.

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[53] As later discussed, beyond counsel's representation at oral argument that plaintiffs sometimes pay homeowners' building inspection fees, there is no record evidence that plaintiffs themselves (or their members for that matter) are taxpayers in the City and have themselves actually paid the fees. However, the City nonetheless requires that its fees be paid, and if those fees are excessive, we believe that plaintiffs' economic interests would be adversely affected. In other words, a genuine argument could be made that excessive building inspection fees are prohibitive to those providing construction-related goods and services.

[54] *Inglis v Pub Sch Employees Retirement Bd*, 374 Mich 10, 12; 131 NW2d 54 (1964).

[55] *Waterford Sch Dist v State Bd of Ed*, 98 Mich App 658, 662; 296 NW2d 328 (1980).

As stated by this Court:

> [I]n enacting [the Headlee] amendment the voters "were . . . concerned with ensuring control of local funding and taxation by the people most affected, the local taxpayers. The Headlee Amendment is the voters' effort to link funding, taxes, and control." Specifically relevant to the case at bar, we held that § 32 is an explicit grant of standing to taxpayers to bring suits under the Headlee Amendment.[56]

According to plaintiffs' complaint, plaintiffs are nonprofit organizations incorporated in the city of Lansing and "represent and count among their members numerous home builders, contractors, subcontractors, construction companies, construction laborers, suppliers, building tradespeople, and supporting businesses such as attorneys, accountants, architects, banks and insurance professionals, that conduct business in, obtain permits from, seek building plan review in, request inspections by, and seek building and construction-related authorizations (such as plan approval, interim and final inspections and occupancy permits) from Defendant and its Building Department." Plaintiffs allege that their "members also include taxpayers in this State, and residents of and taxpayers residing and doing business in the City of Troy."

In plaintiffs' previous appeal in this Court, the issue of standing was broached at oral argument.[57] Although some assurance was given at that time that plaintiffs actually paid the fees charged by the City, a very real

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[56] *Macomb Co Taxpayers Ass'n v L'Anse Creuse Pub Sch*, 455 Mich 1, 7; 564 NW2d 457 (1997) (citation omitted).

[57] At the March 11, 2015 oral argument, the following was stated:

> *Chief Justice* YOUNG: Could I ask a simple question?
>
> *Mr. McClelland*: Certainly. I do best with those.

question remained as to whether plaintiffs were nevertheless "taxpayers." As previously mentioned, this Court reversed the Court of Appeals and remanded for

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Chief Justice YOUNG: I'll try and ask a simple one. Do your—I've not had a lot of building events in my life, I've had a couple—as I—as I recall, although the contractors pull the permits and pay the fees initially, I paid them as the owner, is that how this works?

Mr. McClelland: That's the way it should work.

Chief Justice YOUNG: So in what sense are your clients taxpayers in this case?

Mr. McClelland: We paid the fees your honor and sometimes we get paid and sometimes we don't. I don't know that that's an issue that's currently before the Court, but—

Chief Justice YOUNG: Well, it's a standing question.

Mr. McClelland: Certainly. Certainly.

Chief Justice YOUNG: And it just occurs to me that people who are the pass through may not be the person to have standing.

Mr. McClelland: Well, I will tell the Court that's not a simple question.

Chief Justice YOUNG: Okay, I thought it might be.

Mr. McClelland: But I think as a matter of law they paid the fees and the fact that they do or do not receive reimbursement wouldn't eliminate their standing since they're required to pay the fees.

Chief Justice YOUNG: Okay.

Justice ZAHRA: When you pull the permit, is the permit in the name of the builder or is the permit in the name of the . . . homeowner?

Mr. McClelland: Typically it's the name of the builder.

Justice ZAHRA: Okay.

Mr. McClelland: There are—

Justice ZAHRA: That's a simple answer I think.

Mr. McClelland: Yeah. There are a few owners out there that want to take that responsibility among themselves, but it's not general practice your honor.

further proceedings. The trial court allowed the parties to engage in further discovery. After plaintiffs appealed in this Court, we then expressly asked the parties to address the issue. The parties submitted briefs, amici filed briefs, and oral argument was held on the issue. Yet plaintiffs still failed to provide any record evidence that plaintiffs (or their members for that matter) are taxpayers in the city of Troy and have actually paid the fees beyond the allegations in the complaint and counsel's representation at oral argument that plaintiffs sometimes pay homeowners' building inspection fees. Therefore, we cannot at this time conclude that plaintiffs have established standing.[58]

IV. CONCLUSION

We reverse the lower courts' decisions and hold that the use of the revenue generated by the City's building inspection fees to pay the Building Department's budgetary shortfalls in previous years violates MCL 125.1522(1) because it is not reasonably related to the cost of acts and services provided by the Building Department. However, because the City has presented evidence to justify the retention of a portion of these fees, we remand to the trial court for further proceedings. We also remand for further proceedings to allow plaintiffs to establish representational standing to maintain a claim under the Headlee Amendment.

MCCORMACK, C.J., and MARKMAN, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with ZAHRA, J.

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[58] Because we cannot reach the conclusion on this record that plaintiffs are taxpayers, we do not address the unripe constitutional question whether the challenged fees violate the Headlee Amendment, Const 1963, art 9, § 31. Nonetheless, some of plaintiffs' individual members may be able to establish that they are indeed taxpayers. Thus, we remand to allow plaintiffs to establish representational standing to maintain a claim under the Headlee Amendment.

PEOPLE v THORPE
PEOPLE v HARBISON

Docket Nos. 156777 and 157404. Argued on application for leave to appeal April 11, 2019. Decided July 11, 2019.

In Docket No. 156777, Joshua L. Thorpe was convicted following a jury trial in the Allegan Circuit Court, Margaret Zuzich Bakker, J., of three counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a). At trial, the jury heard testimony from Thomas Cottrell, the prosecution's expert witness who was qualified as an expert in the area of child sexual abuse and disclosure. Cottrell neither examined the alleged child victim nor was provided specific information about the case; rather, Cottrell was called to offer an expert opinion based on his education, experience, and long-term involvement with children and child sexual abuse. Cottrell testified to the broad range of reactions of children who are abused, the cost/benefit analysis children make in deciding whether to disclose abuse, and some of the reasons children may delay disclosure. The prosecution asked Cottrell to provide a percentage of the number of children who lie about sexual abuse. Defense counsel objected, but the court overruled the objection. Cottrell then testified that children only lie about sexual abuse 2% to 4% of the time. The jury convicted Thorpe. Thorpe appealed, and the Court of Appeals, HOEKSTRA, P.J., and MURPHY and K. F. KELLY, JJ., affirmed the convictions in an unpublished per curiam opinion issued on August 10, 2017 (Docket No. 332694). Thorpe moved for reconsideration, which the Court of Appeals denied. Thorpe then sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 869 (2018).

In Docket No. 157404, Brandon J. Harbison was convicted following a jury trial in the Allegan Circuit Court, Kevin W. Cronin, J., of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(b); attempted CSC-I, MCL 750.520b(1)(b); two counts of CSC-II, MCL 750.520c(1)(a); and one count of accosting a child aged less than 16 years old for immoral purposes, MCL 750.145a. At trial, the prosecution pre-

sented testimony from Dr. N. Debra Simms, a pediatrician and an expert in the field of child sexual abuse diagnostics. Dr. Simms examined the alleged child victim, noted nonspecific findings, cited a pediatrics journal article, and diagnosed the child with "probable pediatric sexual abuse." The jury convicted Harbison. Harbison filed an appeal as of right and a motion to remand for an evidentiary hearing. The Court of Appeals, while retaining jurisdiction, granted the motion to remand. Following the hearing, the trial court granted a new trial. However, the Court of Appeals, MURPHY, P.J., and METER, J. (RONAYNE KRAUSE, J., concurring in the result), reversed the trial court's grant of a new trial and affirmed Harbison's convictions in an unpublished per curiam opinion issued on January 26, 2017 (Docket No. 326105). Harbison sought leave to appeal in the Supreme Court, and the Supreme Court, in lieu of granting leave to appeal, vacated the part of the Court of Appeals judgment concerning the testimony of Dr. Simms and remanded the case to the Court of Appeals for reconsideration in light of *People v Peterson*, 450 Mich 349 (1995). 501 Mich 897 (2017). On remand, in an unpublished per curiam opinion issued on January 23, 2018, the Court of Appeals, MURPHY, P.J., and METER and RONAYNE KRAUSE, JJ., again affirmed Harbison's convictions, holding that it could not find a clear error with regard to Dr. Simms's testimony. Harbison again sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1074 (2018).

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal, *held*:

Expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity, and examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury.

1. Preserved, nonconstitutional errors are subject to harmless-error review under MCL 769.26, which states that no judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examina-

tion of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. If the issue is preserved, then the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. If the issue is not preserved, then the defendant must show a plain error that affected substantial rights. In Docket No. 156777, defense counsel's objection to Cottrell's expert testimony that children only lie about sexual abuse 2% to 4% of the time was sufficient to preserve Thorpe's nonconstitutional claim that Cottrell's testimony should not have been admitted. Defense counsel did not open the door to Cottrell's testimony regarding the rate of false reports in child sexual abuse cases simply by asking him on cross-examination whether children lie or manipulate. Accordingly, Thorpe's claim was preserved, and Thorpe had the burden of establishing a miscarriage of justice under a "more probable than not" standard to establish error requiring reversal. In Docket No. 157404, defense counsel did not object to Dr. Simms's expert testimony that the child suffered "probable pediatric sexual abuse." Accordingly, Harbison's claim was reviewed under the plain-error standard.

2. In *People v Smith*, 425 Mich 98 (1986), the Supreme Court held that an examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings and the complainant's medical history. Four years later, the lead opinion in *People v Beckley*, 434 Mich 691 (1990) (opinion by BRICKLEY, J.), observed that evidence of behavioral patterns of sexually abused children may be admissible for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest, or rape. Five years later, in *People v Peterson*, 450 Mich 349 (1995), the Supreme Court found a majority to clarify the plurality decision in *Beckley* and held that an expert may testify in the prosecution's case-in-chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim. *Peterson* further held that an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. However, the Supreme Court held that the experts in *Peterson* improperly vouched for the veracity of the

child victim by testifying that children lie about sexual abuse at a rate of about 2%. Applying that framework, in Docket No. 156777, not only did Cottrell opine that only 2% to 4% of children lie about sexual abuse, but he also identified only two specific scenarios in his experience when children might lie, neither of which applied in this case. As a result, although he did not actually say it, one could reasonably conclude on the basis of Cottrell's testimony that there was a 0% chance the child had lied about sexual abuse. Furthermore, the prosecution's closing argument on rebuttal highlighted this improper evidence at a pivotal juncture at trial. Thorpe's trial was a true credibility contest because there was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements. Because the trial turned on the jury's assessment of the child's credibility, the improperly admitted testimony wherein Cottrell vouched for the child's credibility likely affected the jury's ultimate decision. Under these circumstances, Thorpe showed that it was more probable than not that a different outcome would have resulted without the expert's improper testimony. In Docket No. 157404, Dr. Simms's opinion that the child suffered "probable pediatric sexual abuse" was contrary to the Supreme Court's unanimous decision in *Smith*. Dr. Simms candidly acknowledged that her examination of the child showed no physical evidence of an assault; her conclusion that the child suffered "probable pediatric sexual abuse" was based solely on her own opinion that the child's account of the assaults was "clear, consistent, detailed and descriptive." That testimony fell within *Smith*'s holding that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the conclusion is nothing more than the doctor's opinion that the victim had told the truth. Furthermore, this error was plain. The decision in *Smith* was unanimous and has never been called into question. The test in *Smith* is a very straightforward bright-line test that trial courts can readily observe, and other than in this case, every other Court of Appeals panel that has considered an examining physician's diagnosis of "probable pediatric sexual abuse" has acknowledged that the admission of this testimony is error. Finally, Dr. Simms's testimony that the child suffered "probable pediatric sexual abuse" affected defendant's substantial rights. Regardless of whether "probable pediatric sexual abuse" is a term of art that can be used as a diagnosis with or without physical findings, Dr. Simms's testimony had the clear effect of improperly vouching for the child's credibility. Harbison's case was also largely a credibility contest with the only evidence against Harbison being the child's uncorroborated testimony; accordingly,

given the lack of compelling testimony that formed the basis for the verdict and the plainly erroneous testimony that the child suffered "probable pediatric sexual abuse," the plain error affected Harbison's substantial rights. This error also invaded the province of the jury to determine the only issue in the case, and Dr. Simms reinforced this plain error by claiming that her diagnosis was based on a "national [consensus]" of pediatricians when even a cursory review of the pediatrics journal article on which she relied revealed that the authors did not intend for pediatricians to rely on the article to make a diagnosis of "probable pediatric sexual abuse" at trial. This improperly admitted testimony very likely bolstered the child's credibility and affected the verdict and integrity of Harbison's trial.

Docket No. 156777 reversed and remanded to the Allegan Circuit Court for a new trial; Docket No. 157404 reversed and remanded to the Allegan Circuit Court for a new trial.

1. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — EXPERT WITNESSES TESTIFYING IN CHILD SEXUAL ABUSE CASES.

Expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity.

2. CRIMINAL LAW — CRIMINAL SEXUAL CONDUCT — EXPERT WITNESSES — PHYSICIANS.

Examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Myrene K. Koch*, Prosecuting Attorney, and *Jonathan K. Blair*, Assistant Prosecuting Attorney, for the people in Docket Nos. 156777 and 157404.

State Appellate Defender (by *Katherine L. Marcuz*) for Joshua L. Thorpe.

State Appellate Defender (by *Douglas W. Baker*) for Brandon J. Harbison.

ZAHRA, J. In these consolidated cases, we address the propriety and scope of expert testimony in cases alleging child sexual abuse. In *Thorpe*, we address the admissibility of testimony from an expert in the area of child sexual abuse and disclosure about the rate of false reports of sexual abuse by children to rebut testimony elicited on cross-examination that children can lie and manipulate. In *Harbison*, we address the admissibility of expert testimony from an examining physician that "diagnosed" the complainant with "probable pediatric sexual abuse" despite not having made any physical findings of sexual abuse to support that conclusion. In *Thorpe*, we hold that expert witnesses may not testify that children overwhelmingly do not lie when reporting sexual abuse because such testimony improperly vouches for the complainant's veracity. And because Thorpe has established that this testimony more likely than not affected the outcome of the case, we reverse the judgment of the Court of Appeals and remand to the Allegan Circuit Court for a new trial. In *Harbison*, we hold that examining physicians cannot testify that a complainant has been sexually assaulted or has been diagnosed with sexual abuse without physical evidence that corroborates the complainant's account of sexual assault or abuse because such testimony vouches for the complainant's veracity and improperly interferes with the role of the jury. Because we conclude that this error was plain, affected Harbison's substantial rights, and seriously affected the integrity of his trial, we reverse the judgment of the Court of Appeals and remand to the Allegan Circuit Court for a new trial.[1]

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[1] Given our disposition of these cases, we need not reach the remaining issues raised in defendants' applications.

I. *PEOPLE v THORPE*

In 2006, defendant Joshua Thorpe began a relationship with Chelsie. She had a three-year-old daughter, BG, from a previous relationship. BG viewed Thorpe as a father figure and would refer to him as "dad."

In August 2007, Thorpe and Chelsie had a daughter together. For the next few years, Thorpe and Chelsie raised both girls with each parent working outside the home and sharing responsibilities for watching the children. In 2008, Thorpe's mother, Kimberly, helped take care of both girls after Chelsie went back to school. Kimberly also ran a daycare, and she had a daughter of her own, AS (Thorpe's half-sister), who was close in age and good friends with BG.

In 2010, Thorpe and Chelsie ended their relationship, but Thorpe continued parenting both BG and his daughter. The girls also continued attending the daycare run by Kimberly. Thorpe moved into a new residence down the street from his mother and within walking distance of the girls' elementary school. Although there was no formal custody agreement, Thorpe took care of the girls three days a week when he was not working (Saturday afternoon through Tuesday morning).

In 2012, Chelsie completed her schooling and entered into a relationship with a new boyfriend. Chelsie considered moving to Kalamazoo with him. This caused some conflict between Chelsie and Thorpe. For instance, on July 4, 2012, Chelsie took both girls to see fireworks with her new boyfriend but without Thorpe. According to Thorpe, this led to an argument between Chelsie and Thorpe. Additionally, Thorpe claims that he did not have any parenting time with the girls for the rest of the summer. Thorpe asserts that he did not see either of the girls until August 27, 2012, when he

took his daughter out for her birthday. Thorpe claims that on that day he told Chelsie that he no longer wanted to have parenting time with BG. According to Kimberly, she had advised Thorpe that he should focus on his biological daughter.

Chelsie became pregnant around this same time. Kimberly—who continued watching over BG and Thorpe's daughter at daycare—began to notice that BG had tantrums and outbursts, including when BG would leave the daycare to go home with her mom. Sometime in the fall of 2012, Chelsie arranged for six weeks of counseling sessions for BG. According to Chelsie, she speculated at the time that BG was upset about her pregnancy.

Thorpe stopped seeing BG altogether in late September or early October 2012, but there are conflicting accounts about who made this decision. Thorpe and Kimberly contend that it was Thorpe's decision. According to both Chelsie and BG, however, it was BG who decided that she no longer wanted to visit Thorpe. At that time, BG did not report any inappropriate touching by Thorpe. Kimberly continued to care for both girls, and she occasionally saw BG around Thorpe when he would pick up his daughter from daycare. According to Kimberly, she never got the sense that BG was repulsed by or afraid of Thorpe.

In April 2013, BG told AS (Kimberly's daughter and Thorpe's half-sister) that Thorpe had touched her inappropriately months earlier. AS reported this information to Kimberly. Kimberly talked with BG, who allegedly informed her of a single incident of inappropriate contact. Kimberly, in turn, informed Chelsie. According to Kimberly, she did not believe the allegation, but she believed that she had a duty to communicate the allegation to Chelsie. Chelsie then notified

the authorities. When questioned by authorities, BG reported that Thorpe had touched her inappropriately on multiple occasions. The prosecution charged Thorpe with three counts of second-degree criminal sexual conduct (CSC-II).[2]

At trial, BG testified that Thorpe sexually assaulted her three separate times on two dates in August 2012 when she and Thorpe's daughter had stayed the night at Thorpe's residence. According to BG, the first two incidents occurred while she was watching *Dora the Explorer* in the same bed as Thorpe's daughter, who had fallen asleep. Thorpe entered the room, laid down next to BG, and rubbed her vagina with his hand under her pajamas but over her underwear.[3] The second incident occurred several minutes later when Thorpe again repeated the same behavior. Neither incident involved penetration. Both times BG told Thorpe to stop, and he did. BG testified that her dog, Jake, was in the room during both incidents.[4] The next morning Thorpe told her not to tell anyone about the two incidents.[5]

The third incident occurred about a week later when BG again stayed at Thorpe's residence with his daughter. According to BG, Thorpe entered the room while his daughter was sleeping, pulled BG's wrist behind her body, and placed her hand on his unclothed penis.

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[2] MCL 750.520c(1)(a) (victim under the age of 13).

[3] BG did not previously mention the act of rubbing to authorities. During the preliminary examination, she asserted that Thorpe touched her under her pajamas and under her underwear.

[4] Although an offer of proof was not made at trial, Kimberly asserts that she would have testified that the dog had died several months earlier around Christmas 2011.

[5] During the preliminary examination, BG asserted that Thorpe did not say anything the next morning.

BG asserted that she tried to pull her arm away and kicked his leg. Thorpe let go of her wrist at that point.

During the trial, the jury heard testimony from Chelsie, BG, Kimberly, Thorpe, and an investigator who interviewed BG. The jury also heard testimony from the prosecutor's expert witness, Thomas Cottrell. Cottrell, who has a master's degree in social work and is the vice president of counseling services at the YWCA Counseling Center, was qualified as an expert in the area of child sexual abuse and disclosure. Cottrell neither examined BG nor was provided specific information about the case. The prosecutor called him to offer an expert opinion based on his education, experience, and long-term involvement with children and child sexual abuse. Cottrell testified to the broad range of reactions of children who are abused, the cost/benefit analysis children make in deciding whether to disclose abuse, and some of the reasons children may delay disclosure.

On cross-examination, the following exchange took place between defense counsel and Cottrell:

> *Q*. And that goes along with—well, let me ask you this, kids can lie, true?
>
> *A*. Anyone who has ever worked with a child or has had a child knows that they can lie, yes.
>
> *Q*. And they can manipulate.
>
> *A*. They can do that, yes.

On redirect, the following exchange took place:

> *Q*. In your training and experience of all of the times that you've handled child sexual abuse cases, what, in your experience, if you can say, is the percentage of children who actually do lie?
>
> *A*. About the sexual assault itself?
>
> *Q*. About the sexual assault itself.

Defense counsel objected at this point and asked if there were statistics to support Cottrell's anticipated answer. The trial court ultimately overruled the objection by concluding that defense counsel had brought up the issue of children lying on cross-examination and, thus, opened the door to the prosecutor's line of questioning on redirect.

Cottrell proceeded to answer the prosecutor's last question as follows:

> *A*. Yes. I can only speak to our experience at the organization. There is literature out there that is extremely variable in its—in it's [sic] identification of fabricated disclosures. I can tell you within our population, we run into it probably two to four percent of the cases that we get hav[ing] children alleging abuse when—sexual abuse when abuse did not actually occur. But I will say that in those cases, there is clear motivation for them to do that. When children lie, they lie with a purpose. They are usually trying to get something positive to happen to them or escape some kind of pain. . . . The whole process of investigating and being questioned and being brought into therapy are not pleasant experiences for children by any stretch of the imagination. So lying to bring that on to them is a relatively rare occurrence because there is no gain for children in having the spotlight put on them.

Cottrell then identified two scenarios in which children are likely to lie about sexual abuse: (1) when there is an abused sibling and the other child wants to be a part of whatever the sibling is doing, including therapy, and (2) when there is domestic violence against the other parent and the child lies about sexual abuse in order to bring attention to that situation.

The prosecutor again questioned:

> *Q*. In your experience, you said it's rare; is that correct?
>
> *A*. And it's extremely rare.

On re-cross, defense counsel proceeded with the following line of questioning:

> *Q*. These percentages are when it's discovered, when it's figured out, fair?
>
> *A*. Correct. Yes.
>
> *Q*. It's very possible that there are other cases out there that were fabricated and false that were never discovered.
>
> *A*. Well, we don't know what we don't know, obviously.

Before jury deliberations, the trial court provided the jury with the following instruction regarding Cottrell's testimony:

> You have heard Thomas Cottrell's opinion about the behavior of sexually abused children.
>
> You should consider that evidence only for the limited purpose of deciding whether [BG]'s acts and words after the alleged crime were consistent with those of sexually abused children.
>
> That evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered an opinion by Thomas Cottrell that [BG] is telling the truth.

The jury convicted Thorpe as charged. The trial court sentenced him to concurrent prison terms of 71 months to 15 years of imprisonment for each count. Because BG was under 13 years old and Thorpe was over 17 years old, Thorpe was also sentenced to lifetime electronic monitoring under MCL 750.520n(1). A judgment of sentence was entered on March 22, 2016.

With the assistance of appointed appellate counsel, Thorpe appealed of right. The Court of Appeals affirmed the convictions in an unpublished per curiam opinion, finding no error warranting reversal.[6] Thorpe moved for reconsideration, which the Court of Appeals denied.

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[6] *People v Thorpe*, unpublished per curiam opinion of the Court of Appeals, issued August 10, 2017 (Docket No. 332694).

Thorpe sought leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument on whether to grant the application or take other action, ordering the parties to address the following issues: "(1) whether the trial court abused its discretion by allowing expert testimony on redirect about the rate of false reports of sexual abuse by children, see [*People v Peterson*[7]], in order to rebut testimony elicited on cross examination that children can lie and manipulate; and, if so, (2) whether the error was harmless."[8]

II. *PEOPLE v HARBISON*

Beginning in January 2010, nearly 18-year-old defendant Brandon Harbison would occasionally babysit his nearly 9-year-old niece, TH. He did so through December 2012, around which time TH was removed from her home and placed in foster care. The prosecution characterized TH's childhood as "a life of turmoil" with a seriously drug-addicted mother and a dysfunctional home.

While watching a movie with her foster-care mother about a family struggling to stay together, TH "out of nowhere" started sobbing and began to describe "really bad" things that Harbison had done to her. The foster mother stopped her and called their caseworker before TH could give any details. After TH disclosed instances of sexual abuse to the authorities and a pediatrician, the prosecution charged Harbison with two counts of first-degree criminal sexual conduct (CSC-I),[9] at-

[7] *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995).

[8] *People v Thorpe*, 503 Mich 869, 869 (2018).

[9] MCL 750.520b(1)(b) (fellatio with a victim less than 13 and cunnilingus with a victim less than 13).

tempted CSC-I,[10] two counts of CSC-II,[11] and one count of accosting a child aged less than 16 years old for immoral purposes.[12]

At trial, TH testified that Harbison touched her in inappropriate places, including her vagina, sometimes with his hand and sometimes with his mouth. This first happened at her grandmother's house and then at her mother's house. She testified that at her grandmother's house, her older brother was also in the room but that she and Harbison were alone at her mother's house. TH described Harbison performing oral sex on her "[t]oo many times to remember," masturbating and ejaculating onto her backside, making her watch pornography, and attempting vaginal and anal penetration. TH also testified that Harbison would put his private part in her mouth and that this happened "[a] lot." On cross-examination by defense counsel, TH estimated that Harbison had sexually abused her on more than 30 occasions. The last time one of these incidents occurred, Harbison told her that it was going to stop because he and his girlfriend were having a little girl.

TH's biological mother testified that Harbison, who was her brother, lived with her and her children for a time and also babysat for her. She testified that she was using methamphetamine at the time and that he was too. After she read the police report in this matter, she asked TH if it was true, and TH said "yes."

The prosecution presented testimony from Dr. N. Debra Simms, a pediatrician and an expert in the field

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[10] MCL 750.520b(1)(b) (attempted anal penetration of a victim less than 13).

[11] MCL 750.520c(1)(a) (sexual contact with a victim less than 13).

[12] MCL 750.145a.

of child sexual abuse diagnostics, in its case-in-chief. Dr. Simms examined TH and diagnosed her with "probable pediatric sexual abuse."

Dr. Simms testified:

Q. So all that information that you described all came from [TH].

A. Well it came from [TH] and sometimes from the foster mom.

Q. The information that you said that [TH] told you that she was touched by [Harbison], that he—all of that information that you just recently described, that was all from [TH]?

A. Yes ma'am, that was in my taking a history from [TH] prior to the physical examination.

* * *

Q. What did your physical examination consist of after you got the original history from [TH]?

A. My physical exam included a head to toe generalized physical examination. It included looking at all of the parts of her body, doing the vital signs, and then it included using the culpascope and looking at the genital and anal area.

Q. Okay. And based upon what [TH] had told you, would you have expected to find any injury or anything—any physical findings as a result of your exam?

A. No. When she described the genital to genital contact and I asked about any symptoms or sensation during that, she described that it felt uncomfortable but she did not allege any bleeding.

Q. Okay.

A. Without a history of bleeding it is unlikely that we will see any kind of scarring, although scarring is unusual to this area, but I did not expect to see any findings of healed trauma without that history.

Q. And did you find any physical findings?

A. Well she has normal female genital anatomy. The structures looked normal. In looking at her hymenal tissues she was what we call sexual maturity rating 3, so you're born at 1 and she was progressing puberty wise along a stage of development. She had not yet started her periods and she had enough sexual maturity that that could have happen [sic] at any time. In looking at the hymenal tissues they showed what we call an estrogenized effect, so you could see that she had gone—started going through puberty and had pubertal changes. At the 5:00 position on the hymen there was a very small notch, that's a non-specific finding. So in total her physical exam did not show any acute or remote indications of trauma, just the notch which is a non-specific exam.

Q. And what's a non-specific finding? What does that mean?

A. A non-specific finding is a finding that we can see for many different reasons and is not specific to any type of trauma to the genital tissues. You can have small notches that occur from events like time events such as the bicycle accident or something of that nature. You can get small notches from children that use tampons. You can get small notches that are actually developmental in nature. So when you have a very shallow very small notch that is less than 50% of the width of the hymenal rim, those are considered non-specific findings.

* * *

Q. Did you have a diagnosis based on your exam and history?

A. Yes, ma'am.

Q. What was that?

A. Probable pediatric sexual abuse.

Q. And you said that even if there was no other than what you described [sic], her physical exam was normal?

A. Yes, ma'am.

Q. Was her normal physical exam inconsistent with her description of the sexual penetrations that she suffered?

A. No, ma'am. Her disclosure was that there had been contact by—contact by her uncle's mouth to her genital area. You would not expect residual of trauma from that. There was contact by her mouth to his penis, once again you wouldn't expect any kind of physical examination finding from that. She described that there was touching. Children, we diaper them, we change them, we bathe them, we touch them all the time. To examine these children I have to touch them. I have to spread apart these layers and I don't cause any trauma. And then she described genital to genital contact which did not have any bleeding associated with it. So the fact that her physical examination shows non-specific findings with this notch and generally normal genital structures does not negate her history of what occurred to her body.

Q. How many attempted penile/anal or genital contact[s] [do not] leave any marks on the body? Do you have a percentage?

A. I personally have had lots of experience in which there has been genital to genital contact and in which there is a normal or a non-specific exam. In our published literature there is a paper, the title of it it's normal to be normal [sic], they took 236 children in which there was a substantiation or conviction in which there was a higher standard than just we think that these children may be abused and so they looked at these 236 children and of those 236 children more than two-thirds of girls with substantiated abuse had normal or non-specific findings. So it's normal to be normal. When you talk about what the nature of child sexual abuse is the majority of time it's licking, kissing, touching, rubbing, and we would not expect to see scarring or residual trauma from those events.

The trial court also questioned Dr. Simms:

Q. Alright. You described your conclusion as probable pediatric sexual abuse.

A. Yes, sir.

Q. Would you explain to the jury why you consider probable as opposed to maybe possible?

A. In an attempt to allow pediatricians that do child abuse evaluations to communicate with one another effectively, what I may look at and say this is concerning, and someone else may say it's suspicious, and someone else may say it's this or it's that, what happened is there became a national cocensus [sic] that we need to look at all of the evaluations and we need to be on the same page. We need to look at how is it that we are evaluating these patients and how are we coming to a conclusion. And, what occurred is that instead of using various and sundry words to describe the outcomes of these evaluations, an attempt was made to standardize this by saying if there is no disclosure of abuse and it is a normal exam with no concerning situations, this means that there are no medical indications of abuse at this time, and that is a negative evaluation. If—other criteria exists [sic] but it's what we would consider a lower form of history. As a pediatrician I cannot always diagnose based solely upon the medical testing such as you referenced or from seeing something on the physical examination. If you come in to see me and you have a headache, I cannot see your headache, but based upon your history of where you tell me it hurts, when it hurts, how it hurts, how it feels, when it comes, when it goes, how often it comes, taking a comprehensive history, I can diagnose stress headache, cluster headache, migraine headache, etcetera, based upon the history. So in child sexual abuse we take the history that the child gives us and based upon how clear, consistent, detailed or descriptive it may be, if that is present with or without physical examination findings, that is probable pediatric sexual abuse. If the child makes a statement but the statement is limited because the child may have a developmental disability, they may be young, they may not be able to really tell me what has happened to their body, then that can be possible pediatric sexual abuse. They're making a statement but for some reason they're not able to be clear, consistent, detailed and descriptive like with the headache analogy. To get a diagnosis of definite

> pediatric sexual abuse we have very high tough standards. You have to be pregnant, you have to have a sexually transmitted disease that does not come from anything other than direct sexual contact. There has to be a video, a picture or an eyewitness to you being abused. Or, you have to have physical examination findings that have no other explanation than penetrating trauma to the intervaginal area. That's a really tough standard. So that's our definite. Then clear, consistent, detailed and descriptive history is probable, and then we have the other 2 categories for less than that.
>
> *Q*. You refer to a ["we"] have this standard. Who is the ["we"]?
>
> *A*. The ["we"] are the individuals that do pediatric sexual abuse evaluation nationwide, nationwide. We have this standard. So when I'm communicating with Dr. Chris Greely down at Children's Hospital in Texas, when I say I have this then he knows that [is] the criteria that I'm using. So for individuals that do this on a regular basis, there's no rule to it because as a physician you can choose to do what you want to do, but it's basically a practice standard for those of us that are professionals in this field.

Defense counsel called three witnesses on Harbison's behalf. The first was Harbison's probation officer, who testified that Harbison was in jail during a three-month period covered by the information. The second was Harbison's mother, who was also TH's grandmother. She testified that Harbison quit school in the eighth grade, did not have a driver's license, and that he was never left alone with TH at her house. She testified that TH only came to her house once in a while and was not there very often. On cross-examination, she admitted that Harbison did babysit for TH's mother, and she admitted that she didn't know if any other adults were present during those times. The third witness was Harbison's live-in girlfriend, with whom he had three children by the time of trial. She testified that she and

Harbison were always together, that he almost never went anywhere without her, and that she knew he was never alone with TH when he babysat for TH's mother, because she (his girlfriend) went with him on all those occasions and stayed with him no matter which room he went into, including the bathroom, where they would talk.

After approximately six hours of deliberation over two days, during which the jury asked that TH's testimony be replayed, Harbison was found guilty as charged on all counts. The trial court subsequently denied Harbison's motion for a new trial.

Harbison filed an appeal as of right along with a motion to remand for an evidentiary hearing on his claims that he was denied the effective assistance of counsel. Specifically, Harbison argued that his trial counsel failed to timely convey to him a plea offer and failed to present evidence that TH had previously made prior false accusations of sexual abuse. Harbison also argued that he was denied a fair trial because of Dr. Simms's testimony that TH had been sexually abused.

The Court of Appeals, while retaining jurisdiction, granted Harbison's motion to remand, directing the trial court to conduct a *Ginther*[13] hearing on Harbison's claims of ineffective assistance of counsel and to rule again on his motion for a new trial.[14] Following a lengthy hearing, the trial court granted a new trial on the ground that trial counsel was ineffective in failing to investigate and present testimony from TH's brother. The brother testified at the evidentiary hearing that he never witnessed Harbison try to have

[13] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[14] *People v Harbison*, unpublished order of the Court of Appeals, entered April 25, 2016 (Docket No. 326105).

sexual contact with TH, contrary to TH's testimony at trial that her brother was present in the room at their grandmother's house when Harbison had sexual contact with her.

But the Court of Appeals reversed the trial court's grant of a new trial and affirmed Harbison's convictions in an unpublished per curiam opinion.[15] Judge RONAYNE KRAUSE concurred in the result only but did not provide an explanation. The panel concluded that defense counsel was not ineffective because TH's brother had credibility problems and, therefore, his testimony would not likely have made a difference at trial.[16] Regarding Dr. Simms's diagnosis of "probable pediatric sexual abuse," the panel held that the admission of this testimony was not plain error because "it appears that Dr. Simms was simply leaning toward taking [TH] at her word."[17] Under these circumstances, the panel held that this was not a clear and obvious error and that even if it was, the panel could not find the requisite prejudice because "the testimony, read as a whole, made clear that the physician was simply relying on [TH]'s word, and [TH] herself testified at trial."[18]

Harbison sought leave to appeal in this Court. This Court, in lieu of granting leave to appeal, vacated "that part of the Court of Appeals judgment concerning the testimony of Dr. N. Debra Simms" and remanded "to that court for reconsideration in light of *People v Peterson*, 450 Mich 349 (1995)."[19] Leave to appeal was denied in all other respects.

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[15] *People v Harbison*, unpublished per curiam opinion of the Court of Appeals, issued January 26, 2017 (Docket No. 326105).

[16] *Id*. at 5-6.

[17] *Id*. at 7.

[18] *Id*.

[19] *People v Harbison*, 501 Mich 897, 897 (2017).

On remand, the Court of Appeals held that it "cannot find a clear or obvious error . . . with regard to Dr. Simms's testimony, even when viewed through the lens of *Peterson*."[20] Specifically, the panel held:

> Dr. Simms never directly opined on the ultimate question in this case—i.e., whether the victim was abused by defendant—she merely stated a medical diagnosis based on established diagnostic criteria, *all of which were explained to the jury*. Moreover, she never stated that she personally, or as an expert, found the victim's account of the abuse to be credible. Rather, she indicated that the victim had provided a history that was "clear, consistent, detailed *or* descriptive[.]" (Emphasis added.) Viewed in context, the testimony did not clearly run afoul of *Peterson's* admonishment that an expert may not vouch for the veracity of the victim or testify that the sexual abuse occurred or that the defendant is guilty.[21]

Harbison again sought leave to appeal in this Court. We directed the Clerk of this Court to schedule oral argument on whether to grant the application or take other action, ordering the parties to address the following issues: "whether the prosecution's admission of Dr. N. Debra Simms's expert testimony that the victim suffered 'probable pediatric sexual abuse' violated this Court's decision in [*Peterson*], and, if so, whether this was plain error requiring reversal of [Harbison's] convictions."[22]

III. DETERMINATION OF APPLICABLE STANDARDS OF REVIEW

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion.[23] The decision to

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[20] *People v Harbison (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued January 23, 2018 (Docket No. 326105), p 9.

[21] *Id*. at 8.

[22] *People v Harbison*, 501 Mich 1074, 1074 (2018).

[23] *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls " 'outside the range of principled outcomes.' "[24] A decision on a close evidentiary question ordinarily cannot be an abuse of discretion.[25]

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal.[26]

Preserved nonconstitutional errors are subject to harmless-error review under MCL 769.26, which states:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has *resulted in* a *miscarriage of justice*.[27]

In sum, if the issue is preserved, the defendant has the burden of establishing a miscarriage of justice under a "more probable than not" standard.[28] If the constitutional or nonconstitutional error is not preserved, the defendant must show a plain error that affected substantial rights.[29] The reviewing court should reverse

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[24] *People v Douglas*, 496 Mich 557, 565; 852 NW2d 587 (2014), quoting *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013).

[25] *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

[26] MRE 103(a)(1).

[27] Emphasis added.

[28] *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

[29] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.[30]

In *Harbison*, defense counsel did not object to Dr. Simms's testimony that TH suffered "probable pediatric sexual abuse." Accordingly, we review Harbison's claim under the plain-error standard.

In *Thorpe*, defense counsel objected to Cottrell's testimony that children only lie about sexual abuse 2% to 4% of the time.[31] The trial court overruled the objection, concluding that defense counsel had raised the issue of children lying on cross-examination and, thus, opened the door to the prosecution's line of questioning on redirect examination.

We conclude that defense counsel's objection was sufficient to preserve Thorpe's nonconstitutional claim that Cottrell's expert testimony should not have been admitted.[32] "Opening the door is one thing. But

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[30] *Id*. at 763-764.

[31] Immediately following the prosecutor's improper question on redirect, defense counsel stated: "I am going to object, unless there are statistics. If we have a summary or some sort of report statistics in it."

[32] Defense counsel's objection largely tracks this Court's opinion in *Peterson*, in which this Court highlighted both relevancy and reliability concerns with expert testimony about the rate of false reports of sexual abuse by children. *Peterson*, 450 Mich at 376. And here, even Cottrell acknowledged that there was literature on the topic of fabricated disclosures but that such literature was "extremely variable." Yet Cottrell did not base his opinion on the literature or any other scientific source. Cottrell based his testimony entirely on his experience working with people who were *self-reported* victims of sexual assault. Mental health professionals "are not . . . experts at discerning truth. [They] are trained to accept facts provided by their patients, not to act as judges of patients' credibility." *People v Beckley*, 434 Mich 691, 728; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.) (quotation marks and citation omitted).

what comes through the door is another."[33] "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant."[34] Defense counsel did not open the door to Cottrell's testimony regarding the rate of false reports in child sexual abuse cases simply by asking him on cross-examination whether children lie or manipulate. Counsel did not ask Cottrell about the frequency with which children lie, whether children make false allegations of sexual abuse, or whether he has had any experience with false accusations in his own practice. We agree with Thorpe that defense counsel's questions to Cottrell—"let me ask you this, kids can lie, true?" and "[a]nd they can manipulate[?]"—were discrete, straightforward, and uncontroversial questions of fact. To maintain that these basic questions *invited* the prosecution to elicit expert testimony from Cottrell that children lie about sexual abuse 2% to 4% of the time would essentially require defense counsel to read tea leaves before asking any questions. We therefore conclude that Thorpe's claim is preserved and that he has the burden of establishing a miscarriage of justice under a "more probable than not" standard to establish error requiring reversal.

IV. LEGAL BACKGROUND

Three cases decided by this Court control the analysis of the instant cases. In *People v Smith*,[35] we ad-

[33] *United States v Winston*, 447 F2d 1236, 1240 (CA DC, 1971) (quotation marks and citation omitted).

[34] *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

[35] *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986).

dressed "whether the trial courts erred so as to require reversal in allowing the examining physicians to testify that the complainants had been sexually assaulted."[36] Citing MRE 704, we stated that "[i]t is . . . well-established that expert opinion testimony will not be excluded simply because it concerns the ultimate issue[.]"[37] Yet, we acknowledged that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth."[38] An examining physician's opinion is objectionable when it is solely based "on what the victim . . . told" the physician.[39] Such testimony is not permissible because a "jury [is] in just as good a position to evaluate the victim's testimony as" the doctor.[40] Nonetheless, an examining physician, if qualified by experience and training relative to treatment of sexual assault complainants, can opine with respect to whether a complainant had been sexually assaulted when the opinion is based on physical findings *and* the complainant's medical history.[41]

Smith only addressed the expert testimony of the examining physician; *Smith* declined to address expert psychiatric testimony or evidence of rape trauma syndrome:

> Our decision today is made in the context of the particular cases before us, i.e., both cases concerned admissibility of the doctors' opinions which were based on

[36] *Id*. at 101.

[37] *Id*. at 106.

[38] *Id*. at 109.

[39] *Id*.

[40] *Id*.

[41] *Id*. at 110-112.

> examination of the alleged victims shortly after the incidents. We express no opinion on, e.g., the admissibility of expert psychiatric testimony or rape trauma syndrome evidence, noting only that the rules of evidence should guide any decision on admissibility of expert testimony.[42]

Some four years later, however, we addressed that question in this Court's plurality opinion in *People v Beckley*.[43] In the lead opinion authored by Justice BRICKLEY, joined by Justices GRIFFIN and LEVIN, the Court acknowledged that " 'syndrome' evidence as it relates to child abuse cases is a relatively new development in the law and novel to our Court . . . ."[44] As one article explains:

> Prosecution of offenders for child sexual abuse is often difficult because of the sparsity of witnesses to these crimes. As such, expert testimony is sometimes used at trial to explain some of the commonly misunderstood behaviors exhibited by children who have been victims of sexual abuse, such as delayed reporting and recantation. In the behavioral science field, there exists a syndrome labeled the child sexual abuse accommodation syndrome (CSAAS).[45]

The lead opinion noted, however, that this evidence is problematic:

> [T]he evidence has a very limited use and should be admitted cautiously because of the danger of permitting an inference that as a result of certain behavior sexual abuse in fact occurred, when evidence of the syndrome is not a conclusive finding of abuse. Although syndrome

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[42] *Id*. at 115 n 13.

[43] *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.).

[44] *Id*. at 706.

[45] 85 ALR5th 595, 595.

> evidence may be appropriate as a tool for purposes of treatment, we would hold that it is unreliable as an indicator of sexual abuse.[46]

The lead opinion looked to foreign jurisdictions and recognized a clear divide on the use of such evidence. On one hand, some courts have allowed the use of the syndrome evidence generally and even have allowed the expert to opine that he found the victim's account " 'believable.' "[47] On the other hand, the lead opinion recognized that some courts take an "approach where testimony is allowed only on specific behavioral instances to which the defendant has opened the door in an attempt to discredit the victim's testimony. This . . . approach permits syndrome testimony only with respect to the specific characteristics that the defendant has attacked."[48]

The lead opinion also recognized "a middle ground [that] allows the expert to testify in general terms as to any and all behavior patterns that are seemingly inconsistent with crime victims generally."[49] After reviewing this caselaw, the lead opinion observed that evidence of behavioral patterns of sexually abused children may be admissible "for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape."[50]

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[46] *Beckley*, 434 Mich at 724 (opinion by BRICKLEY, J.).

[47] *Id*. at 708, quoting *State v Kim*, 64 Hawaii 598, 601; 645 P2d 1330 (1982).

[48] *Beckley*, 434 Mich at 708-709 (opinion by BRICKLEY, J.). See, e.g., *People v Bowker*, 203 Cal App 3d 385; 249 Cal Rptr 886 (1988).

[49] *Beckley*, 434 Mich at 710 (opinion by BRICKLEY, J.), citing *State v Hall*, 406 NW2d 503 (Minn, 1987).

[50] *Beckley*, 434 Mich at 710 (opinion by BRICKLEY, J.) (quotation marks and citation omitted). Justice BOYLE, joined by Chief Justice RILEY,

Five years later, the Court found a majority to "clarify [the plurality] decision in *Beckley*" and held:

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.[51]

Applying this framework, the Court identified the errors associated with the experts' testimony in *Peterson*. "First, the experts . . . improperly vouched for the veracity of the child victim" by "testify[ing] that children lie about sexual abuse at a rate of about two percent."[52]

> Second, the experts in *Peterson* were allowed to make numerous references to the consistencies between the

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concurred and wrote separately to express concern that "the rationale employed in the lead opinion may create restrictions on the use of expert testimony in child sexual abuse cases that unnecessarily limit an expert's ability to assist the factfinder." *Id*. at 734 (opinion by BOYLE, J.). Basically, Justice BOYLE agreed with the "numerous jurisdictions [that] allow the use of expert testimony to assist the jury in evaluating credibility, without reference to rehabilitation or rebuttal." *Id*. at 736-737. Justice ARCHER, joined by Justice CAVANAGH, concurred in part and dissented in part. Justice ARCHER disagreed that an expert should be permitted to refer to the complainant in a particular case. He would have limited the expert's testimony to a discussion of the specific postincident behavioral traits at issue, without reference to a complainant or the specific facts of a case. *Id*. at 744-745 (ARCHER, J., concurring in part and dissenting in part). Justice ARCHER opined that "[u]nder the rule the lead opinion would adopt today, the danger is too great that the trier of fact will improperly infer that an expert testifying on the basis of syndrome evidence is, in effect, concluding that the particular complainant before the court has been abused." *Id*. at 747.

[51] *Peterson*, 450 Mich at 352-353.

[52] *Id*. at 375-376.

> victim's behavior and the behavior of typical victims of child sexual abuse. The experts, in various ways, testified regarding the dysfunctional family that each had observed and about some of the bizarre behavior exhibited by the victim.[53]

The Court concluded that "[b]ecause the defendant never argued that the victim's behavior was inconsistent with that of a typical victim of child sexual abuse, such testimony is error."[54]

V. APPLICATION

A. THORPE

We conclude that Thorpe has shown that it is more probable than not that a different outcome would have resulted without Cottrell's testimony that children lie about sexual abuse 2% to 4% of the time. In *Peterson*, this Court observed that nearly identical testimony allowed "the experts in that case [to] improperly vouch[] for the veracity of the child victim."[55] Here, not only did Cottrell opine that only 2% to 4% of children lie about sexual abuse, but he also identified only two specific scenarios in his experience when children might lie, neither of which applies in this case. As a result, although he did not actually say it, one might reasonably conclude on the basis of Cottrell's testimony that there was a 0% chance BG had lied about sexual abuse. In so doing, Cottrell for all intents and purposes vouched for BG's credibility. Furthermore, the prosecution's closing argument on rebuttal highlighted this improper evidence at a pivotal juncture at trial:

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[53] *Id*. at 376.

[54] *Id*. at 376-377.

[55] *Peterson*, 450 Mich at 375-376. *Peterson* also stated that "[s]uch references to truthfulness . . . go beyond that which is allowed under MRE 702." *Id*. at 376. Although we have no sound basis to dispute the Court's statement, we need not reach this unpreserved issue.

> The defense attorney asked you, why would [BG] lie? It's a very good question. You need to think about that, because she did not. Mr. Cottrell did say that it's very rare for children to lie. His percentage was less than two to four percent of all of those cases that his agency sees.
>
> But he said one of the reasons they don't [lie] is because there is no gain for the victim. What [did BG] get out of this? She didn't get [sic] attorney. She had to go to a forensic interview. She had to testify at a prelim, she had to testify here at trial. There is no gain for any of that. She had to talk about this a lot, about what happened to her.

Thorpe's trial was a true credibility contest. There was no physical evidence, there were no witnesses to the alleged assaults, and there were no inculpatory statements. The prosecution's case consisted of BG's allegations, testimony by her mother regarding BG's disclosure of the alleged abuse and behavior throughout the summer and fall of 2012, and Cottrell's expert testimony. Thorpe testified in his own defense and denied the allegations. Additionally, Kimberly testified about other reasons for BG's behavior during the summer and fall of 2012; namely, that her mother had started a new relationship and become pregnant and that Thorpe had decided to no longer have parenting time with BG. Because the trial turned on the jury's assessment of BG's credibility, the improperly admitted testimony wherein Cottrell vouched for BG's credibility likely affected the jury's ultimate decision. Under these circumstances, we conclude that Thorpe has shown that it is more probable than not that a different outcome would have resulted without Cottrell's improper testimony.

B. HARBISON

We conclude that Harbison has established a plain error that affected his substantial rights. Dr. Simms's

expert opinion that TH suffered "probable pediatric sexual abuse" is contrary to this Court's unanimous decision in *Smith*. In *Smith*, the examining physician "testified that although he found no physical evidence of an assault, in his opinion [the] complainant had been sexually assaulted. This opinion was based on the complainant's emotional state, described by [the expert] as 'agitated, extremely nervous' and 'shaking,' and her 'history as she described it . . . .' "[56] This Court readily concluded that the expert testimony was improperly admitted. This Court observed that the expert's "opinion that the complainant had been sexually assaulted was based, not on any findings within the realm of his medical capabilities or expertise as an obstetrician/gynecologist, but, rather, on the emotional state of, and the history given by, the complainant."[57]

In *Harbison*, Dr. Simms candidly acknowledged that her examination of TH showed no physical evidence of

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[56] *Smith*, 425 Mich at 102-103.

[57] *Id*. at 112. In contrast, in *Smith*'s companion case, *People v Mays*, the examining physician testified that "his examination revealed a red mark on [the victim's] face and she had some small abrasions at the entrance of her vagina." *Id*. at 104. The prosecution asked:

> "*Q*. [*Prosecuting Attorney*]: All right. Using your background, your education, your experience, her demeanor, her clothing, her attitude, and what you saw in your examination, all of the things that you know about this person, using all of your experience, did you form an opinion as to whether or not there was sexual penetration against her will?" [*Id*. (alteration in original).]

The expert answered, " 'My opinion was that she had been penetrated against her will.' " *Id*. at 105. The Court found that the admissibility of the expert's testimony presented a "closer question." *Id*. at 113. The Court concluded that the expert provided some objective evidence (abrasions at the entrance of the complainant's vagina) that was not consistent with consensual relations and held that given the victim's emotional state and the expert's experience in treating similar patients, the testimony was admissible.

an assault. Her conclusion that TH suffered "probable pediatric sexual abuse" was based solely on her own opinion that TH's account of the assaults was "clear, consistent, detailed and descriptive." This testimony clearly falls within *Smith*'s holding that an examining physician cannot give an opinion on whether a complainant had been sexually assaulted if the "conclusion [is] nothing more than the doctor's opinion that the victim had told the truth."[58] An examining physician's opinion is objectionable when it is solely based "on what the victim . . . told" the physician.[59] Such testimony is not permissible because a "jury [is] in just as good a position to evaluate the victim's testimony as" the doctor.[60]

We also conclude that this error was plain, i.e., obvious. Our decision in *Smith* was unanimous and has never been called into question. *Smith* provides a very straightforward bright-line test that trial courts can readily observe. Other than the instant case, every Court of Appeals panel that has considered an examining physician's diagnosis of "probable pediatric sexual abuse" has acknowledged that the admission of this testimony is error.[61]

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[58] *Smith*, 425 Mich at 109.

[59] *Id*.

[60] *Id*.

[61] *People v Jackson*, unpublished per curiam opinion of the Court of Appeals, issued April 29, 2010 (Docket No. 283092), p 2; *People v Gresham*, unpublished per curiam opinion of the Court of Appeals, issued December 7, 2010 (Docket No. 293580), pp 2-3; *People v Spayde*, unpublished per curiam opinion of the Court of Appeals, issued September 29, 2011 (Docket No. 294300), pp 3-4; *People v Gillen*, unpublished per curiam opinion of the Court of Appeals, issued May 15, 2012 (Docket No. 304350), p 3; *People v Chevis*, unpublished per curiam opinion of the Court of Appeals, issued October 8, 2013 (Docket No. 304358), p 8; *People v Bentz*, unpublished per curiam opinion of the Court of Appeals, issued December 29, 2016 (Docket No. 329016), p 3.

We also conclude that Dr. Simms's testimony that TH suffered "probable pediatric sexual abuse" affected defendant's substantial rights. *Smith* focused on the lack of reliability of an expert opinion given the lack of physical findings and the superfluous nature of an expert's testimony in cases in which the "jury was in just as good a position to evaluate the victim's testimony . . . ."[62] But we believe the most prejudicial aspect of Dr. Simms's testimony was that she clearly vouched for TH's credibility. This Court has previously drawn a distinction between expert testimony that a particular child was abused and testimony about the common characteristics of abused children:

> Therefore, any testimony about the truthfulness of this victim's allegations against the defendant would be improper because its underlying purpose would be to enhance the credibility of the witness. To hold otherwise would allow the expert to be seen not only as possessing specialized knowledge in terms of behavioral characteristics generally associated with the class of victims, but to possess some specialized knowledge for discerning the truth.[63]

As we recognized in *Beckley* and embraced in *Peterson*:

> The use of expert testimony in the prosecution of criminal sexual conduct cases is not an ordinary situation. Given the nature of the offense and the terrible consequences of a miscalculation—the consequences when an individual, on many occasions a family member, is falsely accused of one of society's most heinous offenses, or, conversely, when one who commits such a crime would go unpunished and a possible reoccurrence of the act would go unprevented—appropriate safeguards are necessary. To a jury recognizing the awesome dilemma of whom to

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[62] *Smith*, 425 Mich at 109.

[63] *Beckley*, 434 Mich at 727-728, 729 (opinion by BRICKLEY, J.).

> believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat.[64]

In *Harbison*, the Court of Appeals found no error in Dr. Simms's testimony, reasoning that Dr. Simms did not opine on whether the complainant was abused by Harbison but only diagnosed the complainant with "probable pediatric sexual abuse." We disagree. Regardless of whether "probable pediatric sexual abuse" is a term of art that can be used as a diagnosis with or without physical findings, we conclude that Dr. Simms's testimony had the clear impact of improperly vouching for TH's credibility.

And much like *Thorpe*, the instant case is largely a credibility contest. The only evidence against Harbison was TH's uncorroborated testimony. To bolster its case, the prosecution presented testimony from a pediatrician who is board-certified in child abuse pediatrics; who is currently a medical director at the Safe Harbor Children's Advocacy Center; who has examined, in her estimate, thousands of children who have been sexually abused; and who has testified as an expert witnesses in 32 counties. Given the lack of compelling testimony that forms the basis for the verdict and the plainly erroneous testimony that TH suffered "probable pediatric sexual abuse," we conclude that the plain error affected Harbison's substantial rights.

We also conclude that this error is far more pernicious than a mere evidentiary error. Rather, this error strikes at the heart of several important principles underlying our rules of evidence. Dr. Simms's testimony that TH suffered "probable pediatric sexual abuse" based solely on TH's statements about her

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[64] *Id*. at 721-722.

history not only had the effect of vouching for TH's credibility, but it also invaded the province of the jury to determine the only issue in the case. Then, Dr. Simms reinforced this plain error by claiming that her diagnosis was based on a "national [consensus]" of pediatricians when even a cursory review of the article on which she relies reveals that the authors did not intend for pediatricians to rely on the article to make a diagnosis of "probable pediatric sexual abuse" at trial.[65] This improperly admitted testimony very likely bol-

[65] Moreover, to the extent that Dr. Simms relied on the article *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal* to conclude that TH suffered "probable pediatric sexual abuse," that reliance was seriously misplaced. Adams, Harper, Knudson & Revilla, *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to be Normal*, 94 Pediatrics 310 (1994). Relying on this article to testify at trial concerning whether a complainant suffered "probable pediatric sexual abuse" actually undermines the integrity of the study by proving the very premise that it accepts as true, i.e., that legally confirmed convictions are a valid measure of the truth. The article admits as much by acknowledging that "since the examiner testified in court in 34 of the cases in which the perpetrator was convicted following a jury trial, it is possible that *testimony concerning medical findings contributed to the conviction*." *Id*. at 315 (emphasis added). Given that the article notes that it "is possible that testimony concerning medical findings contributed to the conviction," it seems likely that testimony concerning a "diagnosis" would further contribute to the conviction, especially, as in this case, when there are no physical findings to be found. *Id*. In many respects, relying on the article in this manner is akin to offering into evidence conviction rates to establish that those charged with crimes will "probably" be convicted.

We conclude that the article is clearly directed toward making a "diagnosis" on the basis of " 'proof' *before* proceeding with criminal charges" and does not support a "diagnosis" of pediatric sexual abuse at trial. *Id*. at 317 (emphasis added). The article only once refers to the term "diagnosis" and only does so by placing the term in scare quotes, which are "used to express esp. skepticism or derision concerning the use of the enclosed word or phrase." *Merriam-Webster's Collegiate Dictionary* (11th ed). In other words, the term "diagnosis" is not being used in its traditional sense. This makes sense, as even Dr. Simms

stered TH's credibility and affected the verdict. We conclude that the gravity of this significant error seriously affected the integrity of Harbison's trial.

VI. CONCLUSION

In *Thorpe*, we reverse the judgment of the Court of Appeals and remand to the Allegan Circuit Court for a new trial. In *Harbison*, we reverse the judgment of the Court of Appeals and remand to the Allegan Circuit Court for a new trial.

MCCORMACK, C.J., and MARKMAN, VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with ZAHRA, J.

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herself explained that the purpose of the "diagnosis" was "to allow pediatricians that do child abuse evaluations to communicate with one another effectively . . . ."

Rather, the article is directed at pediatricians who must make referrals of possible sexual abuse and to inform prosecutors that the absence of medical "findings" does not mean that the complainant did not suffer sexual abuse. This reading of the article not only makes sense but is consistent with Michigan law and likely the law of every other state. Indeed, the Michigan Legislature set a very low bar for triggering a report of sexual abuse, requiring a report if one only "has reasonable cause to suspect child abuse or child neglect . . . ." MCL 722.623(1)(a). And even if, as Dr. Simms testified and the Court of Appeals highlighted, "probable pediatric sexual abuse" is "a term of art used by 'individuals that do pediatric sexual abuse evaluation nationwide,' " there is good reason why a search of the caselaw of every other state reveals no matches for the phrase "probable pediatric sexual abuse" yet a search of our own caselaw reveals the phrase used in several unpublished Court of Appeals opinions.

PEOPLE v WALKER

Docket No. 155198. Argued on application for leave to appeal January 24, 2019. Decided July 11, 2019.

Harold L. Walker was convicted following a jury trial in the Wayne Circuit Court, Qiana D. Lillard, J., of being a felon in possession of a firearm, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and possessing a firearm when committing or attempting to commit a felony, MCL 750.227b(1). In August 2014, defendant was on parole from a prior felony conviction; conditions of defendant's parole prohibited him from possessing a weapon and from being around alcohol. On August 5, 2014, police officers saw a group of four individuals drinking beer and listening to loud music near a vehicle in Detroit. As the officers approached the group, defendant walked toward the nearby house, holding something in the front pocket of his pants that appeared to be heavy. When he reached the front porch of the house, defendant threw something into a bush beside the porch; the police arrested defendant after they recovered a loaded revolver from the bush. Defendant asserted through his own testimony as well as that of a corroborating witness that the witness had earlier hidden the gun in the bush and that defendant had tossed a beer bottle into the bush, not a gun. After the jury was picked, the court noted that Juror No. 8 was late, had not called in, and that "bad things might happen to that person." When the juror arrived, the juror was seated in view of the other jurors in the area reserved for in-custody criminal defendants before being dismissed from the jury. Approximately 75 minutes after it began deliberating, the jury notified the trial court that it was deadlocked. The trial court gave a supplemental, ad-lib instruction to the jury (instead of the M Crim JI 3.12 deadlocked-jury instruction), sent the jury members to lunch, and twice instructed the jury to let the court know if any jurors were failing to follow the instructions or failing to participate in deliberations. The jury found defendant guilty of all charges approximately 90 minutes after resuming deliberations following lunch. Defendant appealed in the Court of Appeals, arguing that he was entitled to a new trial because the trial court's deadlocked-jury instruction was impermissibly coercive. In an unpublished per curiam opinion issued December 1, 2016

(Docket No. 327063), the Court of Appeals, FORT HOOD, P.J., and O'BRIEN, J. (GLEICHER, J., dissenting), affirmed, reasoning that, in context, the instruction did not coerce a verdict. Defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1088 (2018).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

M Crim JI 3.12 provides model jury instructions that may be used when a jury appears to be deadlocked. Although every deviation from M Crim JI 3.12 does not constitute error requiring reversal, the trial court's ad-lib supplemental instruction omitted nearly every safeguard provided by the model instruction and crossed the line from appropriately encouraging deliberation to being unduly coercive: the instruction (1) failed to offer constructive advice to encourage further deliberation, (2) omitted important safeguards of jurors' honest convictions, and (3) included coercive language. In addition, the instruction was delivered in a coercive atmosphere given the tenor of the proceedings. Taken together, these circumstances impermissibly coerced jurors to surrender their honestly held beliefs for the sake of reaching a verdict. The Court of Appeals judgment was reversed and the case remanded for a new trial before a different judge.

1. When a jury indicates that it cannot reach a unanimous verdict, a trial court may give a supplemental instruction to encourage the jury to continue deliberating. If a jury indicates that it is deadlocked after deliberating too short a period for thoughtful deliberation, the trial court may simply instruct the jury to continue their deliberations. The goal of an instruction to a jury that cannot reach a verdict is to encourage deliberation without coercing a verdict and to offer constructive guidance on how to deliberate. In that regard, giving an honest-conviction reminder tempers the trial court's simultaneous emphasis on reaching a unanimous agreement. Encouraging jurors to single out jurors who are not participating when there is no indication that a juror has refused to deliberate can constitute undue pressure, threats, or embarrassing assertions that would tend to force a decision or cause a juror to abandon his or her conscientious dissent and defer to the majority. M Crim JI 3.12, the model deadlocked-jury instruction, balances the goal of encouraging deliberation without coercing a verdict, but that is not the only instruction that may be given to a deadlocked jury. In other words, every deviation from the model instruction does not

constitute error requiring reversal. The relevant inquiry—considering the factual context in which the instruction was given on a case-by-case basis—is whether the instruction given could cause a juror to abandon his or her conscientious dissent and defer to the majority solely for the sake of reaching agreement.

2. Taken together, the trial court's ad-lib supplemental instruction to the jury was unduly coercive because (1) the instruction lacked constructive guidance to the jury on how to continue deliberating and break through the impasse and encouraged an antagonistic relationship among the jurors when it prompted them to single out any juror who was refusing to deliberate when there was no indication that a juror had refused to deliberate; (2) the instruction failed to remind the jurors that they should not give up their honestly held beliefs for the sake of reaching an agreement; (3) rather than simply instructing the jury to continue its deliberations, the instruction contained coercive language that telegraphed to jurors that failure to reach a verdict was not an option and suggested that jurors single out other jurors for refusing to deliberate when there was no indication that a juror had refused to deliberate; and (4) the trial court's conduct during the trial telegraphed that the court would not tolerate a hung jury. In addition, the quick turnaround in arriving at a guilty verdict after the court's supplemental instruction suggested that the verdict was coerced. Therefore, the instruction given not only omitted nearly every safeguard contained in M Crim JI 3.12, but it was administered in a coercive atmosphere. The instruction affected defendant's substantial rights and the fairness, integrity, and public reputation of the judicial proceedings by affecting the jury's verdict.

3. The case was assigned to a different judge on remand because, given the trial court's interactions with defendant during sentencing, the original trial judge would have substantial difficulty setting aside her previously expressed views. Reassignment was necessary to preserve the appearance of justice given the court's hostility and bias toward defendant, and any waste or duplication was not out of proportion to the gain in preserving the appearance of fairness.

Reversed and remanded for a new trial.

Justice ZAHRA, joined by Justice MARKMAN, dissenting, disagreed with the majority's conclusion that the trial court's supplemental instructions were unduly coercive. The majority's holding did not reflect the traditional notion of jury coercion. While the majority acknowledged that it would have been permissible for the trial court to instruct the jury to continue its deliberations

after it was deadlocked, the two statements relied on by the majority to support its coercion conclusion ignored the practical realities the trial court faced when the jury indicated it was deadlocked after deliberating for only 75 minutes. The trial court was uniquely situated to determine whether the jury needed a break or was at a true impasse, and the court reasonably concluded that that the jury had not engaged in a meaningful deliberative process that led to an impasse. Thus, the trial court's statements were directed at the jury's failure to engage in full-fledged deliberation, not its failure to reach a verdict. No reasonable juror would have interpreted the court's statements as compelling a verdict by force or intimidation. Instead, the trial court appropriately gave the jurors a lunch break to help them engage in the deliberative process when they returned. The trial court's instruction that the jury should let the court know if any juror was failing to follow instructions or refusing to participate in the process did not amount to undue pressure, threats, or embarrassing assertions that tended to force a decision or make a juror abandon his or her conscientious dissent and defer to the majority. Significantly, the trial court did not appeal to civic duty or assert that failure to reach a verdict constituted a failure of purpose; the only requirement imposed by the trial court was that the jurors go to lunch, which did not coerce one or more jurors to vote to convict. The trial court's failure to remind the jurors that they should maintain their honest convictions after the jury suggested it might be at an impasse was not dispositive of whether the instructions were coercive; the instruction emphasized that the jurors had not deliberated a sufficient amount of time rather than emphasizing the need to reach a unanimous verdict, making the honest-conviction reminder unnecessary. Because the jury had been given a written copy of the court's final instructions that included honest-conviction reminders, the trial court's failure to reiterate that instruction did not transform the instruction to deliberate after returning from lunch into an unduly coercive one. The trial court did not have to provide guidance on how to continue deliberating and how to break through the impasse because it correctly decided that the jury was not truly deadlocked. While the correct inquiry was whether the supplemental instruction was coercive, the majority's holding promoted a per se rule that any departure from M Crim JI 3.12 would necessarily result in the instruction being unduly coercive. In addition, the majority incorrectly relied on portions of the lower-court record that were unrelated to whether the supplemental instruction was coercive, and those portions did not support its conclusion that the instruction was coercive. The

majority's conclusion demonstrated that it was disconnected from the trial court process because the court's statements to Juror No. 8, which the majority relied on to support its ultimate conclusion, exhibited the trial court's interest in running a timely and efficient, no-nonsense courtroom; the statements did not signal to the remaining jurors that they should ignore the jury instructions and, instead, follow the court's implicit views of the case. Even if the trial court erred by giving the supplemental instruction, reversal was not required because defendant failed to demonstrate that the instruction affected the fairness, integrity, and public reputation of the judicial proceedings. Justice ZAHRA would have affirmed the judgment of the Court of Appeals.

1. JURY INSTRUCTIONS — SUPPLEMENTAL INSTRUCTIONS — COERCIVE INSTRUCTIONS — UNDUE PRESSURE, THREATS, OR EMBARRASSING ASSERTIONS.

When a jury indicates that it cannot reach a unanimous verdict, a trial court may give a supplemental instruction to encourage the jury to continue deliberating; if a jury indicates that it is deadlocked after deliberating too short a period for thoughtful deliberation, the trial court may simply instruct the jury to continue its deliberations; the goal of an instruction to a jury that cannot reach a verdict is to encourage deliberation without coercing a verdict and to offer constructive guidance on how to deliberate; in that regard, giving an honest-conviction reminder tempers the trial court's simultaneous emphasis on reaching a unanimous agreement; encouraging jurors to single out dissenting jurors when there is no indication that a juror has refused to deliberate can constitute undue pressure, threats, or embarrassing assertions that would tend to force a decision or cause a juror to abandon his or her conscientious dissent and defer to the majority.

2. JURY INSTRUCTIONS — M CRIM JI 3.12 — DEVIATIONS FROM MODEL INSTRUCTION NOT GROUNDS FOR AUTOMATIC REVERSAL.

M Crim JI 3.12, the model deadlocked-jury instruction, balances the goal of encouraging deliberation without coercing a verdict, but that is not the only instruction that may be given to a deadlocked jury; in other words, every deviation from the model instruction does not constitute error requiring reversal; the relevant inquiry—considering the factual context in which the instruction was given on a case-by-case basis—is whether the instruction given could cause a juror to abandon his or her conscientious dissent and defer to the majority solely for the sake of reaching agreement.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Jason W. Williams*, Chief of Research, Training, and Appeals, and *Jon P. Wojtala*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Adrienne N. Young*, *Angeles R. Meneses*, and *Katherine L. Marcuz*) for defendant.

CAVANAGH, J. At issue in this case is whether the trial court committed error requiring reversal when it gave an ad-lib deadlocked-jury instruction. We conclude that it did. The instruction given by the trial court lacked constructive advice to encourage further deliberation, omitted important safeguards of jurors' honest convictions, included coercive language, and was delivered in a coercive atmosphere. We hold that the instruction crossed the line from appropriately encouraging deliberation and candid consideration to impermissibly coercing jurors to surrender their honestly held beliefs for the sake of reaching a verdict. The error was plain, affected defendant's substantial rights, and affected the fairness, integrity, and public reputation of the judicial proceeding. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the Wayne Circuit Court for a new trial. Additionally, in light of the trial court's conduct during defendant's sentencing, we direct that defendant be retried before a different judge. Because we hold that defendant is entitled to a new trial, we do not address his remaining issues.

I. FACTS AND PROCEDURAL HISTORY

On August 8, 2014, defendant, Harold L. Walker, was charged with being a felon in possession of a

firearm (felon-in-possession) under MCL 750.224f; carrying a concealed weapon (CCW) under MCL 750.227; and possessing a firearm when committing or attempting to commit a felony (felony-firearm) under MCL 750.227b(1). At trial, multiple police officers testified that on August 5, 2014, while on routine patrol in a high-crime residential area of Detroit, they saw four people standing and drinking beer on a sidewalk outside a home, near a vehicle playing loud music. As the police officers approached the group, defendant quickly walked away, holding something that appeared to be heavy in a front pocket of his pants. When he reached the home's porch, defendant pulled from his pocket what looked to the officers like a large-frame revolver and threw it into a bush beside the porch. The police recovered a loaded revolver from the bush and arrested defendant. As a condition of his parole from a prior felony conviction, defendant was not allowed to possess a weapon.

Defendant offered an alternative explanation for the revolver being in the bush. Darryl Jevon Williams, Jr., lived in the neighborhood and was with defendant on the night in question. Williams testified that he knew defendant was on parole and that defendant could not be around guns, so Williams hid *his* gun in the bush before defendant arrived. Both Williams and defendant testified that it was a Budweiser beer bottle that defendant had tossed into the bush and that defendant had tossed the bottle because he could not be around alcohol while on parole.

At his trial, defendant presented one witness (Williams) and testified on his own behalf. The jury began deliberating at 11:19 a.m. At 12:36 p.m., the trial court announced to counsel that the jury "sent out a note saying that they can't reach a decision and they're

deadlocked." The court stated that, later, if there was another note from the jury, it would "read the *Allen*[1] Instruction, but at this point after one hour of deliberations I don't think, you know, that they've even made a [sic] effort."

When the jury reentered the courtroom, the trial court stated that it had received two notes: one requesting to see the gun (which the trial court noted had already been accomplished), and one stating, "We are hung and I don't believe there will be and [sic] agreement with more time." The trial court then delivered the following instruction:

> Well, *that's not the way this works.* Your [sic] all heard a full day of testimony, and you deliberated for what a [sic] hour and fifteen minutes, and now you just give up. *That's not the way it works*, I'm sending you all to lunch, maybe what you need is some time a part [sic] and some nourishment, other than candy, to help you all, you know, have clear heads and review the evidence that you heard.
>
> *Now, if there's someone among you who's failing to follow the instructions or there's someone who's refusing to participate in the process, you can send us a note and let us know that and we can address that*, but at this point I'm not inclined to end your deliberations at this point because you had a full day of testimony and you've only been at this, discussing it, for one hour.
>
> So I'm going to send you to lunch, maybe sometime [sic] apart will help you all to think about things, and then you'll come back in one hour and resume your deliberations. If you have any questions, if there is anything that you don't understand or need clarification on send a note. *And again, if there's one among you or two among you, three among you who are refusing to follow the instructions or participate in the process you can let us know that, too.* [Emphasis added.]

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[1] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

The jury returned a verdict of guilty on all counts at 3:07 p.m., approximately 1½ hours after returning from lunch. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 46 months to 75 years for felon-in-possession and CCW, both of which were to be served consecutively to the mandatory 10-year sentence for third-offense felony-firearm.[2]

Defendant filed a claim of appeal in the Court of Appeals, arguing, among other assertions of error, that the trial court's deadlocked-jury instruction was impermissibly coercive. In an unpublished opinion, a divided Court of Appeals panel affirmed defendant's convictions. *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063), p 12. In relevant part, the Court of Appeals majority reasoned that the trial court's jury instruction "stressed to the jury the importance of engaging in a full-fledged deliberation" and held that, in context, the instruction did not coerce a verdict. *Id*. at 4. The dissenting judge concluded that the instruction was impermissibly coercive and that defendant was entitled to a new trial. *Id*. (GLEICHER, J., dissenting) at 1, 5.

Defendant sought leave to appeal in this Court. Oral argument was scheduled on whether to grant the application or to take other action, see MCR 7.305(H)(1), on issues including: "whether . . . defendant is entitled to a new trial based on the trial judge's comments to the jury

[2] The Court of Appeals remanded to the trial court the ministerial issue of correcting defendant's judgment of sentence because the judgment should have provided that his felony-firearm sentence is to be served consecutively to his felon-in-possession sentence only, and not consecutively to his CCW sentence. *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063), p 6.

in lieu of the standard 'deadlocked jury' instruction, M Crim JI 3.12[.]" *People v Walker*, 501 Mich 1088 (2018).

II. STANDARD OF REVIEW

"We review de novo claims of instructional error." *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). Because defendant failed to object to the instruction,[3] we apply the plain-error rule, which requires that (1) error must have occurred, (2) the error was plain, (3) the plain error affected substantial rights, and (4) the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error is plain if it is "clear or obvious." *Carines*, 460 Mich at 763. An error has affected a defendant's substantial rights when there is "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. A defendant bears the burden of persuasion with respect to prejudice. *Id*.

III. ANALYSIS

When a jury indicates it cannot reach a unanimous verdict, a trial court may give a supplemental instruction—commonly known as an *Allen*[4] charge—to encourage the jury to continue deliberating. *People v*

[3] The prosecution argues for the first time in its supplemental brief to this Court that defendant waived any challenge to the instruction by approving of the instruction before it was given. The prosecution abandoned this theory. *People v McGraw*, 484 Mich 120, 131 n 36; 771 NW2d 655 (2009).

[4] *Allen*, 164 US 492.

Sullivan, 392 Mich 324, 329; 220 NW2d 441 (1974). The goal of such an instruction is to encourage further deliberation without coercing a verdict. *People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984). See *Allen v United States*, 164 US 492, 501; 17 S Ct 154; 41 L Ed 528 (1896) ("While undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views . . . ."). "If the charge has the effect of forcing a juror to surrender an honest conviction, it is coercive and constitutes reversible error." *Sullivan*, 392 Mich at 334 (quotation marks and citation omitted).

In *Sullivan*, this Court adopted a standard deadlocked-jury instruction that has since been incorporated into our model jury instructions.[5] *Id*. at 341; M Crim JI 3.12. Although the model instruction is an

[5] M Crim JI 3.12 provides the following:

> (1) You have returned from deliberations, indicating that you believe you cannot reach a verdict. I am going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict. As you deliberate, please keep in mind the guidelines I gave you earlier.
>
> (2) Remember, it is your duty to consult with your fellow jurors and try to reach agreement, if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.
>
> (3) As you deliberate, you should carefully and seriously consider the views of your fellow jurors. Talk things over in a spirit of fairness and frankness.
>
> (4) Naturally, there will be differences of opinion. You should each not only express your opinion but also give the facts and the reasons on which you base it. By reasoning the matter out, jurors can often reach agreement.

example of an instruction that strikes the correct balance, it is not the only instruction that may properly be given. The relevant question is whether "the instruction given [could] cause a juror to abandon his [or her] conscientious dissent and defer to the majority solely for the sake of reaching agreement[.]" *Hardin*, 421 Mich at 314. The inquiry must consider the factual context in which the instruction was given and is conducted on a case-by-case basis. *Sullivan*, 392 Mich at 332-334.

The disputed factual issue in this case was relatively straightforward—whether defendant took a gun from his pocket and threw it into a bush where it was recovered by the police—and the jurors deliberated for only about an hour and fifteen minutes before sending a note stating that they could not reach an agreement. Assuming that this was too short a period for thoughtful deliberation, a simple instruction to the jury to "continue your deliberations" would certainly have been permissible. See *People v France*, 436 Mich 138, 165-166; 461 NW2d 621 (1990). See also *Lowenfield v Phelps*, 484 US 231, 238; 108 S Ct 546; 98 L Ed 2d 568 (1988) ("Surely if the jury had returned from its deliberations after only one hour and informed the

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(5) If you think it would be helpful, you may submit to the bailiff a written list of the issues that are dividing or confusing you. It will then be submitted to me. I will attempt to clarify or amplify the instructions in order to assist you in your further deliberations.

(6) When you continue your deliberations, do not hesitate to rethink your own views and change your opinion if you decide it was wrong.

(7) However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.

court that it had failed to achieve unanimity . . . , the court would incontestably have had the authority to insist that they deliberate further."). Although the trial court seems to have recognized that an *Allen* charge was not yet required, it nevertheless ventured into *Allen* territory with its ad-lib instruction. For the reasons below, we conclude the instruction given in this case crossed the line from appropriately encouraging deliberation to being unduly coercive.

First, the trial court failed to provide the jurors guidance on how to continue deliberating and how to try to break through the impasse. For example, M Crim JI 3.12(3) advises jurors that they should "carefully and seriously consider the views of . . . fellow jurors" and "[t]alk things over in a spirit of fairness and frankness." M Crim JI 3.12(4) addresses how jurors might meaningfully engage with one another rather than just stating their positions: "You should each not only express your opinion but also give the facts and the reasons on which you base it." In this case, the only guidance provided by the trial court was that the jurors needed to get "clear heads." Significantly, instead of encouraging the jurors to consider their fellow jurors' views, the trial court encouraged an antagonistic relationship among the jurors by prompting them, without elaborating on what it meant, to report anyone who was "refusing to participate in the process."

Second, the trial court failed to remind the jurors that they should not give up their honestly held beliefs for the sake of reaching an agreement. A review of our past decisions bears out the importance of this honest-conviction reminder, which tempers the court's simultaneous emphasis on reaching a unanimous agreement. In *People v Engle*, 118 Mich 287, 291-292; 76 NW 502 (1898), we ordered a new trial because after the

jury indicated that it was unable to agree on a verdict, the trial court's deadlocked-jury instruction failed to state "that the verdict to which [the jury] agreed should be and must be each individual juror's own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows[.]" *Id*. In contrast, this Court has upheld verdicts in cases in which the instruction given included the honest-conviction reminder. See, e.g., *People v Coulon*, 151 Mich 200, 203-204; 114 NW 1013 (1908) (holding that the instruction in that case was distinguishable from the instruction in *Engle*, and therefore not erroneous, because the trial court had instructed that "no juror should yield his well-grounded convictions or violate his oath; that if upon further consideration a juror cannot conscientiously yield, of course he ought not to do so"). See also *People v Rouse*, 477 Mich 1063 (2007) (reversing the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion, *People v Rouse*, 272 Mich App 665, 675-677; 728 NW2d 874 (2006) (JANSEN, J., dissenting), which noted that the trial court had read the standard instruction, including the honest-conviction reminder, and had "emphasized that no juror should change his or her honest beliefs simply for the sake of reaching a verdict"); *Hardin*, 421 Mich at 318 (holding that supplemental instructions were not unduly coercive because an honest-conviction reminder was given after the challenged instructions).[6]

[6] We disagree with the dissent that the trial court's failure to include an honest-conviction instruction in its ad-lib instruction does not render the ad-lib instruction unduly coercive because the jury was given an honest-conviction instruction with the final instructions and a written copy of these instructions was in the jury room during deliberations. The ad-lib instruction was the last instruction given, and its influence was therefore unmitigated. Cf. *Hardin*, 421 Mich at 318 (noting that "any unwarranted inference by the jury" from the trial court's statements

Third, the trial court's instruction included language that was unduly coercive. The jury's note was received approximately one hour and fifteen minutes after the jury began deliberating.[7] Before sending the note, the jury had obviously discussed the case, it asked to see the gun, and at least one juror harbored doubt regarding defendant's guilt. Because the jury had already indicated that it was deadlocked, at that point, there was "a greater coercive potential." See *People v Pollick*, 448 Mich 376, 385; 531 NW2d 159 (1995). Instead of simply instructing the jury to continue its deliberations after lunch, the trial court twice admonished the jury that "that's not the way this works," telegraphing that failure to reach a verdict was not an option.[8] Further-

was mitigated by those statements having preceded the trial court's instruction that no juror should surrender his or her honest convictions for the purpose of returning a verdict). See also *People v Pollick*, 448 Mich 376, 385; 531 NW2d 159 (1995) ("It requires no special insight to see that there is a greater coercive potential when an instruction is given to a jury that already believes itself deadlocked. Instructions given to a jury that has not yet begun to deliberate are less likely to weigh on a dissenting juror, or to be understood as a request that a particular dissenting juror abandon the view that is preventing an otherwise unanimous jury from reaching its verdict.").

[7] Whatever the trial court's motivation, we disagree with the dissent's assertion that it was reasonable for the trial court to conclude that "the jury had not engaged in an earnest and meaningful deliberative process that led to an intractable impasse." The jury had previously sent a note asking to see the gun, presumably because of the prosecution's contention that Williams's description of the weapon was inaccurate (and that his testimony was therefore not credible). Simply put, the record indicates that the jurors were following instructions and deliberating. To conclude otherwise on the basis of nothing more than the duration of deliberations would permit trial courts to fashion ad hoc instructions based on nothing more than a hunch that one or more jurors may not be deliberating in good faith. Our opinion in *Sullivan*, which encourages courts to use the model deadlocked-jury instruction, is the better path.

[8] The dissent describes the trial court's ad-lib instruction as an "innocuous go-to-lunch instruction" because the trial court simply

more, without an indication that any juror refused to participate in deliberations or follow directions, the trial court twice asked the jurors to "let us know that," signaling to jurors that they should single out their fellow jurors. The trial court's veiled threats were the type of "undue pressure, threats, embarrassing assertions, or other wording that would tend to force a decision or cause a juror to abandon his conscientious dissent and defer to the majority." *Hardin*, 421 Mich at 321.[9]

Finally, given our review of the record, we are left with a firm conviction that the tenor set by the trial court contributed to the instruction being unduly coercive.[10] As noted in *Sullivan*, the coercive nature of the

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wanted to provide the jurors with "nourishment and an opportunity to clear their heads." This description ignores the problematic aspects of the court's instruction. We disagree with the dissent that "[n]o reasonable juror would interpret this statement as compelling a verdict by force or intimidation." First, the dissent distorts the standard by mistakenly asserting that "coercion" in this context is a term of ordinary usage as opposed to a term of art. No one alleges that the trial judge used force to coerce the verdict, and we have yet to find a case that defines "coercion" this way in this context. Second, we think a reasonable juror, having just informed the judge that the jury is deadlocked, might interpret the judge's rejoinder here in terms far more emphatic than a simple order to eat lunch.

[9] Unlike the dissent, we believe that the ad-lib instruction can be interpreted as an appeal to the jurors' "civic duty." See *Hardin*, 421 Mich at 316 (explaining that in *People v Goldsmith*, 411 Mich 555, 561; 309 NW2d 182 (1981), the Court held that "an instruction that calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose, is a substantial departure . . . because it tends to be coercive"). A reasonable juror may have interpreted the judge's comment to mean that failure to reach a verdict was not an option, i.e., that it was part of the jury's civic duty to reach a verdict.

[10] We disagree with the dissent that what it calls "comments and methods by which a trial judge manages the trial" are irrelevant to an evaluation of "the factual context in which [the supplemental] instruc-

instruction must be evaluated in light of the factual context of the case. *Sullivan*, 392 Mich at 341. We agree with the dissenting Court of Appeals judge that this instruction was given in "a coercive and despotic atmosphere" that "likely persuaded dissenting jurors to abandon their principles." *Walker* (GLEICHER, J., dissenting), unpub op at 4.

After the trial court gave its ad-lib deadlocked-jury instruction and the jury returned from its lunch break, the jury returned a verdict in about 90 minutes. This quick turnaround in arriving at a guilty verdict after the trial court's supplemental instruction had been given suggests coercion. *Lowenfield*, 484 US at 238. Furthermore, earlier that day, the trial court had made clear to the jury that dissent would not be tolerated and that public humiliation would be the consequence for anyone who stepped out of line. When the trial court called the case, it noted that one of the jurors (Juror No. 8) was late and had not called in:

> All right, great. So we're getting a fifty-five minutes (sic) late start, and as you can see one of your jurors never came back. I don't wanna keep you all waiting and keep everybody involved in this case waiting any longer for someone who may or may not appear. And if that juror shows up then, you know, I don't know, bad things might happen to that person.

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tion is given." *Hardin*, 421 Mich at 315. In fact, our analysis of whether the three challenged jury instructions in *Hardin* were unduly coercive opened with the statement that the issue "is better understood if we set forth, in some detail, the events that transpired" during deliberations, *id*. at 302-303, and closed with emphasis on "the tone and content of the trial court's language," *id*. at 320. *All* the trial court's comments during deliberations in *Hardin* were relevant in considering the factual context in which the challenged instructions were given. In this case, the trial court's conduct throughout the trial is part of the factual context in which the ad-lib instruction was given.

> It's not fair for everyone involved to keep everyone waiting, and I do want to thank Juror No. 1, who knew she would be running a little late and she called.
>
> Hopefully, this case will finish today, and you all won't have to worry about coming back tomorrow, but when you don't come on time it sets everybody back, it waste[s] everyone's time, so it's important that everyone be on time, okay. I'm talking to you guys, okay?

Juror No. 8 arrived during opening statements and was seated in the place reserved for in-custody criminal defendants—commonly referred to as the "prisoners' box"—during the completion of the prosecution's case. While we do not suggest that trial judges should not take steps to ensure that court proceedings begin in a timely fashion, we cannot discount the effect the trial court's ominous threat ("[B]ad things might happen to that person.") and its heavy-handed treatment of the recalcitrant juror may have had on the remaining jurors by situating that juror in the "prisoners' box" in view of the other jurors.[11]

We hold that, taken together, the omission of constructive guidance to the jury on how to deliberate, the omission of an honest-conviction reminder, the addition of coercive language suggesting that jurors single out other jurors for refusing to deliberate when there was no indication that a juror had refused to deliber-

[11] A better approach, of course, would be for the trial court to address the recalcitrant juror outside the presence of the other jurors and not situate that person in the "prisoners' box" in plain view of the other jurors. The record also shows that the trial court was distracted during the proceedings. For example, the trial court told trial counsel for both sides to "[h]old on, I think I'm about to get a new iPhone 6" when the attorneys asked to put a stipulation on the record. This inattention to the proceedings may have contributed to the trial court shifting blame to counsel for its own errors, such as when the trial court dismissively rebuffed defense counsel's attempts to remedy a mistake the court had made in restating a witness's testimony.

ate, and the trial court's conduct throughout the proceedings telegraphed that failing to reach a verdict would not be tolerated; thus, the instruction was unduly coercive. We emphasize that not every deviation from M Crim JI 3.12 will be erroneous, but the instruction given in this case omitted nearly every safeguard M Crim JI 3.12 contains; added an unwarranted invitation to single out dissenters; and was administered in a "coercive and despotic atmosphere," *Walker* (GLEICHER, J., dissenting), unpub op at 4. We hold that the ad-lib instruction affected defendant's substantial rights by affecting the jury's verdict. See *Carines*, 460 Mich at 763. We also conclude that the error was clear and obvious. See *id*. Finally, in the greater context of the trial, the instruction seriously affected the fairness, integrity, and public reputation of the judicial proceedings by affecting the jury's verdict, and we therefore exercise our discretion to reverse defendant's conviction and remand this case to the Wayne Circuit Court for a new trial.

We also hold that because of the unprofessionalism and bias displayed by the trial court against defendant during sentencing, the case must be assigned to a different judge on remand.[12] When determining whether remand to a different judge is required, we examine the following factors:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is

[12] The dissent does not reach this issue, presumably given its conclusion on the instructional issue. We note, however, that the fairness of the trial court's sentence was raised by defendant as a basis for resentencing, independent of defendant's challenge to the deadlocked-jury instruction.

> advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997) (quotation marks and citations omitted).]

See also *People v Patton*, 497 Mich 959 (2015) (declining to reassign the case to a new judge on remand when the Court was not persuaded that the standards set forth in *Hill* had been met); *Sparks v Sparks*, 440 Mich 141, 163; 485 NW2d 893 (1992) (reassigning the case to a different judge on remand because the appearance of justice would be better served with a new judge presiding).

In this case, the trial court's behavior at defendant's sentencing hearing compels us to reassign this case to a new judge on remand. After defendant indicated at least eight times during his allocution that he had nothing further to say, the trial judge continued to bait him, engaging in name-calling (calling him a "clown" six times and a "coward"), with the exchange escalating to defendant stating, "F— you," to which the trial court replied, "Oh, you wish you could." The trial court also admonished defendant, suggesting that he liked being in prison ("Cause that's what your life shows me, that you like to go to prison.") and stated that it would have sentenced him more leniently but for his disrespect toward the court ("I was inclined to give you the middle of the road, . . . but because you're so disrespectful and you just seem to want to go back to prison . . . .").

Upon even a cursory review of the sentencing transcript, it is clear to us that the court would have substantial difficulty setting aside its previously expressed views and that reassignment is necessary to preserve the appearance of justice given the hostility,

bias, and incredulity directed against defendant by the court.[13] Finally, any waste or duplication is not out of proportion to the gain in preserving the appearance of fairness. Defendant shall therefore be retried before a different judge.[14]

IV. CONCLUSION

We reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a new trial in front of a different judge. Because we grant a new trial, we do not address the remaining issues raised by defendant.

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with CAVANAGH, J.

ZAHRA, J. (*dissenting*). I respectfully dissent. In the morning, following a full day of testimony in a rela-

[13] Although we do not rely on the sentencing transcript to support our holding regarding the coercive nature of the court's deadlocked-jury instruction, our review of the transcript gives us grave concern about the trial judge's demeanor and approach in her interactions with this defendant. It is enough, at this point, to say that the trial judge's conduct was well outside the bounds of what we consider an appropriate way to conduct a sentencing hearing—even one involving a difficult person. Had this exchange or one like it occurred earlier in the trial, there is little doubt it would have called into question whether defendant was deprived of a fair trial. See *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015) (holding that because the trial judge's conduct pierced the veil of judicial impartiality, the defendant was deprived of a fair trial).

[14] The dissent challenges our trial court bona fides by lamenting our "disconnection from the realities of the trial-court process . . . ." Such an approach does little to illuminate the issues in this case and therefore does not warrant a response other than to note that if the choice is between an ivory tower where the Constitution still holds sway, or an alternative universe where this judge's performance during this trial and sentencing is deemed acceptable, we choose the former.

tively simple case, the jury heard closing arguments, received its final instructions, and retired to deliberate. After an hour and fifteen minutes of deliberation, the jury indicated that it had reached an impasse. With no objection, the trial judge informed the jurors that she did not believe they were truly deadlocked after their brief period of deliberation. Rather than providing the standard instruction for deadlocked juries, the trial judge sent the jurors to lunch to afford them nourishment and an opportunity to clear their heads. After lunch, the jurors resumed deliberations and, after an additional hour and a half of deliberations, the jury delivered a guilty verdict. Because the innocuous go-to-lunch instruction was far from being coercive, I discern no basis for reversing the jury's verdict.

I. PERTINENT FACTUAL BACKGROUND

Absent from the majority's opinion are the trial judge's instructions delivered to the jury following the conclusion of closing arguments, around one and a half hours before the jury announced it was at an impasse:

> A verdict in a criminal case must be unanimous. In order to return a verdict it is necessary that each of you agrees on that verdict. In the jury room you will discuss the case among yourselves, but ultimately each of you have to make up your own mind. Any verdict must represent the individual considered judgement of each [of] you.
>
> It is your duty as jurors to talk to each other and make every reasonable effort to reach agreement. Express your opinions and the reason for them, but keep an open mind as you listen to your [fellow] jurors. Rethink your opinions and do not hesitate to change your mind if you decide that you were wrong. Try your best to work out your differences.
>
> However, although you should try to reach an agreement, none of you should give up your honest opinion

> about the case just because other jurors disagree with you or just for the sake of reaching a verdict.
>
> In the end, your vote must be your own, and you must vote honestly and in good conscious [sic].

The record reveals that a written copy of these instructions was provided to the jury for reference during deliberations. The jury retired to deliberate at 11:19 a.m. Roughly an hour and fifteen minutes later (around 12:36 p.m.), it sent out a note that read, "We are hung, and I don't believe there will [be] an agreement with more time." The trial judge reconvened court, informed the parties that the jury had declared itself unable to reach a verdict, and stated her intent to instruct the jurors that they could not simply give up after an hour. Specifically, the trial judge stated as follows:

> I'll sent [sic] them to lunch, they'll be back at 1:35 and I'll send them back in there. That's it. And if they send another note, you know, they have to at least deliberate as long as it took [to] try the case, so. They'll come back tomorrow, if they have to, but I'm not prepared to read them the deadlock instruction, because I don't believe that they've even attempted to deliberate at this point, so. That's it.
>
> Now if there's—if I get another note that indicates that they are deadlocked then I'll read the Allen[1] Instruction, after lunch, but at this point after one hour of deliberations I don't think, you know, that they've even made a[n] effort. So, I'm gonna bring them out, I'm gonna tell them just that and I'm sending to lunch.
>
> Is there anything else?

Without any objection, the trial judge instructed the bailiff to bring the jurors into the courtroom, and after reading their note into the record, she instructed them as follows:

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[1] *Allen v United States*, 164 US 492; 17 S Ct 154; 41 L Ed 528 (1896).

> Well, that's not the way this works. Your [sic] all heard a full day of testimony, and you deliberated for what a[n] hour and fifteen minutes, and now you just give up. That's not the way it works, I'm sending you all to lunch, maybe what you need is some time a part [sic] and some nourishment, other than candy, to help you all, you know, have clear heads and review the evidence that you heard.
>
> Now, if there's someone among you who's failing to follow the instructions or there's someone who's refusing to participate in the process, you can send us a note and let us know that and we can address that, but at this point I'm not inclined to end your deliberations at this point because you had a full day of testimony and you've only been at this, discussing it, for one hour.
>
> So, I'm going to send you to lunch, maybe sometime [sic] apart will help you all to think about things, and then you'll come back in one hour and resume your deliberations. If you have any questions, if there is anything that you don't understand or need clarification on send a note. And again, if there's one among you or two among you, three among you who are refusing to follow instructions or participate in the process you can let us know that, too.
>
> Remember you are not to discuss this case, when you are anywhere other than in the jury room cause you're still a juror. So even if you go to lunch together some of you, you can not [sic] discuss this case cause you can only discuss it when you're all together and when you're in the jury room.

The judge dismissed the jurors for lunch at 12:41 p.m., and they were expected to return around 1:40 p.m. About one and a half hours later, at 3:07 p.m., the jury returned with its verdict, finding defendant guilty as charged.

II. LEGAL BACKGROUND

When a jury indicates that it is unable to reach a verdict, the trial court may give supplemental jury

instructions and direct the jury to continue deliberations.[2] The textbook instruction in this context is known as an "*Allen* charge."[3] The *Allen* charge is also known as a "dynamite charge,"[4] a "nitroglycerin charge,"[5] or a "shotgun instruction"[6] because of its ability to rapidly generate a verdict from an otherwise deadlocked jury.[7]

A proper supplemental instruction facilitates continued deliberation while avoiding coercion, but if the supplemental instruction would force a juror to surrender an honest conviction, the instruction is impermissibly coercive.[8] This Court has identified the two essential hallmarks of a proper deadlocked-jury charge: (1) encouragement of a respectful discussion in which the jurors consider all views and (2) respect for each individual juror's right to disagree. A judge should emphasize "that each juror has to make an individual

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[2] See *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984).

[3] *Allen*, 164 US 492.

[4] As the United States Court of Appeals for the Ninth Circuit explained in *United States v Berger*, 473 F3d 1080, 1089 (CA 9, 2007):

> "The term '*Allen* charge' is the generic name for a class of supplemental jury instructions given when jurors are apparently deadlocked; the name derives from the first Supreme Court approval of such an instruction in *Allen* . . . . In their mildest form, these instructions carry reminders of the importance of securing a verdict and ask jurors to reconsider potentially unreasonable positions. In their stronger forms, these charges have been referred to as 'dynamite charges,' because of their ability to 'blast' a verdict out of a deadlocked jury." [Quoting *United States v Mason*, 658 F2d 1263, 1265 n 1 (CA 9, 1981).]

[5] *Huffman v United States*, 297 F2d 754, 759 (CA 5, 1962) (Brown, J., concurring in part and dissenting in part).

[6] *State v Nelson*, 63 NM 428, 431; 321 P2d 202 (1958).

[7] *Berger*, 473 F3d at 1089.

[8] *People v Sullivan*, 392 Mich 324, 334; 220 NW2d 441 (1974).

judgment"[9] and that "no juror need surrender his honest convictions concerning the evidence solely for the purpose of obtaining a unanimous agreement."[10] "The optimum instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision."[11] Ultimately, an instruction "must be examined in the factual context in which it is given."[12]

This Court has identified various factors that guide the contextual analysis of whether a deadlocked-jury instruction is unduly coercive. The trial court's instruction must not contain "undue pressure, threats, embarrassing assertions, or other wording that would tend to force a decision or cause a juror to abandon his conscientious dissent and defer to the majority."[13] Additional language will "rarely" be considered a substantial departure if it "contains 'no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion.' "[14]

The trial judge must also refrain from requiring or threatening to require "the jury to deliberate for an unreasonable length of time or for unreasonable intervals."[15] Additionally, the trial judge must not state or imply that the jury must reach a decision or else it has failed.[16] In fact, "an instruction that calls for the jury,

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[9] *Id*. at 337.

[10] *People v Goldsmith*, 411 Mich 555, 559; 309 NW2d 182 (1981).

[11] *Sullivan*, 392 Mich at 334.

[12] *Hardin*, 421 Mich at 315.

[13] *Id*. at 321.

[14] *Id*. at 315, quoting *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984).

[15] *Hardin*, 421 Mich at 318-319.

[16] See *Goldsmith*, 411 Mich at 561; *Lowenfield v Phelps*, 484 US 231, 239; 108 S Ct 546; 98 L Ed 2d 568 (1988), citing *Jenkins v United States*, 380 US 445, 446; 85 S Ct 1059; 13 L Ed 2d 957 (1965).

as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose, is a substantial departure . . . because it tends to be coercive."[17] For example, in *People v Goldsmith*,[18] this Court held that a jury instruction was unduly coercive because the trial judge stated, " 'A jury unable to agree, therefore, is a jury which has failed in its purpose.' "

The timing of the instruction is a relevant factor in determining whether the instruction was unduly coercive. That is, no special insight is needed "to see that there is greater coercive potential when an instruction is given to a jury that already believes itself deadlocked"[19] because, at that point, there exists a "minority faction" that is prone to coercion.[20] But if a jury returns from its deliberations after a relatively brief period, the court would incontestably have the authority to insist that the jurors deliberate further.[21] Also, a quick turnaround of a guilty verdict after a supplemental instruction is given to the jury can be suggestive of coercion.[22]

III. DISCUSSION

A. THE SUPPLEMENTAL INSTRUCTION DIRECTING THE JURORS TO BREAK FOR LUNCH BEFORE CONTINUING DELIBERATIONS WAS NOT IMPROPER OR COERCIVE

The majority concludes that the supplemental instruction directing jurors to go to lunch before deliber-

[17] *Hardin*, 421 Mich at 316.

[18] *Goldsmith*, 411 Mich at 558, 561.

[19] *People v Pollick*, 448 Mich 376, 385; 531 NW2d 159 (1995).

[20] *Goldsmith*, 411 Mich at 560 (quotation marks omitted).

[21] *Lowenfield*, 484 US at 238.

[22] *Id*. at 240.

ating further was so unduly coercive that defendant was denied his constitutional right to a fair trial. I disagree.

The majority's holding that the supplemental instruction "crossed the line" does not accurately reflect the traditional understanding of jury coercion. The majority acknowledges that the judge's direction to the jurors to "continue your deliberations" might have been a permissible supplemental instruction[23] but then cites two specific statements by the trial judge that the majority concludes were coercive: (1) stating, "[T]hat's not the way this works" and (2) twice asking the jurors to "let us know" if one or more jurors were refusing to participate or to follow the instructions even though there was no indication that any juror had refused to participate in the deliberations or to follow the court's instructions. The finding of coerciveness from these two phrases is extremely problematic because it ignores the practical reality the trial judge faced in this situation.[24]

Contrary to the majority's assertion, there was a complete absence of coercive language in the trial judge's supplemental instruction. Coercion is commonly understood as the process of restraining or

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[23] *Ante* at 279; see *People v France*, 436 Mich 138, 165-166; 461 NW2d 621 (1990).

[24] The trial judge is uniquely situated to size up a jury to determine whether jurors are merely in need of a respite or truly at a point of impasse. When a trial judge has reason to believe that a jury has not earnestly and interactively participated in the deliberative process, it would be imprudent and unwise to read an *Allen* charge, which, although sanctioned by this Court and the Supreme Court of the United States, nonetheless features coercive attributes. In this case, the trial judge reasonably concluded the jury had not engaged in an earnest and meaningful deliberative process that led to an intractable impasse. The decision to send them to lunch before having them deliberate again was not only not erroneous but prudent under the circumstances.

compelling by force or intimidation.[25] In the majority's view, the trial judge implied that a failure to reach a verdict would not be tolerated when it told the jury, "Well, that's not the way this works." The pertinent portions of the transcript suggest that the trial judge was referring to the jury's failure to *engage* in full-fledged deliberation, not its failure to *reach a verdict*. Notably, the judge continued this statement as follows:

> You[] all heard a full day of testimony, and you deliberated for what a[n] hour and fifteen minutes, and now you just give up. That's not the way it works, I'm sending you all to lunch, maybe what you need is some time a part [sic] and some nourishment, other than candy, to help you all, you know, have clear heads and review the evidence that you heard.

Taken in context, a rational and reasonable interpretation of the statement suggests that the phrase "that's not the way this works" was in no way coercive. The trial judge followed these words with the conclusion that a lunch break was needed to provide the jurors with "nourishment" and "some time a part" to help them "have clear heads and review the evidence" after they returned to court. No reasonable juror would interpret this statement as compelling a verdict by force or intimidation. To the contrary, the trial judge merely afforded the jurors a lunch break to help the jurors engage in the deliberative process when they returned.

Similarly, the trial judge's direction that the jury should let the court know "if there's someone among

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[25] See *Merriam-Webster's Collegiate Dictionary* (11th ed); *Random House Webster's College Dictionary* (1997). While the majority criticizes the ordinary usage of this term, as opposed to using "coercion" as a term of art, it offers no alternative definition of "coercion" to suggest it means anything other than the basic concept of compelling action by force *or* intimidation.

you who's *failing to follow the instructions* or there's someone who's *refusing to participate in the process*" was not coercive.[26] To the contrary, this instruction was sensible. The trial judge expressed the view that the jurors had not engaged in meaningful deliberation and implied that additional effort by the jury was needed before an impasse could be declared. Nonetheless, additional deliberation would not be fruitful, and would in fact be counterproductive, if one or more jurors failed to follow the closing instruction that jurors "talk to each other and make every reasonable effort to reach agreement." The trial judge merely informed the jury that additional deliberation was necessary and that the judge should be alerted if there was a breakdown in the process.

Notably, the trial judge did not single out dissenting jurors—rather, she instructed that further deliberations were not required if there were jurors who refused to engage in the deliberative process. I strongly disagree with the majority's view that these statements amounted to "undue pressure, threats, [or] embarrassing assertions . . . that would tend to force a decision or cause a juror to abandon his conscientious dissent and defer to the majority."[27] To the contrary, these statements properly reflect the notion that refusal to follow the final instructions or engage in the deliberative process required by law is unacceptable.

It is also significant that the trial judge did not appeal to "civic duty" or assert that "failure to reach a verdict constitutes a failure of purpose."[28] While the majority believes that a reasonable juror may have

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[26] Emphasis added.

[27] *Hardin*, 421 Mich at 321; see *Goldsmith*, 411 Mich at 558-561.

[28] *Hardin*, 421 Mich at 316.

interpreted the judge's comments to mean "that it was part of the jury's civic duty to reach a verdict,"[29] the trial judge's instruction simply focused on the jury's short period of deliberation and the need for nutrition and time apart before further deliberation. Given the majority's logic, a "reasonable juror" could interpret almost any judicial instruction as an appeal to his or her civic duty. Thus, the absence of any actual language appealing to the jury's civic duty is significant. In all practical reality, the supplemental instruction facilitated effective deliberation by ensuring that the jurors could resume deliberations with "clear heads" after eating something nutritious. The only requirement the trial judge imposed on the jurors was to go to lunch. In so doing, she in no way coerced one or more jurors to vote to convict.

The majority also fails to give adequate consideration to the trial judge's unique relationship to these proceedings. That is, the jury indicated it was deadlocked after merely an hour and fifteen minutes of deliberation; thus, the trial judge, in her unique position, appeared to have a reasonable basis upon which to disbelieve that the jurors were genuinely deadlocked. The trial judge's comments therefore reflect a reasonable degree of skepticism that the jury had given a real effort at deliberating.[30]

The overall effect of the instruction was not to coerce the jury but "to stress the need to engage in full-fledged deliberation."[31] That is, the "comments were directed

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[29] *Ante* at 283 n 9.

[30] See *Lowenfield*, 484 US at 238 ("Surely if the jury had returned from its deliberations after only one hour and informed the court that it had failed to achieve unanimity . . . , the court would incontestably have had the authority to insist that they deliberate further.").

[31] *Hardin*, 421 Mich at 321.

toward generating discussion and fostering resolution of the case . . . ."[32] And while the trial judge did not remind the jurors that they should maintain their honest convictions after the jury suggested it might be at an impasse, this omission is not dispositive of whether the supplemental instruction was, taken in context, coercive. As eloquently stated by the majority, an "honest-conviction reminder . . . tempers the court's simultaneous emphasis on reaching a unanimous agreement."[33] In this case, nothing in the trial judge's instruction emphasized that the jurors should reach agreement on a verdict. To the contrary, the trial judge merely emphasized that the jurors had not deliberated a sufficient amount of time. This is a critical distinction that emphasizes why the "honestly held beliefs" reminder was not necessary and is therefore not dispositive.

It is also significant that the jury had a written copy of the court's final instructions in the jury room. Those instructions, which were given less than 90 minutes before the jury announced that it was deadlocked, stressed in various ways the notion that the jurors are not to give up their "honest belief" during deliberations:

> In the jury room you will discuss the case among yourselves, but ultimately, *each of you have to make up your own mind*. . . .
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> * * *
>
> . . . Rethink your opinions and do not hesitate to change your mind if you decide that you were wrong. . . .
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> * * *

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[32] *Id*. at 320.

[33] *Ante* at 280.

> However, although you should try to reach an agreement, *none of you should give up your honest opinion* about the case just because other jurors disagree with you or just for the sake of reaching a verdict.
>
> In the end, *your vote must be your own, and you must vote honestly and in good conscious* [sic]. [Emphasis added.]

Therefore, the trial judge's failure to once again encourage jurors to maintain their own convictions did not transform the supplemental instruction to deliberate after returning from lunch into an unduly coercive one.

In support of its conclusion that the failure to instruct jurors to maintain their "honest beliefs" was a fatal omission, the majority relies on *People v Engle.*[34] This Court ordered a new trial in that case because the jury was not instructed that its verdict had to be the product of each juror's individual convictions.[35] The majority's reliance on *Engle* is misguided. Significantly, the opinion in *Engle* does not disclose how long the jury deliberated before declaring they had reached an impasse. Further, the Court's opinion in *Engle* suggests that the jury was never instructed that each juror should maintain his or her own convictions. This is a significant and critical distinction. But even assuming the *Engle* jury did receive such an instruction before beginning deliberations, another meaningful distinction remains: the *Engle* jury was instructed that each juror "must . . . try to be persuaded."[36] Such an instruction tends to force a verdict because it may compel dissenting jurors to give in to their colleagues'

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[34] *People v Engle*, 118 Mich 287, 291-292; 76 NW 502 (1898).

[35] *Id*.

[36] *Id*. at 291.

positions over their own. No instruction or utterance from the trial judge in the instant case compares to the coercive charge given by the trial judge in *Engle*.

The majority further faults the trial judge for failing to provide the jurors guidance on how to continue deliberating and how to try to break through the impasse, but these omissions are also not dispositive. Again, the trial judge reasonably disbelieved that the jury had put forth a genuine effort in the deliberative process such that they were truly deadlocked in the first place. Had the trial judge concluded that the jury was actually deadlocked after their brief deliberation, it would have been necessary for her to guide the jurors on how to break through the impasse and to instruct the jury in accordance with the other hallmark features of an *Allen* charge. But as a threshold matter, this trial judge had rejected the idea that the jury was deadlocked at that point in their deliberations. And the judge's remarks clearly indicate that if the jury had again expressed it was deadlocked after further deliberation, the judge would have given the *Allen* instruction. In my view, the trial judge acted prudently under the circumstances.

It is also troubling that the Court's holding promotes a per se rule that any departure from M Crim JI 3.12 necessarily results in an unduly coercive instruction. This is inconsistent with this Court's mandate that each instruction must be examined in its factual context and that only "substantial departures" from the model instruction constitute error requiring reversal.[37] In this sense, the majority focuses too closely on immaterial omissions from the model instruction. The inquiry is whether the court's supplemental instruc-

[37] *Hardin*, 421 Mich at 313, 315.

tion was coercive,[38] not simply to what extent it fails to reflect M Crim JI 3.12. Accordingly, the omissions the majority identifies are not material, and they are, therefore, not dispositive.

The majority relies on portions of the lower-court record that are wholly unrelated to whether the supplemental instruction itself was coercive to support its conclusion that the trial judge's response to the jury's note conveyed a coercive message to the jury. This is no small matter. Never before has this Court determined that judicial actions unrelated to instructing the jury may render an otherwise innocuous instruction coercive. While it is true that the instruction must be evaluated in light of the factual context of the case,[39] this context relates to the factual dispute presented to the jury, not the comments and methods by which a trial judge manages the trial. Of greater import, the portions of the record the majority cites do not support its conclusion that the supplemental instruction was coercive.

The majority accepts the dissenting Court of Appeals judge's view that the context in which the supplemental instruction was given was "a coercive and despotic atmosphere" that "likely persuaded dissenting jurors to abandon their principles."[40] The majority cites three instances of the trial judge's conduct to suggest that "dissent would not be tolerated" and that jurors who misbehaved would be punished with "public humiliation." These three instances of conduct are: (1) her rebuke of an alternate juror who, without

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[38] *Id*. at 314; *Sullivan*, 392 Mich at 334.

[39] *Sullivan*, 392 Mich at 334.

[40] *People v Walker*, unpublished per curiam opinion of the Court of Appeals, issued December 1, 2016 (Docket No. 327063) (GLEICHER, J., dissenting), p 4.

notice, arrived more than an hour late for trial; (2) her reference to receiving a new smart phone during the trial proceedings; and (3) her disagreement with defense counsel over a minor point regarding the testimony of one witness. None of this conduct, taken individually or collectively, supports the notion that the jury was coerced into convicting defendant. The majority's analysis of this behavior, and the weight afforded to it in the majority's analysis, establishes that the majority has improvidently concluded that the supplemental instruction coerced the jury into delivering a verdict.

There is nothing autocratic, intimidating, or tyrannical in regard to the portion of the proceedings during which the judge was distracted and unable to accept a stipulation between counsel because she was "about to get a new iPhone 6." This exchange evinces, at its absolute worst, a momentary lapse of professionalism. But the exchange does not contribute a scintilla of evidence toward a finding of a "despotic" or "coercive" courtroom environment. The same conclusion applies to the trial judge's disagreement with defense counsel regarding the substance of Sergeant Matthew Gnatek's testimony.[41] The trial judge incorrectly concluded that defense counsel mischaracterized the officer's prior testimony, but this error is wholly immaterial. More significantly, in making her ruling, the trial judge was not disrespectful, domineering, or imperious toward defense counsel. She simply stated she would

[41] On direct examination Sergeant Gnatek testified he had observed defendant sprinting away from the group with whom he was gathered. On cross-examination, defense counsel asked Sergeant Gnatek to reaffirm that he had observed defendant sprinting away. The trial judge described this as a mischaracterization of Sergeant Gnatek's prior testimony. The judge believed that the officer had testified that defendant had run rather than sprinted away from the group.

not argue the point because she had made her ruling. Nothing in this exchange suggests that the instruction was coercive, as found by the majority. Having dismissed these two examples of the coercive nature of the proceedings, the majority is thus left to hang its claims of "despotism" and "coercion" on the events involving Juror No. 8.

We are indeed ruling from an unusually lofty ivory tower wherefrom we second-guess trial judges who rebuke—even harshly so—jurors who woefully fail to conform to the requirements of the court. This Court's disconnection from the realities of the trial court process becomes even more troublesome when we conclude, as the majority does here, that such conduct is evidence that the entirety of the trial was "despotic" and "coercive." Chastising a juror who is more than an hour late for trial without even extending the court the courtesy of calling to explain why that juror cannot timely appear is within the range of acceptable trial-court conduct. Because the judge's response was appropriate, it is not evidence of the coercive nature of a jury instruction given a day after Juror No. 8 was rebuked and discharged for being tardy. The trial judge merely displayed her interest in running a timely and efficient, no-nonsense courtroom. This action cannot be translated into a signal from the judge to the jurors that they are to act in accordance with her implicit views of the case.

With the benefit of hindsight, the majority describes "[a] better approach" to handle punctually challenged jurors. Regardless of whether the approach described by the majority is "better," this Court should not be in the business of second-guessing the manner by which trial courts handle discourteous jurors who fail to timely appear for service as ordered by the court. Such jurors are not only disrespectful of their fellow jurors

and the court, they also delay our justice system to the detriment of taxpayers and litigants not only in the case in which they are serving but also in all other cases on the trial court's backlogged docket. While each trial judge may choose to handle such occurrences differently, the action taken by any given judge rests in the inherent discretion invested in each judge to manage the courtroom. And even if the remaining jurors perceived the act of requiring tardy Juror No. 8 to sit in an area of the courtroom normally reserved for remanded litigants as an act of public humiliation, jurors are fully competent to understand that even a harsh, but deserved, rebuke to a tardy juror is hardly a directive to the remaining jurors that they are therefore to ignore the instructions on the law and, instead, subordinate their decision-making authority concerning matters of guilt or innocence to the implicit preferences of the trial judge.

In sum, viewing the supplemental instruction in proper context, I conclude that the only "coercive" act by the trial judge was requiring the jury to go to lunch before resuming its deliberations. Nothing in the record supports the conclusion that the trial judge implicitly directed the jurors to return a guilty verdict.

B. DEFENDANT HAS NOT SHOWN THAT THE SUPPLEMENTAL INSTRUCTION SERIOUSLY AFFECTED THE FAIRNESS, INTEGRITY, AND PUBLIC REPUTATION OF THE JUDICIAL PROCEEDINGS

Even if we were to concede that the trial judge erred by giving the supplemental instruction, reversal of defendant's conviction is not warranted because he has failed to satisfy the plain-error standard of review.[42]

[42] *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001) (explaining that unpreserved claims of instructional error are reviewed for plain error affecting the defendant's substantial rights, while the instructions themselves are reviewed in their entirety).

This standard requires a defendant to establish that (1) error occurred, (2) the error was plain (i.e., "clear or obvious"), and (3) the error affected the defendant's substantial rights.[43] But even if the defendant satisfies these three elements, reversal is warranted *only* when the error results in either the conviction of an actually innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.[44]

The majority's application of the fourth plain-error prong is deeply concerning: it summarily concludes that the supplemental instruction "seriously affected the fairness, integrity, and public reputation of the judicial proceedings by affecting the jury's verdict[.]" Simply put, the majority unduly strains the plain-error standard. Even assuming that the trial judge, in giving the supplemental instruction, committed a clear or obvious error of law that affected defendant's substantial rights, there is no basis for reversal under the fourth requirement of the plain-error standard.

Neither the fairness nor the integrity nor the public reputation of this trial was compromised when the trial judge gave the supplemental instruction that the jury should go to lunch and continue deliberating upon return. The trial judge made it clear from the outset that she did not believe the jury was indeed deadlocked. She informed the attorneys that the jury could not deliberate for 75 minutes and simply give up. She informed counsel of her intent to tell the jurors exactly that. Next, she informed counsel that if it turned out that one or more jurors was not participating in the jury

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[43] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

[44] *Carines*, 460 Mich at 763.

process, the court would address that situation. Then, she stated that she was going to send the jurors to lunch. She also expressed that she would give the *Allen* instruction if she received another "deadlocked" note after lunch. Finally, she again reminded the attorneys that she would make these statements to the jury and then asked if there was anything else to address.

In providing this explanation, the trial judge essentially provided counsel multiple opportunities to object and on several grounds. That is, she specifically afforded the opportunity to object based on the general omission of the *Allen* charge, the supposedly coercive statements made to the jury, and on the grounds that she was sending the jurors to lunch at that time. But no objection was asserted. Without any objection to aid or inform the trial judge about the substance of defendant's concerns, the judge brought the jury into the courtroom and instructed them as she had informed counsel she would. And while the absence of an objection does not categorically preclude a defendant from establishing plain error, the absence of objections in this context suggests that any error was certainly not clear or obvious, considering defense counsel was presented with *several grounds* upon which to object and was provided a *detailed explanation* as to what the court was going to tell the jury. But for the same reasons, even assuming defense counsel missed a clear or obvious error of law, the trial judge did not come close to compromising the fairness, integrity, or public reputation of the trial. On these facts, the plain-error standard is not even close to being satisfied.

IV. CONCLUSION

This Court's holding misapprehends the traditional understanding of juror coercion, fails to recognize the

practical realities of trial court proceedings, and strains the requirements for reversing a jury's verdict under the plain-error standard of review. At most, the trial judge merely required the jury to go to lunch. Nothing said by the trial judge coerced the jury to convict defendant. Accordingly, I would affirm the judgment of the Court of Appeals.

MARKMAN, J., concurred with ZAHRA, J.

PEOPLE v McBURROWS

Docket No. 157200. Argued on application for leave to appeal April 11, 2019. Decided July 15, 2019.

Romon B. McBurrows was charged in the Monroe Circuit Court with one count of delivery of a controlled substance causing death, MCL 750.317a, in connection with the death of Nicholas Abraham. Abraham, a resident of Monroe County, had driven an acquaintance to a house in Wayne County where the acquaintance bought heroin from defendant. Abraham and the acquaintance used some of the heroin in a nearby parking lot and then returned to their homes. Abraham was found unresponsive the next morning and was pronounced dead later that day. An autopsy concluded that Abraham had died from an overdose of fentanyl, which is sometimes mixed with heroin. Defendant filed a motion disputing Monroe County as a proper venue, and the trial court, Daniel White, J., denied the motion. Defendant then applied for leave to appeal on an interlocutory basis in the Court of Appeals, which granted leave and stayed the trial court proceedings pending the appeal. The Court of Appeals, TALBOT, C.J., and BORRELLO and RIORDAN, JJ., reversed, holding that venue was proper in Wayne County, where defendant allegedly delivered the heroin, and that venue was not proper in Monroe County under either MCL 762.5 or MCL 762.8. *People v McBurrows*, 322 Mich App 404 (2017). The prosecution appealed in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1073 (2018).

In a unanimous opinion by Justice CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

In a prosecution for delivery of a controlled substance causing death, venue is not properly laid in a county if the death, but not the delivery, occurred in that county.

1. A criminal trial should be by a jury of the county or city where the offense was committed. The parameters of this general rule are not codified in Michigan. While MCL 762.1 provides that the courts of this state that have jurisdiction and powers over criminal causes have the "jurisdiction and powers as are now conferred upon them by law," this language is too general to

provide meaningful guidance. Instead, what is codified are certain exceptions to or expansions of the general rule, which allow venue in locations besides that provided for in the general rule. Thus, identifying a proper venue is a two-step process: first, the proper venue under the general rule must be identified; second, it must be determined whether a statutory exception permits departure from the general rule. Although the general venue rule has, at times, been stated in permissive terms, in the absence of an applicable statutory exception, that the trial be held in the county or city where the offense was committed is a mandatory aspect of criminal venue in Michigan that derives from the continuing constitutional guarantee of the preexisting common-law right to trial by jury.

2. Under federal law, which constitutionally requires that federal criminal trials be held in the state where the crimes were committed, the location of the crime is determined from the nature of the crime alleged and the location of the act or acts constituting it. One method for making this determination is the "verb test," in which identifying the essential verb in the statute creating a crime is the critical inquiry in identifying the proper venue for a federal prosecution. However, the Supreme Court has stated that this test cannot be applied rigidly, to the exclusion of other relevant statutory language, because the proper inquiry is into the nature of the offense. In this case, whether emphasizing the key verbs or inquiring into the nature of the offense, a violation of MCL 750.317a occurs at the place of the delivery of the controlled substance. This statute punishes an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death; that consequences are felt elsewhere is immaterial, even if those consequences are required elements of the offense.

3. While the Court of Appeals correctly determined that the proper venue for prosecuting this case was Wayne County, it reached that conclusion using flawed reasoning. MCL 750.317a is properly understood as punishing an individual for the act of placing into the stream of commerce a controlled substance that ultimately causes an individual's death. Therefore, a violation of MCL 750.317a occurs at the place of the delivery of the controlled substance. This is true even though the crime is not complete until all of its elements occur, and both consumption of a controlled substance and death caused by that consumption are elements of the offense. Accordingly, MCL 750.317a is not merely a "penalty enhancement"; it is a crime with its own elements that is distinct from the crime established in MCL 333.7401.

4. Neither MCL 762.5 nor MCL 762.8 provides a basis for establishing venue in Monroe County. MCL 762.5 provides that "[i]f any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county." The word "inflict" is defined, in part, as "to impose as something that must be suffered or endured," and the word "administer" is defined, in relevant part, as "[t]o dispense, furnish, supply, or give . . . to the recipient." In this case, defendant neither imposed anything on the decedent nor gave anything to the decedent. Rather, it was alleged that defendant delivered certain substances to the decedent through an intermediary, with no allegation that defendant even was aware of the decedent's existence. He did not interact with the decedent in the fashion contemplated by MCL 762.5 or in the way the defendant did in *People v Southwick*, 272 Mich 258 (1935), which was distinguishable for that reason. Similarly, venue was not properly laid in Monroe County under MCL 762.8, which provides: "Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect." For MCL 762.8 to apply here, there must have been an act done in perpetration of the alleged felony in Monroe County by defendant or his agent. There was, however, no allegation that defendant endeavored to deliver the heroin to the decedent or that he intended the decedent's death, nor was it alleged that the decedent intended to die or coordinated his actions with defendant in any way. In the absence of some indication that the decedent was implicated in or culpable for defendant's action, he has not done something in perpetration of defendant's offense for purposes of MCL 762.8.

Court of Appeals judgment affirmed; case remanded for further proceedings.

CRIMINAL LAW — COURTS — VENUE — DELIVERY OF A CONTROLLED SUBSTANCE CAUSING DEATH.

In a prosecution for delivery of a controlled substance causing death under MCL 750.317a, venue is not properly laid in a county if the death, but not the delivery, occurred in that county.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Michael G. Roehrig*, Pros-

ecuting Attorney, and *Michael C. Brown* and *Allison M. Arnold*, Assistant Prosecuting Attorneys, for the people.

Rockind Law (by *Neil Rockind* and *Noel Erinjeri*) for defendant.

Amicus Curiae:

Melissa A. Powell, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

CLEMENT, J. In this case, we consider whether, in a prosecution for delivery of a controlled substance causing death, venue is properly laid in a county if the death, but not the delivery, occurred in that county. We conclude that venue in such circumstances is not proper, and so we affirm the conclusion of the Court of Appeals in this regard and remand for further proceedings not inconsistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY[1]

On December 12, 2016, Nicholas Abraham—a resident of Monroe County—contacted an acquaintance, William Ingall, about procuring some heroin. Abraham picked up Ingall, and the two traveled to a house in Detroit. Abraham gave Ingall money, and Ingall went into the house to purchase heroin from defendant, Romon McBurrows. Abraham and Ingall then went to a nearby laundromat parking lot, where they consumed some of the heroin. Ingall noted that the heroin seemed unusually strong, and he warned Abraham to be careful

[1] Because trial has not yet been held, there is no jury verdict in this case. Defendant maintains that he is innocent of the crimes with which he has been charged but, for the sole purpose of testing venue, accepts the People's allegations as true.

when consuming it. Abraham took Ingall home and then returned to his own home, in Monroe County. Upon arriving at home at about 10:00 p.m., Abraham provided some heroin to his wife, Michelle, who used it and passed out. When she awoke in the early morning hours of December 13, she found Abraham unresponsive, and after failing to resuscitate him, she called the authorities, who pronounced him dead that same day. An autopsy ultimately concluded that Abraham's death was caused by fentanyl toxicity—fentanyl being a substance sometimes mixed with heroin.

Defendant was charged in Monroe County with one count of delivery of a controlled substance causing death. He filed a motion disputing Monroe County as a proper venue.[2] The trial court denied the motion. Defendant then filed an application for leave to appeal on an interlocutory basis in the Court of Appeals, which granted leave and stayed the trial court proceedings pending the appeal.[3] The Court of Appeals ultimately reversed the judgment of the trial court. *People v McBurrows*, 322 Mich App 404; 913 NW2d 342 (2017). The People then appealed in this Court, and we ordered argument on the application as to whether, on these facts, Monroe County was a proper venue for this criminal trial. *People v McBurrows*, 501 Mich 1073 (2018).

II. STANDARD OF REVIEW

"A trial court's determination regarding the existence of venue in a criminal prosecution is reviewed de

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[2] Defendant titled his motion a "motion to dismiss for lack of jurisdiction." The trial court and Court of Appeals recharacterized it as a venue challenge. Defendant does not challenge that recharacterization in this Court.

[3] *People v McBurrows*, unpublished order of the Court of Appeals, entered July 13, 2017 (Docket No. 338552).

novo." *People v Houthoofd*, 487 Mich 568, 579; 790 NW2d 315 (2010). This case also involves certain venue statutes, the interpretation of which we also review de novo. *Tryc v Mich Veterans' Facility*, 451 Mich 129, 145; 545 NW2d 642 (1996).

III. ANALYSIS

A criminal "trial should be by a jury of the county or city where the offense was committed." *People v Lee*, 334 Mich 217, 226; 54 NW2d 305 (1952). See also 4 LaFave et al, Criminal Procedure (4th ed), § 16.1(c), pp 777-778 ("American jurisdictions . . . all utilize the same formula for designating the particular district in which the prosecution must be initiated and trial held[:] that district in which the 'crime shall have been committed.' "). This is known as "[t]he 'crime-committed' formula." *Id*. at 778. The parameters of this general rule are not, however, codified in Michigan. While MCL 762.1 provides that "[t]he various courts . . . of this state now having jurisdiction and powers over criminal causes, shall have such jurisdiction and powers as are now conferred upon them by law," this language is too general to provide meaningful guidance. Cf. *People v Milton*, 393 Mich 234, 245; 224 NW2d 266 (1974) ("The language concerning the jurisdiction of the courts to try criminal cases embodied in [MCL 762.1] is so general that one cannot readily determine whether the circuit court's jurisdiction in criminal cases is constitutionally vested, derives from the common law, the Judicature Act . . . , or the Code of Criminal Procedure."). Instead, what *is* codified are certain exceptions to or expansions of the "general rule," allowing venue in locations besides the location provided for in the "general rule." The People here rely on two of these statutory qualifications. Thus, identi-

fying a proper venue is a two-step process: first, we must identify the proper venue under the general rule; second, we must determine whether the statutes on which the People rely permit departure from the general rule.

A. MICHIGAN'S COMMON-LAW CRIMINAL VENUE RULE

The general venue rule is derived from the common law. Since statehood, each of our Constitutions has guaranteed the continuation of a preexisting right to trial by jury. See Const 1835, art 1, § 9 ("The right of trial by jury shall remain inviolate."); Const 1850, art 6, § 27 ("The right of trial by jury shall remain . . . ."); Const 1908, art 2, § 13 (same language as 1850); Const 1963, art 1, § 14 (same language as 1850 and 1908). In *Swart v Kimball*, 43 Mich 443, 448; 5 NW 635 (1880), we held that the right which "remains" is "the right as it existed before; the right to a trial by jury as it had become known to the previous jurisprudence of the State." In *Swart*, we confronted a statute providing that a proper venue for prosecuting an individual who illegally cut timber on public lands was either " 'in the county where the offense was committed, or in such other county as the Commissioner of the State Land Office, or the Attorney General, shall, by written instructions to the prosecuting attorney thereof, direct.' " *Id*. at 445, quoting 1857 PA 100, § 5. We held that the statute, in "so far as it undert[ook] to authorize a trial in some other county than that of the alleged offense, [was] oppressive, unwarranted by the Constitution, and utterly void." *Id*. at 450. Several subsequent cases reemphasized *Swart*'s holding. See, e.g., *Hill v Taylor*, 50 Mich 549, 551; 15 NW 899 (1883) ("[I]t cannot be seriously claimed that the prosecution can be had in a county where the crime was not actually or in contem-

plation of law perpetrated. The constitutional guaranty on this subject is too plain to be controverted."); *People v Harding*, 53 Mich 48, 53; 18 NW 555 (1884) (Residence of jurors in the vicinage of the offense "has always been associated with the jury system in criminal cases in the jurisprudence of both England and America . . . ."); *People v Brock*, 149 Mich 464, 466; 112 NW 1116 (1907) ("It would be a startling innovation should we say that the legislature has power to subject a person charged with crime to prosecution in any one of several counties . . . ."); *People v Olson*, 293 Mich 514, 515; 292 NW 860 (1940) ("After these [illegally undersized] fish were shipped by defendant [in Benzie County] he was not in Newaygo county and cannot, therefore, be prosecuted in that county upon any theory of constructive possession of the fish in Newaygo county.").

Consequently, Michigan's "crime committed" formula is a function of the constitutional provision that "[t]he right of trial by jury shall remain," which is to say, it continues from its common-law origins. See also Const 1963, art 3, § 7 ("The common law and the statute laws now in force . . . shall remain in force until they expire by their own limitations, or are changed, amended or repealed."). Although we have at times said that "trial *should* be by a jury of the county or city where the offense was committed," *Lee*, 334 Mich at 226 (emphasis added), there should be no confusion that—in the absence of an applicable statutory exception—this is a mandatory aspect of criminal venue in Michigan. "The standard formula for setting venue calls for dividing the territory of the political entity . . . into geographical districts and then selecting as the appropriate venue that district in which the alleged crime was committed." LaFave et al, § 16.1(c), p 777. But how does one define where it is that a crime was committed?

We find federal law illuminating in this regard. Because there is a federal constitutional requirement that "[t]he Trial of all [federal] Crimes . . . shall be held in the State where the said Crimes shall have been committed," US Const, art III, § 2, cl 3, the stakes are particularly high in federal court for identifying where a crime was committed. The Supreme Court has said that "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *United States v Anderson*, 328 US 699, 703; 66 S Ct 1213; 90 L Ed 1529 (1946). One author suggested that identifying the "essential verb" in the statute creating a crime is the critical inquiry in identifying the proper venue for a federal prosecution. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va L Rev 287, 289 (1926). This has given rise to the "verb test" that is influential in federal court. See generally LaFave, § 16.2(c), pp 842-848. The Supreme Court has stated, in the federal context, that while "the 'verb test' certainly has value as an interpretative tool, it cannot be applied rigidly, to the exclusion of other relevant statutory language," because the proper "inquiry [is] into the nature of the offense," *United States v Rodriguez-Moreno*, 526 US 275, 280; 119 S Ct 1239; 143 L Ed 2d 388 (1999). That said, scrutinizing the key verbs in a criminal statute remains a common way to identify the conduct prohibited by a statute. See *State v Kell*, 276 Ga 423, 425; 577 SE2d 551 (2003) ("Studying 'the key verbs which define the criminal offense in the statute is helpful in determining venue in doubtful cases.' ") (quotation marks and citation omitted); LaFave, § 16.2(c), p 848 ("While *Rodriguez-Moreno* rejected the use of literalism as an exclusive approach, it left uncertain the precise role of key-verb analysis in determining the 'nature of the

crime.' Some lower courts continue to look first to what the key verb suggests as to proper venue.").

It is clear, then, that to identify where defendant's crime was committed, we must scrutinize the statute creating defendant's offense. Defendant is charged with violating MCL 750.317a, which provides:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of . . . MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

We conclude that, whether emphasizing the "key verbs" or inquiring into "the nature of the offense," a violation of MCL 750.317a occurs at the place of the delivery of the controlled substance. As we said in *People v Plunkett*, 485 Mich 50, 60; 780 NW2d 280 (2010), the statute punishes "an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death." That consequences are felt elsewhere is immaterial, even if those consequences are required elements of the offense. This point is illustrated by *People v Duffield*, 387 Mich 300; 197 NW2d 25 (1972). In *Duffield*, the victim was beaten in his home in Cass County and died in Indiana. In analyzing the rules of jurisdiction and venue in the circuit courts, we held that "as between counties the common-law rule is that jurisdiction to prosecute for manslaughter or homicide lies at the place where the blow was given." *Id*. at 328. Thus, the mere fact that a death was *felt* in a county does not make that county the proper venue for trying the case; rather, the question is where the crime itself was committed. Accordingly, the death of the victim in Monroe County

does not make Monroe County the proper venue under the general rule; instead, venue is proper in Wayne County because that is the county in which the crime itself was committed.

The Court of Appeals correctly determined that, under the general rule, the proper venue for prosecuting this case was Wayne County. However, it reached that conclusion using flawed reasoning.

> MCL 750.317a is properly understood as providing a penalty enhancement when a defendant's criminal *act*—the delivery of a controlled substance in violation of MCL 333.7401—has the *result* or *effect* of causing a death to any other individual. It is also clear, however, that a defendant's criminal act is complete upon the delivery of the controlled substance. Criminal liability has attached at that point. The effects of that completed action merely determine the degree of the penalty that a defendant will face despite the fact that a defendant need not commit any further acts causing the occurrence of any specific result (such as a death by drug overdose). [*McBurrows*, 322 Mich App at 413.]

The People argue that the Court of Appeals erred by characterizing MCL 750.317a as a "penalty enhancement," and we agree.[4] The Court of Appeals characterized MCL 750.317a as a "penalty enhancement" in reliance on this Court's statement in *Plunkett*, 485 Mich at 60, that MCL 750.317a "provides an additional

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[4] Indeed, it seems that the Court of Appeals was too fixated in general on defendant's own act. Consider a scenario in which a defendant installs a car bomb on a victim's car in one county, and the victim then drives to another county where the bomb goes off, killing the victim. As we said in *Duffield*, in the case of murder or manslaughter venue is proper at common law where the mortal wound is given, which would indicate that venue would be proper *where the bomb went off*, rather than *where the defendant's act occurred*. As it happens, a violation of MCL 750.317a is committed where the defendant's wrongful act occurs, but that does not necessarily define where a crime is committed in all cases.

punishment for persons who 'deliver[]' a controlled substance in violation of MCL 333.7401 when that substance is subsequently consumed by 'any . . . person' and it causes that person's death." The Court of Appeals read too much into our characterization of MCL 750.317a as providing "an additional punishment." It is only an "additional punishment" because MCL 333.7401 itself criminalizes the delivery of a controlled substance, without regard to the consequences, and punishes it to a lesser degree than MCL 750.317a. Nothing requires the Legislature to criminalize delivery of a controlled substance *at all*; it could content itself with only punishing a delivery *if* the consumption of the delivered substance causes a death. In such a scenario, *no crime at all* would have occurred —and criminal liability would not have attached— until the death occurred, which illustrates the necessity of the death as an element of the crime itself, rather than a mere basis for a penalty enhancement.

To express this concept another way, MCL 750.317a establishes a crime that is distinct from the crime established in MCL 333.7401, with its own elements. The elements of a prosecution under MCL 750.317a are: (1) delivery to another person, (2) of a schedule 1 or 2 controlled substance (excluding marijuana), (3) with intent to deliver a controlled substance as proscribed by MCL 333.7401, (4) consumption of the controlled substance by a person, and (5) death that results from the consumption of the controlled substance.[5] Although MCL 750.317a is predicated on a violation of MCL 333.7401, it adds elements that make it a distinct

[5] At least one panel of the Court of Appeals has articulated the elements in a similar fashion. See *People v Olger*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2017 (Docket Nos. 331705 and 331876), p 17.

offense. While, as noted, it would be entirely possible for the Legislature not to criminalize delivery of a controlled substance at all, the fact that it has—and has provided a different punishment when the consumption of the delivered substance causes a death—illustrates that what the Court of Appeals characterized as a "penalty enhancement" is in fact a distinct crime. An "element" of a crime is any "fact[] that increase[s] the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) (quotation marks and citation omitted). Because death, if proved, "increase[s] the prescribed range of penalties," it is an "element" as defined in *Apprendi* and not a mere "sentencing consideration" or "penalty enhancement," meaning it "must be submitted to a jury, and proved beyond a reasonable doubt." *Id*.

All that being said, the Court of Appeals was correct to identify the county in which the delivery occurred—here, Wayne County—as the proper county in which a prosecution for a violation of MCL 750.317a should be pursued. In a prosecution for delivery of a controlled substance causing death, the proper venue at common law is in the county where the delivery occurred.

B. MICHIGAN'S CRIMINAL VENUE STATUTES

Having identified a proper venue for this case under the general rule, we now must turn to our statutory venue rules. *Swart* and its progeny held that a defendant has a constitutional *right*—as a preservation of the common law—to be prosecuted in the county where an offense occurs. This would defeat the validity of any inconsistent venue statute. However, what *Swart* did not acknowledge was that while our first Constitution *both* preserved a right to a trial by jury *and* guaranteed

criminal defendants "an impartial jury of the vicinage," Const 1835, art 1, § 10, our subsequent Constitutions did not retain the vicinage requirement. On the basis of this lack of a vicinage requirement in our subsequent Constitutions, an early line of cases established a common-law exception to the right to be prosecuted in the county where an offense occurred: once proper venue was established, it could then be moved to another county for good cause shown. See *People v Peterson*, 93 Mich 27; 52 NW 1039 (1892); *People v Fuhrmann*, 103 Mich 593; 61 NW 865 (1895); see also *Glinnan v Detroit Recorder's Court Judge*, 173 Mich 674, 688; 140 NW 87 (1913) (opinion by BIRD, J.) ("For reasons which are historical, the rule that one charged with crime has a right to be tried by a jury of the vicinage has taken a fast hold on our system of jurisprudence. The rule itself is not in dispute; only its exceptions are questioned.").[6]

This discrepancy between the Constitution of 1835 and subsequent Constitutions also created space for the Legislature to enact *statutory* venue rules that did not entirely track the "crime committed" requirement.[7]

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[6] More nebulous precedents include *Lyle v Cass Circuit Judge*, 157 Mich 33; 121 NW 306 (1909), and *People v Rich*, 237 Mich 481; 212 NW 105 (1927). In *Lyle*, the trial court denied a motion for a change of venue and the relator filed a mandamus action in this Court to compel a different result. The lead opinion by Justice HOOKER denied the writ of mandamus, asserting "that a judge's discretion is not reviewable in any manner . . . ." *Lyle*, 157 Mich at 36. A majority of the justices "concur[red] in the result reached by Justice HOOKER, but d[id] not desire to be understood that in no case can there be a review of action involving an abuse of discretion; such question being reviewable on error." *Id.* at 42 (opinion by OSTRANDER, MCALVAY, & BROOKE, JJ.). In *Rich*, an equally divided Court also affirmed a change of venue on motion.

[7] After all, "[i]t is axiomatic that the Legislature has the authority to abrogate the common law." *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 389; 738 NW2d 664 (2007).

We thus upheld a statute providing for prosecution of a crime in either county when a crime was committed within 100 rods of the boundary between the counties. See *Bayliss v People*, 46 Mich 221; 9 NW 257 (1881); *People v Hubbard*, 86 Mich 440; 49 NW 265 (1891); *People v Donaldson*, 243 Mich 104; 219 NW 602 (1928). We also held that it was proper for the Legislature to "giv[e] to certain counties bordering on the Great Lakes a common jurisdiction of all offenses committed on such lakes within this State." *People v Bouchard*, 82 Mich 156, 159; 46 NW 232 (1890). See also *People v Coffee*, 155 Mich 103, 107; 118 NW 732 (1908).

> The reason for creating an enlarged vicinage for the trial of offenses committed upon the Great Lakes is obvious, on account of the great difficulty which would be encountered in determining in which of the bordering counties the commission of the act took place. It is quite evident that the necessity of the situation was what gave rise to this enlarged vicinage. While the general rule is that the county is the vicinage, there are some exceptions thereto where justice demands it. . . .
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> . . . The fixing of the boundaries of a vicinage is a legislative function, and it has been exercised in this State by the legislature declaring that the county shall be the unit in which jurors shall be selected to try offenses committed therein, and this rule has been steadily and consistently adhered to, save in unusual cases where the proper administration of justice demanded an enlarged jurisdiction. We see nothing in this section which indicates that the legislature has exceeded its powers. It has created an enlarged vicinage for the trial of all offenses committed upon the waters of Lake Huron, because the vicinage of the county would be an impracticable one. If these jurisdictions are larger than they should be, it must be remedied by the legislature, and not by the courts. [*Andrews v Ellsworth*, 190 Mich 157, 160-161; 156 NW 115 (1916).]

As exceptions to the *Swart* rule continued to mount, the camel's back was soon to break. In *People v Richards*, 247 Mich 608; 226 NW 651 (1929), we rejected a defendant's challenge to a statute providing that the proper venue in a prosecution for prison escape was not in the county where the escape took place, but rather in the county where the administrative office of the prison was located. We wrote that while

> [i]t [was] true that he departed from custody in Clinton county, . . . his escape was from imprisonment in the State prison, and such escape, and not the mere place of his departure, was the gist of the offense, and he cannot be heard to say that he has been deprived of a constitutional right by trial in Jackson county. [*Id*. at 613.]

The dissent argued that *Swart* and its progeny were decisive, and "[o]nly by the adoption of a legal fiction, which to my mind is fallacious, can these decisions be circumvented, and it be held that a crime actually committed in Clinton county was in contemplation of law committed in Jackson county." *Id*. at 609 (FELLOWS, J., dissenting). Not long thereafter, the *Swart* decision itself was challenged as simply being poorly reasoned, in that it ignored that the Michigan Constitution of 1850 (and subsequent Constitutions) omitted a vicinage requirement. See Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich L Rev 59, 80-87 (1944). The Blume article also asserted that *Swart* misinterpreted the state of the common-law venue rules at the time Michigan became a state, such that there was substantially more legislative flexibility at common law to expand or alter venue rules than *Swart* acknowledged. *Id*.

The Blume criticism of *Swart* was ratified by this Court in *Lee*. We acknowledged that *Swart* "ha[d] been criticized on the ground that Justice COOLEY overlooked the fact that the Michigan Constitution of 1850

had omitted the words, 'of the vicinage.' " *Lee*, 334 Mich at 225. We then noted that several cases since *Swart* "ha[d] shown a departure in certain instances from a strict application of the rule that the jury must be of the vicinage, or of the county," *id*., including *Bayliss*, *Hubbard*, *Peterson*, and *Glinnan*, along with *People v Southwick*, 272 Mich 258; 261 NW 320 (1935), and *People v Coapman*, 326 Mich 321; 40 NW2d 167 (1949), which had upheld prosecutions under MCL 762.5 (allowing for a prosecution in either the county where the injury occurs or the death results where "violence or injury shall be inflicted, or any poison shall be administered"). We concluded in *Lee* that " '[i]n the absence of any limitation by constitutional provision, it seems to be generally recognized that the power of a State legislature to fix the venue of criminal prosecutions in a county or district other than that in which the crime was committed is unrestricted.' " *Lee*, 334 Mich at 225, quoting Anno: *Constitutionality of Statute for Prosecution of Offense in County Other Than That in Which it was Committed*, 76 ALR 1034, 1035, § II.

In sum, then, when we said in *Lee* that a crime "should" be prosecuted where it was committed, we were recognizing a *requirement* that it be prosecuted where it was committed, even while expressly acknowledging the broad prerogative of the Legislature to enact statutes that provide for *alternative* venue. *Lee* recognized that what *Swart* had said was a *constitutional right*—trial in the county where a crime is committed—is instead a *default rule* that the Legislature is free to adjust statutorily.[8] That rule is grounded in the common law and focuses on identifying the one county where the crime was committed. However, the

[8] Thus, in *Richards*, we felt obliged to rationalize the venue statute at issue as being consistent with *Swart*, and resorted to what the dissent called a "legal fiction" to reach that result. *Richards*, 247 Mich at 609

Legislature has the authority to specifically provide for other venues by statute, and it has done so in Chapter II of the Code of Criminal Procedure, which contains several venue rules for criminal prosecutions that supplement the general rule. The People here allege that venue is properly laid in Monroe County under either of two of these provisions.

The first provision the People cite, MCL 762.5, provides that "[i]f any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county." The People theorize that the delivery of the controlled substance in this matter—which occurred in Wayne County—was akin to a "ticking time bomb," such that the delivery of it qualified as giving a mortal wound that can be prosecuted under the statute in the county where the death occurred. They also argue that heroin is a "poison" under the statute, such that, again, the death that resulted from consuming it can be prosecuted in the county where the death occurred. In support, they cite *Southwick*. In *Southwick*, the decedent traveled from Oakland County to Jackson County where the defendant doctor provided her with unlawful medical treatment. *Southwick*, 272 Mich at 260. About a week later, the decedent passed away in Oakland County. We affirmed the propriety of charging the defendant in Oakland County under the venue statute now codified at MCL 762.5. The People argue that just as the procedure in *Southwick* was a mortal wound, "the delivery of these dangerous controlled substances was a mortal wound or injury."

(FELLOWS, J., dissenting). Were we to decide *Richards* again, *Lee* would make clear that the Legislature is free to adopt venue statutes, relieving us of the need to reconcile any given venue statute to the *Swart* rule.

Neither theory advanced by the People is supported by *Southwick*. The statute requires that a mortal wound be *inflicted*, or a poison[9] be *administered*. The word "inflict" is defined as "[t]o lay on as a stroke, blow, or wound; to impose as something that must be suffered or endured; to cause to be borne." *Oxford English Dictionary* (2d ed). The word "administer" is defined in relevant part as "[t]o dispense, furnish, supply, or give . . . to the recipient[.]" *Id*. Neither occurred here. Defendant neither imposed anything *on* the decedent nor gave anything *to* the decedent.

Our conclusion that venue under MCL 762.5 requires more direct interaction with the victim is consistent with *Southwick*, in which the defendant's unlawful medical treatment was "wilful" and performed "upon the body" of the decedent. *Southwick*, 272 Mich at 262. Nothing in *Southwick* supports the People's theory in this case, because in *Southwick* it was alleged that the defendant had either acted directly upon the decedent's body or provided "medicines, drugs and substances," *id*. at 260, directly to her as part of a course of treatment. Here, by contrast, it is alleged that defendant *delivered* certain substances to the decedent, and only through an intermediary at that, with no allegation that defendant even was aware of the decedent's existence. He did not *interact with* the decedent in the way the defendant did in *Southwick*, or in the fashion contemplated by MCL 762.5.

The People also argue that venue is properly laid in Monroe County under MCL 762.8. That statute provides:

> Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the

[9] Given our analysis, we do not decide whether heroin is a "poison" for purposes of MCL 762.5.

> felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.

There is no argument here that defendant "intended" for any effects of his offense to be felt in Monroe County. The People argue, however, that an essential element of defendant's crime is the decedent's death, and that the decedent's death was caused by his consumption of the heroin. The People contend that the decedent's consumption of the heroin was thus an "act[] done in the perpetration of [defendant's] felony," in that it was an act which had to occur to satisfy all the elements of defendant's offense. The Court of Appeals concluded that MCL 762.8 does not apply here because "the alleged crime—with the exception of the sentencing enhancement for the death of [the decedent]—was complete at the point of sale," meaning "there was no further act to be committed 'in the perpetration of that felony[.]' " *McBurrows*, 322 Mich App at 415-416.

As noted in our discussion of identifying the proper venue under Michigan's default rule, we agree with the People that MCL 750.317a is not a "sentencing enhancement." Further, as we noted in our earlier discussion, the alleged crime here was *not* complete at the point of sale. Although we disagree with the Court of Appeals' reasoning, that Court correctly concluded that venue is not proper in Monroe County under MCL 762.8. For MCL 762.8 to apply, there must have been an "act[] done in the perpetration of [defendant's] felony" in Monroe County. The prosecution contends that venue is proper because the decedent's acts of consuming the heroin and dying were also "acts done in perpetration" of MCL 750.317a. We disagree. "Perpetration" is defined as "[t]he action of perpetrating or performing (an evil deed); the committing (of a

crime)[.]" *Oxford English Dictionary* (2d ed). It carries with it a connotation of culpability or blameworthiness, as though a part of the defendant's endeavor. Thus, the Legislature's use of the word "perpetration" serves to limit the application of MCL 762.8 to the conduct of a criminal actor or his agent.[10] But there is no allegation here that defendant endeavored to deliver this controlled substance to the decedent, or that he intended the decedent's death; nor is it alleged that the decedent intended to die or coordinated his actions with defendant in any way. In the absence of some indication that the decedent was *implicated* in or *culpable* for defendant's action, he has not done something in *perpetration* of defendant's offense. Consequently, MCL 762.8 is not an adequate basis for establishing venue in Monroe County—not because the crime was complete at the point of the delivery, but rather, because the decedent's acts (which were necessary to complete the elements of the offense) were unconnected to defendant's and therefore did not implicate the decedent or make him culpable for defendant's behavior.[11]

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[10] Cf. *Rodriguez-Moreno*, 526 US at 280 & n 4 (recognizing a distinction between "circumstance elements" and "conduct elements" in locating the proper venue for a federal criminal prosecution); *United States v Myers*, 854 F3d 341, 359 (CA 6, 2017) (Kethledge, J., concurring in part and dissenting in part) ("In determining where a crime was committed for purposes of constitutional venue, . . . the court looks to the place of the 'conduct elements' rather than to the place of any 'circumstance element[s]' of the offense."). While the victim's death in this matter was an essential element of the offense and must be proved beyond a reasonable doubt, it is analogous to the sort of "circumstance element" recognized by federal law that does *not* establish proper venue, rather than a "conduct element," which does.

[11] The People also argue in this Court—for the first time—that "the Delivery of a Controlled Substance constitutes a conspiracy and acts in furtherance of the conspiracy occurred in Monroe County." We need not

IV. CONCLUSION

Neither statute that the People cite is an adequate basis for venue in Monroe County. Consequently, while we disagree with the Court of Appeals' characterization of MCL 750.317a as a mere "penalty enhancement" statute, we agree with its conclusion that Wayne County is the proper county for the prosecution of this offense under the general rule. We further agree that under the facts of this case neither MCL 762.5 nor MCL 762.8 provides an exception to the general rule sufficient to establish venue in Monroe County, and we remand to the trial court for further proceedings not inconsistent with this opinion.

MCCORMACK, C.J., and MARKMAN, ZAHRA, VIVIANO, BERNSTEIN, and CAVANAGH, JJ., concurred with CLEMENT, J.

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consider this argument, because "[i]ssues and arguments raised for the first time on appeal are not subject to review." *In re Forfeiture of Certain Personal Prop*, 441 Mich 77, 84; 490 NW2d 322 (1992). Moreover, MCL 762.8 requires that "the felony" the defendant is being prosecuted for be the same as "the felony" that occurred in multiple counties and gives rise to venue under MCL 762.8. But defendant is not charged with any conspiracy; consequently, while we express no opinion as to whether a conspiracy could be alleged on these facts, even if it *could*, MCL 762.8 would not apply here because no conspiracy *has* been alleged.

WIGFALL v CITY OF DETROIT
WEST v CITY OF DETROIT

Docket Nos. 156793 and 157097. Argued on application for leave to appeal April 11, 2019. Decided July 16, 2019.

In Docket No. 156793, Dwayne Wigfall brought an action in the Wayne Circuit Court against the city of Detroit for injuries he sustained in a motorcycle accident allegedly caused when he hit a pothole on a city street. On advice from the city's Law Department, Wigfall sent a notice via certified mail addressed to the Law Department that included a description of the pothole, its location, and a description of plaintiff's injuries. An adjuster from the Law Department acknowledged receipt of Wigfall's claim. After Wigfall filed his complaint, the city moved for summary disposition under MCR 2.116(C)(7), arguing that Wigfall's claim was barred by governmental immunity because Wigfall failed to serve notice of his claim on the mayor, the city clerk, or the city attorney as required by MCL 691.1404(2) and MCR 2.105(G)(2). The court, Daniel A. Hathaway, J., denied the city's motion, and the city appealed. The Court of Appeals, SAAD, P.J., and CAVANAGH and CAMERON, JJ., reversed and remanded for entry of an order granting the city's motion for summary disposition. 322 Mich App 36 (2017). Wigfall applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1089 (2018).

In Docket No. 157097, Faytreon O. West brought an action in the Wayne Circuit Court against the city of Detroit for injuries she allegedly suffered when she tripped on a pothole and fell while walking on a city street. West's counsel sent notice of the injury and highway defect to the city's Law Department via certified mail, instructing the city to immediately contact West's counsel if it believed that the notice did not comply with any applicable notice requirements. The Law Department received the letter, and an adjuster from the Law Department acknowledged receipt of West's claim. After West filed her complaint, the city moved for summary disposition under MCR 2.116(C)(7), arguing that West had failed to comply with the notice requirement in MCL 691.1404(2) because she had not served an indi-

vidual who may lawfully be served with civil process. The trial court, John A. Murphy, J., granted summary disposition in favor of the city and denied West's motion for reconsideration. West appealed, and the Court of Appeals, JANSEN, P.J., and CAVANAGH and CAMERON, JJ., affirmed in an unpublished per curiam opinion issued December 12, 2017 (Docket No. 335190). West applied for leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1089 (2018).

In a unanimous opinion by Justice VIVIANO, in lieu of granting leave to appeal, the Supreme Court *held*:

Plaintiffs complied with the requirements of MCL 691.1404(2) by serving their notices on the city's Law Department, because the Law Department is an agent of defendant's city attorney—also known as the Corporation Counsel—and is charged with receiving notice under the city's charter and ordinances.

1. Under the governmental tort liability act, MCL 691.1401 *et seq*., unless one of five exceptions applies, governmental agencies are immune from tort liability when they are engaged in a governmental function. One such exception is the highway exception, MCL 691.1402(1), which provides in part that a person who sustains bodily injury by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. A claimant seeking recovery under the highway exception must comply with MCL 691.1404(1), which requires the injured person to serve a notice on the governmental agency that specifies the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant. MCL 691.1404(2) provides that the notice may be served upon any individual, either personally or by certified mail, who may lawfully be served with civil process directed against the governmental agency. In turn, MCR 2.105(G)(2) provides that service of process on a municipal corporation may be made by serving a summons and a copy of the complaint on the mayor, the city clerk, or the city attorney.

2. Plaintiffs complied with the statute's notice requirement because the city authorized its Law Department to receive notices of injuries sustained and of highway defects. Under the common law of agency, the Law Department is an agent of the Corporation Counsel. The city acknowledged that the Corporation Counsel is the administrative head of its Law Department, and the city's charter provides that the Law Department "is headed by the

Corporation Counsel who is the duly authorized and official legal counsel for the City of Detroit and its constituent branches, units and agencies of government." As the head of the Law Department, the Corporation Counsel has the right to control the Law Department. Consequently, the Law Department and its members are agents of the Corporation Counsel. That the Law Department has the authority to receive the notice required by MCL 691.1404(2) on behalf of the Corporation Counsel is supported by the practical reality that the Corporation Counsel is not individually capable of receiving notice for every claim filed against the city. Further, a city ordinance provides that all claims of whatever kind against the city, excluding certain claims not relevant here, shall be first submitted to and reviewed by the Law Department. Because receiving notice is necessary for the Law Department to exercise its express authority to receive and review claims, the Law Department had implied authority to receive service of the notices of injury and highway defects required by MCL 691.1404(2). Moreover, the Law Department's receipt of these notices was the usual practice to which the Corporation Counsel had knowingly acquiesced.

Reversed and remanded to the Wayne Circuit Court for further proceedings.

Chief Justice MCCORMACK, joined by Justice BERNSTEIN, concurred in full with the majority but wrote separately to state that the Corporation Counsel and the Law Department are functionally interchangeable barring exceptional circumstances not present in this case. She further stated that advancing such a false technical argument ill served both lawyers generally and their clients specifically.

Bauer & Hunter PLLC (by *Christopher C. Hunter* and *Richard A. Moore*), and *Mike Morse Law Firm* (by *Michael J. Morse*, *Robert Silverman*, and *Stacey L. Heinonen*) for Dwayne Wigfall.

Ravid and Associates PC (by *Keith M. Banka*) for Faytreon O. West.

City of Detroit Law Department (by *Lawrence T. Garcia* and *Linda D. Fegins*) for the city of Detroit (Docket No. 156793).

City of Detroit Law Department (by *Lawrence T. Garcia* and *Sheri L. Whyte*) for the city of Detroit (Docket No. 157097).

Amici Curiae:

Plunkett Cooney (by *Mary Massaron*, *Hilary A. Ballentine*, and *Josephine DeLorenzo*) for the Michigan Municipal League and the Government Law Section of the State Bar of Michigan.

Henn Lesperance PLC (by *William L. Henn* and *Andrea S. Nester*) for the Michigan County Road Commission Self-Insurance Pool.

VIVIANO, J. The issue in these cases is whether plaintiffs, Dwayne Wigfall and Faytreon West, properly served their notices of injuries sustained and of highway defects. MCL 691.1404(2) provides that this notice "may be served upon any individual . . . who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding." MCR 2.105(G)(2) states that service may be made upon a city by leaving the summons and a copy of the complaint with "the mayor, the city clerk, or the city attorney . . . ." Here, West and Wigfall served their notices on the Law Department of the city of Detroit (the City). We hold that plaintiffs complied with the requirements of MCL 691.1404(2) by serving their notices on the Law Department, which is an agent of the Corporation Counsel.[1] Therefore, we reverse the Court of Appeals in both cases and remand to the trial court for further proceedings not inconsistent with this opinion.

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[1] The Corporation Counsel is an "officer having substantially the same duties as" a city attorney. MCL 600.1925.

I. FACTS

A. *WIGFALL v DETROIT*

Wigfall alleges that he was driving his motorcycle on Algonac Street in Detroit when he hit a pothole. As a result, Wigfall fell off his motorcycle and sustained multiple injuries. Through counsel, Wigfall contacted the City's Law Department and was informed that his notice of injury and highway defect should be addressed to "City of Detroit Law Department — Attention Claims." Consequently, Wigfall sent notice via certified mail to "City of Detroit Law Department — CLAIMS." The notice stated, "Pursuant to MCL 600.6431, this letter is intended to provide you with statutory notice that our client, Dwayne Wigfall, suffered personal injuries as a result of a defect under the City of Detroit's care and control on June 9, 2014 at approximately 9:00 p.m." The notice also included a description of the pothole, its location, and a description of plaintiff's injuries. The Law Department received the notice on September 22, 2014.

An adjuster from the Law Department contacted Wigfall's attorney via a letter dated December 3, 2014. The letter stated, "The filing of your client's claim regarding the above-referenced incident is hereby acknowledged." The adjuster also requested additional documents to proceed with processing the claim.

Wigfall later filed the instant complaint against the City. The City sought summary disposition under MCR 2.116(C)(7), asserting that Wigfall's claim was barred by governmental immunity because the statutory notice was not served upon an individual who may lawfully be served with civil process, as MCL 691.1404(2) requires. The trial court denied the City's motion for summary disposition. The City appealed,

and the Court of Appeals reversed, holding that Wigfall failed to comply with MCL 691.1404(2).[2] Wigfall applied for leave to appeal in this Court. We scheduled oral argument and requested briefing on the following issue, among others: "[W]hether an individual described in MCR 2.105(G)(2) can delegate the legal authority to accept lawful process under MCL 691.1404(2), see 1 Mich Civ Jur Agency § 1 (2018)."[3]

B. *WEST v DETROIT*

West alleges that she was walking on Mansfield Street in Detroit when she tripped on a pothole and fell, suffering injuries as a result. West's counsel sent notice of the injury and highway defect to the City's Law Department via certified mail. It instructed the City, "If you believe that this notice does not comply in any way with any applicable notice requirements, immediately contact the undersigned and any additional information required by statu[t]e, ordinance, rule, or regulation will be promptly furnished." The Law Department received the letter on August 8, 2014. As with Wigfall, a municipal adjuster responded with a letter stating, "The filing of your client's claim regarding the above-referenced incident is hereby acknowledged" and requesting additional documentation.

West later filed the instant complaint, and the City filed a motion for summary disposition under MCR 2.116(C)(7), arguing—as it did in *Wigfall*—that West had failed to comply with the notice requirement in MCL 691.1404(2) by failing to serve an individual who

[2] *Wigfall v Detroit*, 322 Mich App 36, 44-45; 910 NW2d 730 (2017).

[3] *Wigfall v Detroit*, 501 Mich 1089 (2018).

may lawfully be served with civil process. The trial court granted summary disposition in favor of defendant.

West moved for reconsideration, arguing that the trial court erred because the notice statute, MCL 691.1404(2), states that "the notice may be served upon any individual" and the word "may" is permissive and not mandatory. The trial court denied the motion. West appealed, and the Court of Appeals affirmed in an unpublished per curiam opinion, citing its earlier decision in *Wigfall v Detroit*.[4] West then filed an application for leave to appeal in this Court. This Court scheduled oral argument and requested briefing on the following issue, among others: "[W]hether an individual described in MCR 2.105(G)(2) can delegate the legal authority to accept lawful process under MCL 691.1404(2), see 1 Mich Civ Jur Agency § 1 (2018)."[5]

II. STANDARD OF REVIEW

"This Court reviews the grant or denial of summary disposition de novo to determine if the moving party is entitled to judgment as a matter of law."[6] " 'When a motion is filed under [MCR 2.116(C)(7)], the court must consider not only the pleadings, but also any affidavits, depositions, admissions or documentary evidence that is filed or submitted by the parties.' "[7] "The contents of the complaint are accepted as true unless contradicted

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[4] *West v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued December 12, 2017 (Docket No. 335190), p 3.

[5] *West v Detroit*, 501 Mich 1089, 1090 (2018).

[6] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[7] *Bauserman v Unemployment Ins Agency*, 503 Mich 169, 179; 931 NW2d 539 (2019), quoting *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529; 582 NW2d 828 (1998). See also MCR 2.116(G)(5).

by documentation submitted by the movant."[8] A question of statutory interpretation is a question of law that we also review de novo.[9]

III. ANALYSIS

Under the governmental tort liability act, MCL 691.1401 *et seq*., unless one of five exceptions applies, governmental agencies are immune from tort liability when they are engaged in a governmental function.[10] One such exception is the highway exception, MCL 691.1402(1), which provides that "[a] person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency."

A claimant seeking recovery under the highway exception must comply with the notice requirements of MCL 691.1404, which provides, in relevant part:

> (1) As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

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[8] *Maiden*, 461 Mich at 119.

[9] *Detroit Fire Fighters Ass'n, IAFF Local 344 v Detroit*, 482 Mich 18, 28; 753 NW2d 579 (2008).

[10] See MCL 691.1407(1) ("Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function.").

> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding.

Finally, to determine the "individual[s] . . . who may lawfully be served with civil process directed against the governmental agency," we look to MCR 2.105(G)(2). That court rule provides, in relevant part, as follows:

> Service of process on a public, municipal, quasi-municipal, or governmental corporation, unincorporated board, or public body may be made by serving a summons and a copy of the complaint on:
>
> * * *
>
> (2) the mayor, the city clerk, or the city attorney of a city[.][11]

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[11] MCL 600.1925 similarly provides that

> [s]ervice of process upon public, municipal, quasi-municipal, or governmental corporations, unincorporated boards, or public bodies, may be made by leaving a summons and a copy of the complaint with
>
> * * *
>
> (2) the mayor, city clerk, or city attorney, in the case of cities[.]

Ordinarily the court rules would take precedence, *McDougall v Schanz*, 461 Mich 15, 26; 597 NW2d 148 (1999) ("It is beyond question that the authority to determine rules of practice and procedure rests exclusively with this Court."); 1 Longhofer, Michigan Court Rules Practice, Text (7th ed), § 2105.2, pp 213-214 ("Since there can be little doubt that the means of service of process is procedural, the rules must control when they are in conflict."). But because the Legislature duplicated what were then the proposed court rules regarding service of process when it enacted Chapter 19 of the Revised Judicature Act, MCL 600.1901 through MCL 600.1974, there is no conflict between the pertinent provisions here. 1 Honigman & Hawkins, Michigan Court Rules Annotated, pp 76-77.

Plaintiffs complied with the statute's notice requirement because they sent their notices to the agent of the Corporation Counsel. As noted above, MCL 691.1404(2) provides that "[t]he notice may be served upon any individual who may lawfully be served with civil process against the governmental agency." While MCR 2.105(G)(2) says that cities may be served with process by leaving a summons and a copy of the complaint with the "the mayor, the city clerk, or the city attorney," "whatever a person may lawfully do if acting in his own right and on his own behalf he may lawfully delegate to an agent."[12] For the reasons below, we conclude that the City authorized its Law Department to receive notices of injuries sustained and of highway defects.[13]

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[12] *Link, Petter & Co v Pollie*, 241 Mich 356, 359-360; 217 NW 60 (1928) (citation omitted). Notably, the Court of Appeals has already applied agency principles to MCL 691.1404(1), which states, in relevant part, that "the injured person . . . shall serve a notice on the governmental agency . . . ." In *Russell v Detroit*, 321 Mich App 628, 646; 909 NW2d 507 (2017), the Court of Appeals rejected the City's argument that the "injured person" himself or herself had to send the notice required by Subsection (1). Instead, the Court of Appeals concluded, "Given the legal relationship between agents and principals, and, in particular, between attorneys and their clients, it follows that an injured person may serve a governmental agency through the acts of an agent, including an attorney." *Id*. at 641. Just as "established agency principles" apply to MCL 691.1404(1), *Russell*, 321 Mich App at 641, such principles also apply to MCL 691.1404(2).

[13] Because we conclude that, under traditional agency principles, the Corporation Counsel delegated the authority to receive the notice required by MCL 691.1404(2) to the Law Department, we need not address whether the Law Department was authorized to receive such notice because it was delegated the authority to receive service of process under MCR 2.105(H)(1) or MCL 600.1930. See MCR 2.105(H)(1) ("Service of process on a defendant may be made by serving a summons and a copy of the complaint on an agent authorized by written appointment or by law to receive service of process."); MCL 600.1930 ("Service of process upon any defendant may be made by leaving a summons and a copy of the complaint with an agent authorized by written appointment or by law to receive service of process."). That rule and statute only

"Under the common law of agency, in determining whether an agency has been created, we consider the relations of the parties as they in fact exist under their agreements or acts and note that in its broadest sense agency includes every relation in which one person acts for or represents another by his authority."[14] "Fundamental to the existence of an agency relationship is the right of the principal to control the conduct of the agent."[15]

An agent's actual authority may be express or implied.[16] Implied authority consists of the power " 'to do all things which are reasonably necessary or proper to efficiently carry into effect the power conferred, unless it be a thing specifically forbidden.' "[17] "[I]mplied au-

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impose restrictions on delegation of the authority to receive *service of process*, not delegation of the authority to receive the requisite notice under traditional agency principles.

[14] *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 458 Mich 540, 557; 581 NW2d 707 (1998) (quotation marks and citations omitted).

[15] *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 80; 780 NW2d 753 (2010).

[16] See, e.g., *Stephenson v Golden*, 279 Mich 710, 734; 276 NW 849 (1937) (" 'An agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal.' "), quoting Bowstead on Agency (4th ed), p 1. We focus on actual authority because we believe that in this case the Law Department had actual authority to accept notice. However, we recognize that agents may have apparent authority as well. See, e.g., *Shinabarger v Phillips*, 370 Mich 135, 140; 121 NW2d 693 (1963) (" 'As between the master and servant, the master is liable only when the servant acts within the actual scope of his authority, but as between defendant and third persons injured by the acts of the servant, defendant may be liable when the servant is acting within the apparent scope of his authority.' "), quoting *Anderson v Schust Co*, 262 Mich 236, 239; 247 NW 167 (1933).

[17] *Kerns v Lewis*, 249 Mich 27, 29; 227 NW 727 (1929), quoting *Emery v Ford*, 234 Mich 11, 28; 207 NW 856 (1926). See also *Grossman v Langer*, 269 Mich 506, 510; 257 NW 875 (1934) ("The general rule is that the powers of an agent are *prima facie* coextensive with the business

thority must rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar."[18] "Whether the act in question is within the authority granted depends upon the act's usual or necessary connection to accomplishing the purpose of the agency."[19]

Implied authority is not without limits: " 'The apparent or implied authority of an agent cannot be so extended as to permit him to depart from the usual manner of accomplishing what he is employed to effect. Nor can he enlarge his powers by unauthorized representations and promises.' "[20] "An implied agency can-

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intrusted to his care."); *Smith, Hinchman & Grylls Assocs, Inc v Riverview*, 55 Mich App 703, 706; 223 NW2d 314 (1974) ("Agents have the implied power to carry out all acts necessary in executing defendant's expressly conferred authority."); 1 Michigan Civil Jurisprudence (2009 rev), Agency, § 53, pp 254-255 ("It is a fundamental principle of agency that every delegation of power carries with it authority to do all things reasonably necessary or proper to efficiently carry into effect the power conferred, unless an act is specifically forbidden."); 1 Michigan Civil Jurisprudence (August 2018 cum supp), Agency, § 53, p 14 ("Agents have the implied power to carry out all acts necessary in executing the principal's expressly conferred authority.").

[18] *Shinabarger*, 370 Mich at 139. See also *Field v Jack & Jill Ranch*, 343 Mich 273, 279; 72 NW2d 26 (1955) ("[T]he authority of an agent includes not only those things he is expressly told to do, but those things the principal knowingly acquiesces in his doing.").

[19] *Smith*, 55 Mich App at 706. See also *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992) ("An agent has implied authority from his principal to do business in the principal's behalf in accordance with the general custom, usage and procedures in that business. However, the principal must have notice that the customs, usages and procedures exist.") (citation omitted); 1 Michigan Civil Jurisprudence (2009 rev), Agency, § 53, p 255 ("However, an agent's implied authority cannot be so extended as to permit the agent to depart from the usual manner of accomplishing that which he or she is employed to effect, or to enter into a transaction, the only possible result of which would be to work a fraud on a client of the firm for which he or she is an agent.").

[20] *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 667; 66 NW2d 92 (1954), quoting 2 Am Jur, Agency, § 103, p 85. See also

not exist contrary to the express intention of an alleged principal although it may spring from acts and circumstances permitted by the principal over a course of time through acquiescence."[21]

In this case, it is clear that the Law Department is an agent of the Corporation Counsel. Indeed, defendant acknowledges that the Corporation Counsel is the administrative head of its Law Department. This truism is also made clear by the Detroit Charter, which provides, "The Law Department is headed by the Corporation Counsel who is the duly authorized and official legal counsel for the City of Detroit and its constituent branches, units and agencies of government."[22] As the head of the Law Department, the Corporation Counsel has the right to control the Law Department, and consequently, the Law Department and its members are agents of the Corporation Counsel.[23]

Shinabarger, 370 Mich at 139 ("[I]mplied authority must rest upon acts and conduct of the alleged agent known to and acquiesced in by the alleged principal prior to the incident at bar. . . . 'An implied agency must be based upon facts, and facts for which the principal is responsible; and upon a natural and reasonable, but not a strained, construction of those facts.' "), quoting 2 CJ, Agency, § 32, p 436.

[21] *Flat Hots Co, Inc v Peschke Packing Co*, 301 Mich 331, 337; 3 NW2d 295 (1942).

[22] Detroit Charter, § 7.5-201. The Law Department's website also states on its home page:

> Established by the Detroit City Charter, the Law Department is an independent agency that represents the interests of the City of Detroit as a corporate body. The Department is headed by the Corporation Counsel, whose mission is to provide a variety of legal services to the City, its elected officials, departments, agencies, offices, commissions, and boards, as well as its individual employees, in their official capacity. [Detroit, *Law Department* <https://detroitmi.gov/departments/law-department> (accessed June 13, 2019) [https://perma.cc/8SXE-8VDN].]

[23] *Briggs Tax Serv*, 485 Mich at 80.

That the Law Department has the authority to receive the notice required by MCL 691.1404(2) on behalf of the Corporation Counsel is supported by the practical reality that the Corporation Counsel is not individually capable of receiving notice for every claim filed against the City. In *Brown v Dep't of State*,[24] the Court of Appeals explained this reasoning in a similar context:

> To interpret the Vehicle Code to require the "commissioner" to personally reexamine every driver whose competence to drive can be reasonably questioned and to personally recommend the suspension or revocation of licenses would be in defiance of the obvious purpose of Chapter III of the Code. Michigan has over 5,000,000 licensed drivers residing in 83 counties. Each year approximately 100,000 of those drivers are summoned for reexamination in their home counties. One man cannot possibly do the task. Were the law as plaintiff states it, thousands of drivers, whose competence to operate a motor vehicle can be reasonably questioned, would not be reexamined and thousands of drivers who should not be on the highway would still be driving and endangering others. The courts will not assume that a legislature passed an act that serves no useful purpose, if the act can be interpreted in a way which avoids such a consequence.

On the basis of such reasoning, and considering the relevant portion of the Michigan Vehicle Code, the Court of Appeals in *Brown* rejected an argument that the commissioner could not delegate his duty to examine drivers' competency.[25]

The Detroit Ordinances provide further support that receiving notice was within the scope of the Law Department's authority. Detroit Ordinances, § 2-4-18 states, "All claims of whatever kind against the city,

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[24] *Brown v Dep't of State*, 45 Mich App 322, 326; 206 NW2d 481 (1973).

[25] *Id*. at 324-325, 328.

excluding claims by city employees arising out of the employment relationship, claims against the department of water and sewerage and undisputed claims for services, labor and materials furnished to city departments shall be first submitted to and reviewed by the law department." "Claim" is defined as " '[t]he assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional' and 'a demand for money, property, or a legal remedy to which one asserts a right; esp., the part of a complaint in a civil action specifying what relief the plaintiff asks for.' "[26] This broad definition of "claim" necessarily encompasses the notice required by MCL 691.1404.[27] The notice must be submitted "[a]s a condition to recovery for injuries," and it must "specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant."[28] The notice includes such facts to establish that a plaintiff is entitled to monetary relief, in other words to "assert[] . . . an existing right" to monetary relief.

It is difficult to understand how "[a]ll claims of whatever kind against the city" can be submitted to and reviewed by the Law Department if the Law

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[26] *Bauserman*, 503 Mich at 182 n 6, quoting *Black's Law Dictionary* (10th ed).

[27] The City argues that "claims," as used in the ordinance, does not include legal claims. We are unpersuaded by this argument. According to the above definition, the term "claims," as used in the ordinance, is broad enough to encompass both legal and nonlegal claims, particularly given that the ordinance refers to "all claims of whatever kind." Additionally, when acknowledging plaintiffs' notices, the municipal adjuster referred to the notices as claims: "The filing of your client's *claim* regarding the above-referenced incident is hereby acknowledged." (Emphasis added.)

[28] MCL 691.1404(1).

Department has no authority to receive the notice required by MCL 691.1404(2). Service of such notice is the primary way the City will know of a claim against it. If notice were sent to an outside party and the Law Department only received a copy in order to review the claim, the Law Department could accomplish only one of its two required tasks under the ordinance—the ordinance requires not only that claims be reviewed by the Law Department but also that claims be submitted to, and therefore received by, the Law Department. Consequently, receiving notice is necessary for the Law Department to exercise its express authority to receive and review claims.[29] Thus, the Law Department had implied authority to receive service of the notices of injury and highway defects required by MCL 691.1404(2).

Moreover, the Law Department's receipt of these notices was the usual practice to which the Corporation Counsel knowingly acquiesced. The plaintiff's attorney in *West* explained during oral argument that he had sent notices to the Law Department for several years prior to this case without incident. The City has only recently begun claiming that the Law Department cannot receive notice.[30] Under traditional agency prin-

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[29] *Slocum v Littlefield Pub Sch Bd of Ed*, 127 Mich App 183, 194; 338 NW2d 907 (1983).

[30] In 2011, the Court of Appeals addressed an argument of this type for the first time, holding that the plaintiff's notice did not comply with MCL 691.1404 because it was mailed to the City's Risk Management Division rather than the mayor, city clerk, or city attorney. *Carroll v Flint*, unpublished per curiam opinion of the Court of Appeals, issued February 10, 2011 (Docket No. 296134). It appears that it was not until a few years later that the City began to raise this defense. See, e.g., *Withers v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued February 18, 2016 (Docket No. 324009); *Powell v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued

ciples, the Law Department had authority to receive claims because the Corporation Counsel, at a minimum, knowingly acquiesced in this practice.[31]

IV. CONCLUSION

Because the Law Department is the agent of the Corporation Counsel and is charged with receiving notice under the City's charter and ordinances, we conclude that West and Wigfall complied with the requirements of MCL 691.1404(2) by mailing their notices of injury and highway defect to the Law Department.[32] We therefore reverse the Court of Appeals' judgments in both cases, and we remand both cases to

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August 8, 2017 (Docket No. 332267); *Church v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued December 12, 2017 (Docket No. 335413); *Garza v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued January 18, 2018 (Docket No. 334342); *Sadler v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued March 6, 2018 (Docket No. 336117); *Sykes v Detroit*, unpublished per curiam opinion of the Court of Appeals, issued September 11, 2018 (Docket No. 339722).

[31] See *Field*, 343 Mich at 279 ("Clear it is also, on plainest principles of agency, that the authority of an agent includes not only those things he is expressly told to do, but those things the principal knowingly acquiesces in his doing.").

We realize that *McLean v Dearborn*, 302 Mich App 68, 80; 836 NW2d 916 (2013), rejected an agency argument because there was "no record evidence [that the third party] was authorized by *written appointment* or *law* to accept service on behalf of defendant." (Emphasis in original.) But *McLean* is distinguishable. There, the plaintiff argued for the first time on appeal that the city could delegate the authority to receive service of process under MCR 2.105(H)(1) ("Service of process on a defendant may be made . . . on an agent authorized by written appointment or by law to receive service of process."). Therefore, unlike here, the Court did not address traditional agency principles.

[32] Though MCL 691.1404(2) requires service upon an "individual," plaintiffs may comply with the statute by serving an agent of that individual, even if the agent, like the Law Department, is not an individual.

the Wayne Circuit Court for further proceedings not inconsistent with this opinion.[33]

MCCORMACK, C.J., and MARKMAN, ZAHRA, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with VIVIANO, J.

MCCORMACK, C.J. (*concurring*). I concur in the majority opinion in full. I write separately because it should not take all that.

The city of Detroit, through its lawyers, has taken the position that a notice of injury and defect that complies with all the substantive statutory requirements and which the city acknowledged receiving is nevertheless insufficient because it was mailed to the city's Law Department and not the Corporation Counsel—the person himself. The city takes this puzzling position even though the Corporation Counsel is the Law Department's administrative head and the Law Department is his agency.

The notice rules require service on "the mayor, the city clerk, or the city attorney of a city[.]" MCR 2.105(G)(2); see MCL 691.1404(2). The city attorney in Detroit is the Corporation Counsel. The Corporation Counsel has a staff, and that staff works in the city's Law Department; they work in the same building with their boss, together representing the city's legal interests. They all receive mail at the exact same address.

In these cases, the Law Department received timely notice, acknowledged receiving it, and had no complaints about its contents. There is no dispute that all

[33] Because we determine that the Law Department is the agent of the Corporation Counsel, we need not decide whether the word "may" in MCL 691.1404(2) is permissive, such that service of notice may be permitted on individuals other than those named in MCR 2.105(G)(2). We also do not decide whether equitable estoppel may apply.

the purposes of notice were satisfied; the Law Department makes no claim that it would have processed the notice any differently had the words "Corporation Counsel" appeared at the top of the address on the envelope. And indeed for years the Law Department accepted notice in cases just like these, as acknowledged (unsurprisingly) during oral argument before this Court.

But at some point after acknowledging notice in these cases, one of the lawyers on the Corporation Counsel's staff came up with a wacky idea to get the lawsuit dismissed: argue that the plaintiff's notices were not compliant after all, because, instead of mailing them to the Corporation Counsel personally, at 2 Woodward Avenue, Suite 500, Detroit, MI, 48226, the plaintiffs mailed them to the Corporation Counsel's staff, the Law Department, at that same address.

And with no sense of irony, attorneys in the Law Department then wrote and filed with a court a motion to dismiss, advancing this theory. They submitted the motions on behalf of the Corporation Counsel. The Corporation Counsel personally did not sign the motion, nor did he come to court to argue it. His staff did so, acting, as usual, on behalf of his office. Same again in the Court of Appeals, and again in this Court.

Apparently, it is the city's position that when the lawyers from the Law Department file motions and appellate briefs and show up in court to make arguments they do so on behalf of the Corporation Counsel, but not so when they receive and acknowledge notices from litigants. The city's argument reduces to: "On behalf of Corporation Counsel, we, the Law Department, submit that serving notice on us is insufficient because we do not act on Corporation Counsel's behalf for *that* purpose."

This kind of pseudo technicality can give lawyers a bad name. Notice to the "City Attorney" is satisfied by notice to the Corporation Counsel or to the Law Department. These are functionally interchangeable, barring exceptional circumstances not relevant here (such as a suit against the Corporation Counsel in his individual capacity).

The city has every right to insist that litigants follow the rules when they file a claim. But the Corporation Counsel and his Law Department have done themselves and their client little service in advancing the argument made here.

BERNSTEIN, J., concurred with MCCORMACK, C.J.

PEOPLE v SWILLEY

Docket No. 154684. Argued on application for leave to appeal March 7, 2019. Decided July 17, 2019.

Kareem A. Swilley, Jr., was convicted following a jury trial in the Saginaw Circuit Court of first-degree premeditated murder, MCL 750.316(1)(a); conspiracy to commit murder, MCL 750.157a; three counts of assault with intent to commit murder, MCL 750.83; carrying a dangerous weapon with unlawful intent, MCL 750.226; and six counts of possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the drive-by shooting death of DaVarion Galvin. Defendant asserted an alibi defense, stating that he was at city hall at the time of the shooting with his grandmother Alesha Lee, Lee's fiancé Philip Taylor, and defendant's sister. Taylor and Lee corroborated defendant's testimony at trial, and texts between defendant and one of his codefendants around the time Galvin was shot appeared to suggest that defendant was not with the codefendant at that time. Over defense objection, the court, Frederick L. Borchard, J., extensively questioned Taylor, Lee, and Joshua Colley (a witness who was present when Galvin was shot). The jury found defendant guilty of all charges. Defendant appealed in the Court of Appeals, arguing that the trial judge's questioning of witnesses pierced the veil of judicial impartiality and denied him a fair and impartial trial under *People v Stevens*, 498 Mich 162 (2015). In an unpublished per curiam opinion, issued September 13, 2016 (Docket Nos. 323313, 325530, and 325806), the Court of Appeals (TALBOT, C.J., and O'CONNELL and OWENS, JJ.), affirmed defendant's convictions but remanded the case for correction of defendant's sentence for conspiracy to commit murder. Defendant sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 503 Mich 868 (2018).

In an opinion by Justice BERNSTEIN, joined by Chief Justice MCCORMACK and Justices VIVIANO, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

The judge's improper questioning of Taylor, a key alibi witness for defendant, pierced the veil of judicial impartiality and violated defendant's constitutional right to a fair trial under *Stevens*.

1. Under MRE 614(b), a trial judge is generally permitted to ask questions of witnesses; however, the central object of judicial questioning should be to clarify. In that regard, a trial judge may question witnesses to produce fuller and more exact testimony or elicit additional relevant information, and the judge may intervene in a trial to expedite matters, prevent unnecessary waste of time, or clear up an obscurity. Judicial questioning might be more necessary when a difficult witness refuses to answer questions or provides unclear answers. Conversely, judicial intervention is less justified when a witness's answers are clear and responsive. Undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward a witness may tend to prevent the proper presentation of the cause or the determination of the truth. For that reason, a judge should avoid questions that are intimidating, argumentative, or skeptical. It is not the role of the court to impeach a witness or undermine a witness's general credibility. Similarly, a judge should not emphasize or expose potential weaknesses in a witness's testimony or convey the judge's personal view on whether a witness should be believed. Questions from a judge that are designed to emphasize or expose incredible, *unsubstantiated*, or contradictory aspects of a witness's testimony are impermissible. In the context of judicial questioning, a judge is not tasked with making substantive points or arguments, and questions that, in essence, advocate are not within prescribed judicial authority. The credibility of a witness should be tested by cross-examination, not by judicial inquisition.

2. Under *Stevens*, a trial judge's conduct before a jury deprives a party of a fair and impartial trial when the conduct pierces the veil of judicial impartiality. The conduct violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party. Evaluating the totality of the circumstances is a fact-specific analysis that involves a consideration of various factors, including the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of the trial. The list of factors is nonexhaustive, and a reviewing court may consider additional factors if they are relevant to the determination of partiality in a particular case. Not every factor has to weigh in favor of the conclusion that the judge demonstrated the appearance of partiality; in other

words, the cumulative effect of the errors, not the effect of each error standing alone, must be considered when making that determination. When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review; a structural error has occurred and automatic reversal is required. When the judge's conduct involves judicial questioning, a witness's lack of memory is not equivalent to a lack of clarity, and a judge should let such unambiguous testimony stand. With regard to considering the scope of judicial intervention within the context of the length and complexity of the trial and issues therein, a court must evaluate both the length of the trial and the complexity of the particular issues that were subject to judicial inquiry. In a long and complicated trial, it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial. A judge's inquiries may be more appropriate when a witness testifies about a topic that is convoluted, technical, scientific, or otherwise difficult for a jury to understand. In contrast, when a witness testifies on a clear or straightforward issue, judicial questioning is less warranted, even if the testimony occurs within the context of a lengthy trial, or one that involves other complex but unrelated matters. Said differently, when testimony deals with a particular issue or topic that is not complicated or complex, the utility of judge-led questioning is more limited. Accordingly, judicial partiality may be exhibited when an imbalance occurs with respect to either the frequency of the intervention or the manner of the conduct.

3. In this case, the trial judge repeatedly challenged Taylor's clear, responsive testimony in a manner that closely resembled prosecutorial cross-examination. The questions cast suspicion on Taylor's testimony and his reasons for being on the stand, which impeached and undermined Taylor's general credibility. Moreover, the questioning did not clarify any of the issues or produce fuller testimony. Although the judge's questioning of Taylor alone weighed in favor of a determination that the court pierced the veil of judicial impartiality, aspects of the judge's questioning of Lee and Colley were similarly problematic. The judge's questions impermissibly drilled into defendant's alibi defense and were inappropriately designed to assess the believability of witnesses presented in support of that defense. In addition, the judge's questions were imbalanced in both frequency and manner, decidedly in the prosecution's favor. In sum, the nature of the trial judge's questioning of defendant's key alibi witness, Taylor; the judge's tone and demeanor during the questioning; the scope of the intervention in light of the relatively straightforward testi-

mony at issue; and the imbalanced direction of the intervention all support the conclusion that the judge pierced the veil of judicial impartiality. Although the judge issued curative instructions to the jury, the judge's words repeatedly conflicted with his actions throughout the trial. Consequently, the curative instructions were not sufficient to overcome the partiality the judge exhibited against defendant. Considering the totality of the circumstances, it was reasonably likely that the judge's questioning of Taylor improperly influenced the jury by creating an appearance of advocacy or partiality against defendant. Accordingly, the judge's improper questioning of Taylor pierced the veil of judicial impartiality and violated defendant's constitutional right to a fair trial under *Stevens*.

Reversed and remanded for a new trial.

Justice MARKMAN, joined by Justice ZAHRA, concurring in the judgment, agreed with the majority that certain aspects of the trial judge's questioning were inappropriate and concluded that defendant was entitled to a new trial for the reasons stated in Justice ZAHRA's concurring opinion, which Justice MARKMAN joined in full. Justice MARKMAN wrote separately to emphasize that the goal of judicial questioning is to assist the jury in its truth-seeking function without compromising the jury's ability to independently render a verdict. Trial judges should not be reluctant, or even hesitant, to employ judicial questioning under MRE 614(b) in order to assist the jury in its truth-seeking function as long as the questioning does not signal to the jury the judge's personal opinion such that it erodes the jury's role as fact-finder. Judges have broad discretion to question witnesses within those boundaries, even if the questions touch on the credibility of the witness or reveal evidence that is damaging to a party's case. The key inquiry is whether the questioning signals to the jury the judge's personal opinion as to the veracity of the witness or as to the strength or weakness of a party's case, not whether the question itself touches upon issues of credibility or is intended to, or results in, harm to a particular party's case. Because trial judges are generally better positioned than appellate judges to determine whether additional questioning would best aid the jury, appellate courts should afford reasonable deference to a trial judge's decision to question witnesses. Moreover, notwithstanding references to the Code of Judicial Conduct in *Stevens* and the majority opinion in this case, improper questioning that entitles a party to a new trial should only rarely result in a judicial-disciplinary proceeding. Trial judges are entitled to a strong presumption that any improper judicial questioning was under-

taken in good faith and does not more generally reflect on their fitness for the bench. Justice MARKMAN wrote separately to express his concern that the majority's negative tone toward judicial questioning and overly aggressive appellate review, including its overly casual references to the Code of Judicial Conduct, could make members of the bench hesitant to use their authority under MRE 614(b) to interrogate witnesses and thereby further the truth-seeking function of the criminal trial.

Justice ZAHRA, joined by Justice MARKMAN, concurring in the judgment, agreed with the majority that defendant was entitled to a new trial but disagreed that the case should be resolved under *Stevens*. Courts should not reach constitutional issues in cases that can be resolved on nonconsitutional grounds, and this case could have been resolved on nonconstitutional grounds. Specifically, relief should have been granted because the trial judge abused his discretion under MRE 614(b) when he posed several of his questions to Taylor, a key alibi witness for defendant, and when he intervened extensively. Because Taylor's credibility and veracity were necessary to defendant's alibi defense, it was more probable than not that the jury would have acquitted defendant but for the judge's improper questioning.

TRIAL — INTERROGATION OF WITNESSES BY THE COURT — DETERMINING WHETHER JUDICIAL CONDUCT PIERCED THE VEIL OF JUDICIAL IMPARTIALITY — FACTORS — LENGTH AND COMPLEXITY OF THE TRIAL.

A trial judge's conduct before a jury deprives a party of a fair and impartial trial when the conduct pierces the veil of judicial impartiality; when the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review; a structural error has occurred and automatic reversal is required; a reviewing court evaluates the totality of the circumstances, a fact-specific analysis that involves a consideration of various factors, including (1) the nature of the trial judge's conduct, (2) the tone and demeanor of the judge, (3) the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, (4) the extent to which the judge's conduct was directed at one side more than the other, and (5) the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of the trial; when the judge's conduct involves judicial questioning, a witness's lack of memory is not equivalent to a lack of clarity, and the judge should let such unambiguous testimony stand; it is not the role of the court to impeach a witness or undermine a witness's general credibility; a judge should not emphasize or expose potential

> weaknesses in a witness's testimony or convey the judge's personal view on whether a witness should be believed; questions from a judge that are designed to emphasize or expose incredible, unsubstantiated, or contradictory aspects of a witness's testimony are impermissible; in the context of judicial questioning, a judge is not tasked with making substantive points or arguments, and questions that, in essence, advocate are not within prescribed judicial authority; when reviewing the scope of judicial conduct in the context of the length and complexity of the case, an appellate court should not simply evaluate whether the trial as a whole was long or involved complicated issues but must also evaluate the complexity of the particular issues that were subject to judicial inquiry; that is, a judge's inquiries may be more appropriate when a witness testifies about a topic that is convoluted, technical, scientific, or otherwise difficult for a jury to understand; in contrast, when a witness testifies on a clear or straightforward issue, judicial questioning is less warranted, even if the testimony occurs within the context of a lengthy trial, or one that involves other complex but unrelated matters; said differently, when testimony deals with a particular issue or topic that is not complicated or complex, the utility of judge-led questioning is more limited; judicial partiality may be exhibited when an imbalance occurs with respect to either the frequency of the intervention or the manner of the conduct; despite the presence of curative instructions, when a judge's words repeatedly conflict with the judge's actions throughout the trial, a reviewing court may find that the instructions do not cure the impermissible judicial conduct (MRE 614(b)).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John S. McColgan, Jr.*, Prosecuting Attorney, *Joseph M. Albosta*, Chief Appellate Attorney, and *Joseph F. Sawka*, Assistant Prosecuting Attorney, for the people.

Imran J. Syed for defendant.

BERNSTEIN, J. In this case, we consider whether the trial judge's conduct pierced the veil of judicial impartiality, depriving defendant of a fair trial. We conclude that it did. Considering the totality of the circumstances, we conclude that it was reasonably likely that

the judge's questioning of defendant's alibi witness improperly influenced the jury by creating an appearance of advocacy or partiality against defendant, in violation of our decision in *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015). Accordingly, we reverse the judgment of the Court of Appeals and remand this case for a new trial.

I. FACTS AND PROCEDURAL HISTORY

This case arises from the shooting death of DaVarion Galvin. Defendant, Kareem Amid Swilley, Jr., and his codefendants, John Henry Granderson, Terrance Demon-Jordan Thomas, Jr., and Derell Martin, were tried jointly on charges related to the shooting. A jury ultimately convicted defendant of first-degree premeditated murder, MCL 750.316(1)(a); conspiracy to commit murder, MCL 750.157a; three counts of assault with intent to commit murder, MCL 750.83; carrying a dangerous weapon with unlawful intent, MCL 750.226; and six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.[1]

Galvin's shooting occurred on November 21, 2012. On that date, at approximately 2:30 p.m., Galvin, Willie Youngblood, Joshua Colley, and Marcus Lively were walking in the Bloomfield neighborhood in Saginaw, Michigan.[2] A dark-colored Saturn approached the group, and the occupants of the vehicle opened fire. Colley and Lively took cover, and they were not shot.

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[1] Codefendants Granderson and Thomas were convicted of the same charges as defendant. Thomas was also convicted of being a felon in possession of a firearm, MCL 750.224f, and of a seventh count of felony-firearm. Codefendant Martin was found not guilty of all charges.

[2] Evidence at trial suggested that Galvin, Youngblood, Colley, and Lively were members of a local gang and that defendant and his codefendants were members of a rival gang.

Youngblood was struck once in the stomach but fled the scene and survived. Galvin was struck by multiple bullets and died in the hospital shortly thereafter. The police found nine-millimeter and .40-caliber shell casings at the location of the shooting. The car used in the drive-by shooting was later recovered, and a fingerprint on the vehicle matched that of codefendant Granderson.

On December 25, 2012, about a month after the November 2012 shooting, an unknown person fired shots at the home that defendant shared with his grandmother. Police went to the home and saw four men running. Three stopped: defendant, codefendant Thomas, and Jamar Swilley. Although the fourth man escaped, he was seen making a throwing motion near the rear of a house. Two rifles were later recovered from under the porch of that home. In a nearby parking lot, the police also found a loaded nine-millimeter handgun with casings that matched those found at the scene of the November 2012 shooting. DNA recovered from the handgun matched that of codefendant Thomas.

In the days after the November 2012 shooting, the police interviewed Youngblood, who described the car used in the shooting as a black or blue midsize vehicle. The police showed Youngblood a photo array containing images of defendant and his codefendants, but Youngblood did not identify any of them as the perpetrators. However, Youngblood's account changed about a year later, after he was detained on a misdemeanor warrant. At the time, the police were also investigating Youngblood for possible involvement in a September 2013 shooting at the Cass River Market in Saginaw. During subsequent questioning, Youngblood suddenly named defendant and his codefendants as the perpetrators of the November 2012 shooting. Youngblood repeated these claims at the preliminary examination

in this case, testifying that codefendant Granderson was the driver of the vehicle, that codefendant Thomas was in the front passenger seat, that defendant sat behind codefendant Thomas, and that a fourth man was also in the vehicle. He also testified that everyone in the vehicle had guns, except Granderson. Youngblood claimed that he had known defendant and codefendant Thomas before the shooting and that he had looked them up on Facebook to get their real names.

At trial, Youngblood changed his story yet again. On direct examination, Youngblood claimed that when the car approached, he only saw guns and the men's hair styles but that he did not know the perpetrators' names or see defendant in the car. Youngblood acknowledged his contradictory preliminary-examination testimony, but he maintained that other people had told him that defendant and his codefendants were involved in the shooting and that he did not personally recognize any of the men on the day of the incident. Youngblood later conceded that he could not positively identify defendant as being in the car and that it would not surprise him if defendant had not actually been in the car. Youngblood also admitted that he grew up being told that he should not speak with the police or testify in court and that he was worried his family would be retaliated against for him doing so. He acknowledged that he was testifying in exchange for a cap on his sentence arising from the Cass River Market shooting.

Defendant asserted an alibi defense, claiming that at the time of the shooting, he was at city hall with his grandmother, Alesha Lee, his grandmother's fiancé Philip Taylor, and defendant's sister, Marcel Swilley. Both Taylor and Lee testified. Phone records from the day of the incident were also introduced at trial. The phone records showed that defendant received a text

message from codefendant Thomas at 1:57 p.m., asking defendant to call him. At 2:35 p.m., defendant sent a text to an unidentified person asking, "[W]hat's up?" At 2:44 p.m., defendant texted another unidentified person, informing the person that he was going down to city hall to transfer property. At 2:48 p.m., Thomas texted defendant, "[B]ekupp." Defendant responded, asking, "[H]ow many down?" Thomas answered at 2:50 p.m., "[A]bout three."

At the close of trial, defendant was convicted as noted above. The trial judge sentenced defendant to concurrent prison terms of life without parole for conspiracy to commit murder, 37 to 75 years for first-degree premeditated murder, 18 to 36 years for each count of assault with intent to commit murder, and 38 months to 5 years for carrying a dangerous weapon with unlawful intent. These sentences were to be served consecutively to six concurrent terms of 2 years in prison for the felony-firearm convictions.

On appeal in the Court of Appeals, defendant raised several issues, including that the trial judge's questioning of witnesses denied him a fair and impartial trial. In an unpublished per curiam opinion, the Court of Appeals rejected that claim. *People v Granderson*, unpublished per curiam opinion of the Court of Appeals, issued September 13, 2016 (Docket Nos. 325313, 325530, and 325806).[3] The Court of Appeals affirmed defendant's convictions but remanded the case for a correction of defendant's sentence for conspiracy to commit murder.[4]

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[3] The Court of Appeals consolidated defendant's appeal with those of his codefendants.

[4] The Court of Appeals instructed that the sentence for conspiracy to commit murder be amended to life with the possibility of parole. *Granderson*, unpub op at 29.

Defendant filed an application for leave to appeal in this Court.[5] On September 27, 2018, we ordered oral argument on the application. *People v Swilley*, 503 Mich 868 (2018).

II. THE TRIAL JUDGE'S QUESTIONING OF WITNESSES

In this appeal, defendant argues that the trial judge's questioning of witnesses pierced the veil of judicial impartiality, depriving him of a fair trial. Particularly at issue is the trial judge's questioning of three witnesses—Taylor, Lee, and Colley.

We note that at the start of trial, the trial judge issued preliminary instructions with respect to the judge's questioning of witnesses: "I may ask some questions of the witnesses myself. These questions are not meant to reflect my opinion about the evidence. If I ask a question, my only reason would be to ask about things that may not have been fully explored." At the close of trial, during his final instructions to the jury, the trial judge explained that he did not intend to express any opinion on the case and that if the jurors believed such an opinion had been conveyed, they should disregard it.

A. PHILIP TAYLOR

Taylor's testimony was central to defendant's alibi defense. On direct examination by defense counsel, Taylor testified extensively about the time line of events on November 21, 2012, from his perspective. Taylor recalled that he, along with Lee, defendant, and

[5] Codefendants Granderson and Thomas filed separate applications for leave to appeal in this Court. Those applications were held in abeyance. See *People v Granderson*, 917 NW2d 407 (2018); *People v Thomas*, 917 NW2d 84 (2018).

defendant's sister, visited city hall to transfer a piece of property to defendant and defendant's sister. Taylor explained that the property, a home, had initially been in Lee's name but that it had since been transferred to Taylor's name. Lee wanted legal title transferred to defendant and defendant's sister because Lee had been diagnosed with cancer and wanted to ensure that the home went to her grandchildren. Taylor elaborated, stating that they

> [w]ent down there to [city hall] that day and had the house signed over out of my name into [defendant's] and [defendant's sister's] name.
>
> * * *
>
> Must have left the house right around about 2:00. Got down there—I think about three departments down there. I might have paid my water bill and then went to sign—got their name signed off at the front desk up there. Everybody had to show their ID to get their name signed over. Then we left there, and we got it notarized.

A quitclaim deed stamped November 21, 2012, was entered into evidence, bearing the signatures of defendant, defendant's sister, and Taylor, with Taylor's signature notarized.[6] Taylor further testified that at some point during the family's outing, defendant received a phone call. Taylor recalled that after receiving the call, defendant said that he was glad he was with Taylor "because something just went down, and they probably would try to blame it on me." After leaving city hall, the family went to Taylor's bank to get a printout of Taylor's account details. The family then went to a Chinese restaurant before returning home around 5:00 p.m.

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[6] A Saginaw city administrator testified that the deed was entered into the city's computer system at 3:42 p.m. on November 21, 2012.

On cross-examination, the prosecution revisited the details of these events, questioning Taylor comprehensively about his testimony that defendant was with him on the afternoon of November 21, 2012. Among other details, Taylor indicated, as he had during direct examination, that he was unsure whether he had paid his water bill that day and reiterated that the main reason the family had gone to city hall was to transfer the property out of his name and into the names of defendant and defendant's sister. Taylor repeated that defendant had received a phone call and that afterward, defendant had commented that he was glad to be with Taylor because something had happened that might be blamed on defendant. Taylor also stated that he did not hear defendant's phone ring, possibly because defendant had the phone on vibrate.

After direct examination, cross-examination, and redirect examination, the judge signaled that he had some questions for Taylor: "I have some questions. I want to stress to the jury, I have no preference, again, on—as a result of the questions I'm asking." The judge then proceeded to question Taylor extensively. The judge first asked Taylor to clarify whether the transferred property was in his name or in Lee's name. Taylor repeated his testimony that title had previously been transferred from Lee's name to his name and that Lee wanted him to transfer the property to the grandchildren's names because of her cancer diagnosis. The judge continued:

> *The Court*: But wait a minute. I'm getting confused. Legally, who had the title to that house?
>
> [*Taylor*]: [Defendant] and [defendant's sister] got it right now.
>
> *The Court*: All right. Prior to November 21st, whose name was the house in?

[*Taylor*]: My name.

The Court: All right. Back to my point. If she got sick, was she on the title at all at that point?

[*Taylor*]: No.

The Court: When you say it was her house—I'm sorry. Are you married, or were you married to her at that time?

[*Taylor*]: No, we've just been going together.

The Court: That's where I am getting confused then.

[*Taylor*]: But it was—

The Court: How did you get the house if you say it was her house?

[*Taylor*]: It was—

[*Defense Counsel*]: Your Honor, I've got to object. That's been asked and answered. He said that she put the house in his name, and then she said that she wanted—after she found out that she was sick that she wanted the house in the kids' name, and that's what he did.

The Court: Well, that isn't what I'm hearing. On November 21st of 2012, was the house legally in your name at that point?

Switching gears, the judge probed Taylor's account of the family's activities. The judge first asked how the family got to city hall and questioned defendant's whereabouts the night before. Despite the fact that Taylor had indicated on several occasions that he was unsure whether he had paid the water bill, the judge asked Taylor if he paid the water bill before the property transfer was made. Taylor repeated that he was not sure whether he had paid the water bill. But the judge pressed further, asking whether Taylor had received a receipt of payment, whether the receipt was timestamped, and whether Taylor had the receipt. Taylor replied, once again, that he did not know if he had even paid the bill on that day.

The judge then quizzed Taylor regarding his testimony that the family went to the bank after leaving city hall. The judge asked where the bank was located and what Taylor did at the bank. Taylor responded, as before, that he went to get a printout of his account details. The judge then asked Taylor if he had a copy of that printout, which precipitated the following exchange:

> [*Defense Counsel*]: Your Honor, I've got to object. It's—I don't know what you're doing here. I have documents that we've entered into evidence that shows that he was there.
>
> *The Court*: You've alleged an alibi defense, and I want to—I'm going through—I want to know what this gentleman did. It's not clear in my mind whether he paid the bill that day. First he thought he paid it, now he didn't pay it, went to the bank, and I'm entitled to ask questions.
>
> [*Defense Counsel*]: Your Honor, and I've got to object. I think you're being very prosecutorial in this—
>
> *The Court*: Your objection is noted.

Over defense counsel's objection, the judge continued to seek proof that Taylor went to the bank. The judge asked whether Taylor got a "sheet" from the bank, where the sheet was, whether there was a date on the sheet, and the name of the bank official he talked to while there.

The judge next investigated Taylor's testimony that defendant had received a phone call while with Taylor. In response to the judge's question, Taylor repeated that he was not sure of the exact time defendant received the call. The judge then stated:

> Okay. You don't remember the phone ringing—and I'm not being critical of you. I just want to understand what you're saying. You don't remember the phone ringing, you don't remember seeing [defendant] with the phone, but you do remember [defendant] saying he got a phone call

> and words to the effect, I'm glad I'm with you, because something happened or something went down?

Taylor reiterated that he did not hear defendant's phone ring, positing again that defendant had it on vibrate. The judge proceeded with various questions concerning what exactly defendant had told Taylor after the phone call. At this point, Taylor paused, stating, "[W]ait a minute, you trying to confuse me." The judge pressed on, asking Taylor whether he had sought more information from defendant about the phone call: "Okay. Did you say what happened? Why? What do you mean, grandson? What are you talking about? Did you say anything like that?"

The judge then targeted Taylor's response to learning that defendant was a suspect in the shooting. When Taylor confirmed that he had learned about a warrant for defendant's arrest about six months to a year after the incident, the judge asked whether Taylor did anything in response. When Taylor seemed confused by the question, the judge asked, "Did you talk to [the police officers] at all and say, hey, you got the wrong guy, my grandson was with me?" When Taylor answered that he had not, the judge replied, "Why not?" Taylor explained that the police had not contacted him, to which the judge retorted, "How would they know to call you?"

Immediately after the judge's questioning of Taylor, the jurors indicated that they too had questions for Taylor. In essence, the jury submitted the following questions, largely echoing the judge's lines of inquiry:

- Do you know of any phone records of the call defendant received at city hall?
- Do you know who called defendant when you were at city hall?

- Is there proof that you were at the bank?
- If you have something that was printed out at the bank, do you have a copy of that document?
- Did you at any time see defendant with a phone in his hand? and
- Did you see defendant with anything at the city hall?

While reading the jury's questions out loud, the judge noted the similarities: "I think these are some of the similar questions I asked."

B. ALESHA LEE

Although Lee was listed as a defense witness, the prosecution called her to testify during its case-in-chief. With respect to defendant's activities on November 21, 2012, Lee's testimony largely paralleled Taylor's, providing support for defendant's alibi defense. Lee testified that she went to city hall with Taylor, defendant's sister, and defendant to sign over property to defendant and defendant's sister. Like Taylor, Lee explained that she wanted the grandchildren to have the home in case her health declined. Like Taylor, Lee recalled that the family filled out paperwork at city hall, went to the bank, ate at a Chinese restaurant, and then returned home.

After both the prosecution and the defense questioned Lee in detail regarding these events, the judge also questioned the witness. The judge asked Lee which piece of property she signed over to defendant, and who lived at the home. The judge then asked: "Okay. Do you have any paperwork at all?" Defense counsel objected, indicating, "That's for the defense's case. We have the case." The judge answered: "I'm entitled to ask questions, I'm not taking any position

one way or the other. I could care less. This is for you to decide. But if you're going [sic] cover it in there, then I'll withdraw the question."

C. JOSHUA COLLEY

During its case-in-chief, the prosecution also called Colley, who had been with Galvin when Galvin was shot. More than two months after the shooting, Colley was interviewed by the police about what had occurred on that day. Colley provided a statement describing the vehicle and its approach. Colley indicated that he saw three people with guns lean out the window, and he described what happened as bullets were flying. But Colley told the police that he was unable to identify any of the people in the vehicle. Colley was shown a photo array containing images of defendant and his codefendants, but he did not make an identification.

During direct examination at trial, Colley changed his account. Contrary to his earlier statement, Colley testified that he, in fact, never saw the car from which shots were fired. He instead claimed that he was texting on his phone when he heard gun shots, hit the ground, and then "blacked out." When the prosecutor confronted Colley with his earlier statement, Colley claimed that he could not remember the details contained within the statement because he was high on drugs at the time of the shooting. He claimed that the information in the statement was based on what others had told him. Colley also testified that neither he nor Youngblood knew who the shooters were: "I told him I don't know. I said I asked him. He said he didn't know. So he never—he never seen no faces, man." After direct examination, cross-examination by all the defense attorneys, redirect examination, recross-examination,

and a second redirect examination by the prosecutor, the judge indicated that he too had some questions.

First, the judge sought to confirm with one of the attorneys the length of Colley's statement. After being informed that it was 38 pages long, the judge confronted Colley:

> *The Court*: Thirty-eight pages. So you talked to these police officers for 38 pages, and they've asked you about all these questions and answers that you gave, and you're saying now none of that is correct?
>
> [*Colley*]: I don't remember none of that, sir. Like I said, I told you all what I remember. I was high from Promethazine, Codeine, marijuana and Xanax. That cause some blackouts.
>
> *The Court*: But one of your dear friends, your home boys as you called him, was murdered that day in front of you—
>
> [*Colley*]: Right.
>
> *The Court*: —laying [sic] on the ground bleeding to death, and you believe it's important to talk to the police after and let them know what you know happened?
>
> [*Colley*]: Right.
>
> *The Court*: And you did talk to them and you heard what you told them at that time.
>
> [*Colley*]: But I was going on what somebody else had told me.
>
> *The Court*: Did you at any time in that statement tell them, I don't—that I don't know what happened?
>
> [*Colley*]: No.
>
> *The Court*: You didn't say, hey, I don't know, I don't know, I don't know, I don't know. You gave these other answers, correct?
>
> [*Colley*]: I told you, man. I was high off Promethazine, Codeine, marijuana and Xanax.

Not finished, the judge then asked the prosecutor directly, "Did anyone in that statement . . . did he—did he give a response, I don't know, I was high[?]" Defense counsel for codefendant Granderson interjected that he did not believe it was procedurally correct to ask the prosecutor such a question, but the judge insisted that he could ask questions to "shorten this up." The judge returned to Colley, stating, "Are you saying that when these questions were asked of you at [sic] the officer back at the time you gave the statement you said, I don't know, I was high?" Colley began, "Listen, I—" but was interrupted by the judge as follows: "That wasn't your answer, was it?" Colley said, "No, I was going on what somebody else told me." The judge replied, "Did you tell them that?" Colley admitted that he had not.

Next, the judge inquired into gang associations, first asking whether Colley was friends with defendant and the codefendants. Colley responded that they were not and that it had surprised him that defendant and his codefendants were charged because no one had known the identities of the shooters. The judge then asked, "So you have no problem if Ranger—excuse me, if Officer Shaft, excuse me, were to put you in cells with [defendant's rival gang]?" Colley answered that he would not have a problem. The judge instructed the prosecutor to redisplay a photograph that allegedly showed several individuals making gang signs. Defense counsel objected: "Your Honor, with all respect, I've got to object to this. It appears to me as though the judge is taking the role of the prosecutor." The judge replied: "Not at all. I have no interest in this case and the outcome. I've instructed you on that before, I'm instructing you again, and the Court is entitled to ask questions. I'm entitled to summarize the evidence if I want, and I'm not doing that." The judge proceeded to ask Colley what his friends were doing with their

hands in the photographs, and Colley answered that they were just making signals. The judge concluded, "I don't have anything further."

III. STANDARD OF REVIEW

The question whether a judge's conduct has "denied a defendant a fair trial is a question of constitutional law that this Court reviews de novo." *Stevens*, 498 Mich at 168. "When the issue is preserved and a reviewing court determines that the trial judge's conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review." *Id*. at 164.[7] Rather, "once a reviewing court has concluded that judicial misconduct has denied the defendant a fair trial, a structural error has occurred and automatic reversal is required." *Id*. at 168, citing *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

IV. ANALYSIS

In *Stevens*, this Court established the appropriate standard for determining when a trial judge's conduct in front of a jury has deprived a party of a fair and impartial trial. "A trial judge's conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality." *Stevens*, 498 Mich at 164. "A judge's conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party." *Id*. at 171.

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[7] In this case, defendant's claim is preserved because defendant objected to the judge's questioning at trial.

Evaluating the totality of the circumstances is a fact-specific analysis that involves a consideration of various factors. *Id*. at 171-172. The *Stevens* Court instructed:

> In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors including, but not limited to, the nature of the trial judge's conduct, the tone and demeanor of the judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions, either at the time of an inappropriate occurrence or at the end of trial. [*Id*. at 164.]

Because this list of factors is nonexhaustive, a reviewing court "may consider additional factors if they are relevant to the determination of partiality in a particular case." *Id*. at 172. "[T]he aggrieved party need not establish that each factor weighs in favor of the conclusion that the judge demonstrated the appearance of partiality for the reviewing court to hold that there is a reasonable likelihood that the judge's conduct improperly influenced the jury." *Id*. "The reviewing court must consider the relevance and weigh the significance of each factor under the totality of the circumstances of the case." *Id*. "Ultimately, the reviewing court should not evaluate errors standing alone, but rather consider the cumulative effect of the errors." *Id*. at 171-172.

A. THE NATURE OF THE JUDICIAL CONDUCT

In reviewing claims of judicial partiality, a reviewing court must first examine "the nature or type of judicial conduct itself." *Id*. at 172. Improper judicial conduct may come in many forms, including "belittling of counsel, inappropriate questioning of witnesses, pro-

viding improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions." *Id*. at 172-173. In this case, we are concerned with the trial judge's questioning of witnesses.

In *Stevens*, we noted that under MRE 614(b), a trial judge is generally permitted to ask questions of witnesses.[8] *Id*. at 173. But we warned that judicial questioning has boundaries. *Id*. at 174. "[T]he central object of judicial questioning should be to *clarify*." *Id*. at 173 (emphasis added). "Therefore, it is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information." *Id*. A judge may intervene in a trial to expedite matters, prevent unnecessary waste of time, or clear up an obscurity. *Id*. at 174, citing Code of Judicial Conduct, Canon 3(A)(8).[9]

However, "undue interference, impatience, or participation in the examination of witnesses, or a severe attitude on the judge's part toward witnesses . . . may tend to prevent the proper presentation of the cause, or the ascertainment of truth in respect thereto[.]" *Stevens*, 498 Mich at 174, quoting former Canon 3(A)(8) (quotation marks omitted). See also *People v Bigge*, 297 Mich 58, 70; 297 NW 70 (1941) ("It is well known that jurors in a criminal case may be impressed by any conclusion reached by the judge as to the guilt of the accused."). Therefore, a judge should not "exhibit disbelief of a witness intentionally or unintentionally" or " 'permit his own views on disputed issues of fact to become apparent to the jury.' " *Stevens*, 498 Mich at

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[8] MRE 614(b) permits a court to "interrogate witnesses, whether called by itself or by a party."

[9] Canon 3(A)(8) was renumbered to 3(A)(12) on October 25, 2018. 503 Mich clxii (2018).

174 (citation omitted). "A judge should avoid questions that are intimidating, argumentative, or skeptical." *Id*. at 175. See also *People v Wilder*, 383 Mich 122, 124; 174 NW2d 562 (1970). In other words, it is appropriate for a judge to ask questions of a witness that are designed to make clearer otherwise unclear, vague, or confusing testimony. *Stevens*, 498 Mich at 173, 175-176; *People v Young*, 364 Mich 554, 558; 111 NW2d 870 (1961) (noting that a judge's authority "encompasses a right to question a witness for the purpose of shedding light on something unclear in the testimony"); *Simpson v Burton*, 328 Mich 557, 564; 44 NW2d 178 (1950) (noting that a trial judge may ask "appropriate questions to produce fuller and more exact testimony"). But it is not the role of the court to impeach a witness or undermine a witness's general credibility. *Stevens*, 498 Mich at 174; *Simpson*, 328 Mich at 564 ("[G]reat care should be exercised that the court does not indicate its own opinion and does not lay undue stress upon particular features of a witness'[s] testimony that might, in the eyes of the jury, tend to impeach him."). A judge's responsibilities do not include emphasizing or exposing potential weaknesses in a witness's testimony or conveying the judge's personal view on whether a witness should be believed. *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558 (noting that a judge's questions or comments should not place "his great influence on one side or the other in relation to issues which our law leaves to jury verdict"); *Loranger v Jageman*, 169 Mich 84, 86; 134 NW 967 (1912) (finding that the defendant was deprived of a fair and impartial trial when "questions of fact were not allowed to go to the jury free from the opinion of the trial judge in relation to them"); Code of Judicial Conduct, Canon 3(A)(12) ("A judge . . . should not be tempted to the unnecessary display of learning or a premature

judgment."). Rather, in an adversarial system, it is the litigants' job to demonstrate to the jury, through questioning or other means, that the testimony of a particular witness is incredible, unsubstantiated, or contradictory. Questions from a judge that are designed to emphasize or expose incredible, unsubstantiated, or contradictory aspects of a witness's testimony are impermissible. *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558-559; *Loranger*, 169 Mich at 86.

With this in mind, we examine the judge's questioning of witnesses in this case, beginning with the judge's treatment of Taylor. As previously noted, Taylor's testimony was central to defendant's alibi defense, providing support for defendant's claim that he was with his family at city hall when Galvin was shot at a different location. In its decision, the Court of Appeals acknowledged that the judge's questioning of Taylor was extensive but justified the conduct by characterizing Taylor's testimony as unclear and confusing. *Granderson*, unpub op at 28. We disagree with that assertion.

To the contrary, Taylor's testimony was clear, simple, and straightforward, providing a consistent time line of events during the afternoon in question. Taylor explained that he went to city hall with Lee, defendant, and defendant's sister around 2:00 p.m. to transfer the property. He explained who owned the home and provided the reason Lee wanted the property transferred. He testified that the transfer was completed soon thereafter, and defense counsel entered documentation into evidence to substantiate that testimony. Taylor also indicated, unequivocally and on several occasions, that he could not recall whether he paid his water bill while at city hall. He explained that the family subsequently went to the bank, ate at a Chinese restaurant, and then returned home. There

was nothing confusing, vague, or disjointed about this series of events. Rather, it was sequential and detailed. In short, Taylor's testimony was clear.

Whether Taylor's testimony was believable is a different question, the answer to which was critical for both the defense and the prosecution. The defense needed the jury to credit Taylor's testimony to bolster defendant's claim that he was elsewhere when Galvin was shot. Conversely, the prosecution sought to cast doubt on Taylor's credibility to weaken defendant's alibi claim. Indeed, the prosecution cross-examined Taylor extensively to this effect, revisiting the details of his account, testing his memory of the events, and challenging his overall credibility. It was certainly within the role of the prosecutor to challenge Taylor in this fashion; but it was not within the role of the judge. Yet, that is exactly what the judge did. The judge rigorously questioned Taylor in a manner that more closely resembled prosecutorial cross-examination, rather than a mere attempt at clarification. Despite the fact that Taylor had detailed the events several times during examination by the attorneys, the judge revisited those details in a way that undermined Taylor's credibility. For instance, the judge requested that Taylor provide a printout evidencing his transactions at the bank, suggesting to the jury that if he could not, his testimony was not credible. Similarly, the judge requested a receipt from Taylor to validate that he had paid the water bill. When defense counsel objected, the judge responded in a way that reflected an erroneous belief that the judge's questioning had no bounds: "You've alleged an alibi defense, . . . [and] it's not clear in my mind whether he paid the bill that day. First he thought he paid it, now he didn't pay it, . . . and I'm entitled to ask questions." We explicitly denounced such a judicial overstep in *Stevens*. See

Stevens, 498 Mich at 183. It was not the trial judge's job to drill into defendant's alibi defense or to assess the believability of witnesses presented in support of that defense. Credibility is properly tested in the crucible of cross-examination, not by judicial inquisition. See *id.* at 174; *Simpson*, 328 Mich at 564.[10]

In his questions about the water bill, the judge not only took an impermissible swipe at Taylor's credibility but also mischaracterized the witness's testimony on this point. Taylor had consistently stated that he was unsure whether he had paid the water bill. A lack of memory is not equivalent to a lack of clarity. To the contrary, Taylor was very clear; he was unsure whether he paid the water bill. Instead of letting this unambiguous testimony stand, the judge reframed the testimony as if Taylor had claimed that he had paid the bill. In doing so, rather than clarifying unclear testimony, the judge actually created confusion where there was none. Moreover, the judge suggested that it was the witness who had been inconsistent, undermining Taylor's veracity. Whether intentional or unintentional, this mischaracterization both prevented a " 'proper presentation of the cause' " and weakened Taylor's testimony in a manner that might impeach him. *Stevens*, 498 Mich at 174, quoting former Canon 3(A)(8); *Simpson*, 328 Mich at 564. The judge injected similar confusion into Taylor's clear explanation of who initially owned the property, suggesting incorrectly that Taylor had testified that the property was in Lee's name. Defense counsel objected, noting that Taylor had

[10] The Court of Appeals acknowledged that "many of the trial court's questions could have been interpreted as challenging Taylor's memory and veracity" and that "the jury could have viewed the trial court's questioning of Taylor as having expressed an opinion on his veracity." *Granderson*, unpub op at 28.

actually testified that the property was in his own name, but the court rejected that correction: "Well, that isn't what I'm hearing." Again, the judge both mischaracterized Taylor's testimony and inappropriately displayed his own personal view on the consistency of Taylor's explanations. See *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558.

But that was not all. Next, the judge cast suspicion on Taylor's reason for being on the stand. Despite the fact that Taylor's motive for testifying had nothing to do with the clarity of his testimony, the judge implied that Taylor was attempting to cover up for defendant. The judge asked whether Taylor had reported to the police immediately after learning defendant was a suspect: "Did you talk to [the police officers] at all and say, hey, you got the wrong guy, my grandson was with me?" The judge then questioned why Taylor had not done so. Not subtly, the judge was suggesting to the jury that there was an appropriate response, and because Taylor had not taken that approach, his entire testimony was suspect. Although this might be an effective line of inquiry for the prosecution, it was an entirely inappropriate one for the judge. See *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558; *People v Cole*, 349 Mich 175, 196; 84 NW2d 711 (1957); *Loranger*, 169 Mich at 86; Canon 3(A)(12). The judge also signaled to the jury that Taylor's testimony about defendant receiving a phone call might be a lie: "You don't remember the phone ringing, you don't remember seeing [defendant] on the phone, but you do remember [defendant] saying he got a phone call and words to the effect, I'm glad I'm with you, because something happened or something went down?" This can hardly be characterized as a question, and it was certainly an undisguised attempt to impeach Taylor. The judge may not have believed Taylor, but that was not for him to

broadcast to the jury. *Stevens*, 498 Mich at 174; *Young*, 364 Mich at 558-559; *Simpson*, 328 Mich at 564; *Loranger*, 169 Mich at 86.

Finally, although not necessary to reach our conclusion, we note that none of this was lost on the jury. Immediately after the judge's questioning of Taylor, the jury submitted questions that focused precisely on the points emphasized by the judge. The inquiries included asking for a copy of a bank printout, whether Taylor saw defendant speaking on the phone, and who was on the other end of the line. The similarity was so obvious and striking that the judge himself commented on it. This manifests a fundamental concern we expressed in *Stevens*: "Because jurors look to the judge for guidance and instruction, they are very prone to follow the slightest indication of bias or prejudice upon the part of the trial judge." *Stevens*, 498 Mich at 174 (quotations marks and citation omitted).

In sum, the judge's questioning of Taylor did not serve to clarify any of the issues or produce fuller testimony but, instead, served to impeach and to undermine the witness's general credibility. See *id*. at 173-175; *Simpson*, 328 Mich at 564. The judge's inquiry emphasized potential weaknesses in Taylor's testimony and disclosed what the jury likely interpreted as the judge's personal view on whether the witness should be believed. Thus, the questioning was impermissible. See *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558; *Simpson*, 328 Mich at 564; *Loranger*, 169 Mich at 86; Canon 3(A)(12). For these reasons, the judge's questioning of Taylor weighs in favor of concluding that the judge pierced the veil of judicial impartiality.

The judge's questioning of Taylor alone is enough to weigh this factor in favor of a determination that the court pieced the veil of judicial impartiality. But in

considering the totality of the circumstances, we also note that aspects of the judge's questioning of Lee and Colley were similarly problematic. Lee's testimony, like Taylor's, supported defendant's alibi defense. And Lee's testimony, like Taylor's, was clear. She testified about a series of factual events that occurred on November 21, 2012, from her perspective. Rather than allow this unambiguous testimony to stand, the judge tested Lee's account. Similar to his questions to Taylor regarding the bank printout, the judge requested physical proof from Lee that the property had been transferred: "Okay. Do you have any paperwork at all?" The judge's suggestion here was that if Lee did not have documentation, her testimony should be viewed with skepticism. Again, rather than clarifying an unclear matter, the judge was attempting to expose incredible or unsubstantiated testimony, permitting his view on a disputed issue to become evident to the jury. See *Stevens*, 498 Mich at 174; *Young*, 364 Mich at 558-559.

Likewise, several aspects of the judge's examination of Colley were not clarifying in nature but were, instead, argumentative, reflected skepticism, and undermined the witness's credibility. See *Stevens*, 498 Mich at 174-175; *Wilder*, 383 Mich at 124. Colley testified that he did not see the vehicle approach, did not see the occupants inside the car, and did not remember what happened during the shooting itself, all in contrast to details provided in his prior statement. This could be considered a weakness in Colley's trial testimony, one that the prosecution indeed emphasized during its examination of the witness.

However, the judge inappropriately participated in the adversarial process by engaging the witness in a way that further emphasized this potential weakness:

"So, you talked to these police officers for 38 pages, and they've asked you about all these questions and answers that you gave, and you're saying now none of that is correct." The judge then underscored his own disbelief of Colley's explanation: "But one of your dear friends, your home boys as you called him, was murdered that day in front of you[.]" As with Taylor, the judge's subsequent inquiry employed recognizable cross-examination techniques, with the judge posing leading questions in a way that cast further doubt on Colley's trial testimony. At one point, the judge even invited the prosecutor to weigh in, asking the prosecutor directly whether Colley had ever told anyone that he was high at the time of the shooting. The inappropriateness of this solicitation was immediately recognized and objected to by codefendant Granderson's defense counsel.

And finally, as he had done with Taylor, the judge again targeted a witness's underlying motive for testifying in defendant's favor. The trial judge implied that Colley was scared of defendant and his codefendants, posing his own subtle threat to Colley to make this point: "So you have no problem if . . . Officer Shaft . . . were to put you in cells with [defendant's rival gang]?" This intimidating question and severe attitude toward the witness was patently inappropriate. See *Stevens*, 498 Mich at 174-175; *Wilder*, 383 Mich at 124; Canon 3(A)(12). As with Taylor and Lee, it was the prosecution's job to highlight any incredible, unsubstantiated, or contradictory aspects of Colley's testimony, but it was not within the purview of the judge. See *Stevens*, 498 Mich at 174-175.

For these reasons, the nature of the judge's conduct weighs in favor of concluding that the judge pierced the veil of judicial impartiality.

B. THE TONE AND DEMEANOR OF THE JUDGE

Next, we examine the tone and demeanor of the trial judge. *Id*. at 172. Often, "this factor will dovetail with analysis of the nature and type of judicial conduct; the manner in which the judge's inquiry is made will affect how the jury perceives the conduct. To the extent that it is appropriate, these factors may be considered together." *Id*. at 186.

Because of the jury's inclination to follow the slightest indication of bias on the part of the judge, "[t]o ensure an appearance of impartiality, a judge should not only be mindful of the substance of his or her words, but also the manner in which they are said." *Id*. at 175. Though appellate courts typically do not witness a trial judge's tone and demeanor first hand, a judge's hostility, bias, or prejudice can sometimes be gleaned from the nature or choice of the words used by the judge or the series or structure of the court's questions. *Id*. at 186; *Cole*, 349 Mich at 197-200. " '[T]he judge should avoid a controversial manner or tone.' " *Stevens*, 498 Mich at 174, quoting former Canon 3(A)(8). "Pert remarks and quips from the bench have no place in the trial of a criminal case . . . ." *People v Neal*, 290 Mich 123, 129; 287 NW 403 (1939). Adversarial cross-examination of a witness by a judge is impermissible. *Stevens*, 498 Mich at 186; *Cole*, 349 Mich at 196 ("[H]ostile cross-examination of a defendant in a criminal prosecution is a function of the prosecuting attorney and . . . a judge before whom a jury case is being tried should avoid any invasion of the prosecutor's role."). Judicial questioning might be more necessary when confronted with a difficult witness who refuses to answer questions or provides unclear answers. *Stevens*, 498 Mich at

175-176. But judicial intervention is less justified when a witness provides clear, responsive answers, or has done nothing to deserve heated judicial inquiry. *Id*. at 175; *Cole*, 349 Mich at 199 ("The record does not disclose any action or tone of voice on the part of the witness which in anywise threatened the orderly conduct of the trial. It would seem that the trial judge could have dealt with these matters with less heat."). "[A]n objection by trial counsel may specifically note the inappropriateness of the judge's demeanor in the courtroom," though no such objection is required to conclude that a judge's tone or demeanor was inappropriate. *Stevens*, 498 Mich at 176.

Beginning again with Taylor's testimony, the Court of Appeals concluded that nothing in the record indicated that the trial judge's tone with Taylor was argumentative or skeptical. *Granderson*, unpub op at 28. Again, we disagree. First, we note that Taylor was not a difficult witness who refused to answer questions or provided unclear answers. As explained earlier, Taylor provided clear, responsive answers during both direct examination and cross-examination. Nonetheless, as described, the trial judge treated Taylor with hostility and took a prosecutorial tone in questioning the witness. Indeed, a review of the record reveals several instances in which defense counsel specifically objected to the trial judge's approach, clearly stating that it was argumentative[11]

[11] For instance, during one exchange, defense counsel objected: "Your Honor, I've got to object. That's been asked and answered." The judge responded, "Well, that isn't what I'm hearing." At another point, defense counsel objected: "I don't know what you are doing here. I have documents that we've entered into evidence that shows he was there." The judge shot back, "You've alleged an alibi defense, . . . and I'm entitled to ask questions." In context, these pert remarks and quips were inappropriate. See *Neal*, 290 Mich at 129.

and prosecutorial.[12] These record objections alone signal that judicial questioning had gone awry.

The judge's words and the structure of his questions to Taylor also indicated a skeptical, confrontational approach. For instance, during one exchange, the judge asked whether Taylor had told the police, "hey, you got the wrong guy, my grandson was with me?" The judge then asked, "Why not?" And he followed that question by then asking, "How would they know to call you?" This series of questions suggested that the judge considered Taylor's actions illogical or unnatural, casting doubt on the truthfulness of Taylor's testimony. In another instance, the judge essentially asked how it was possible that Taylor did not remember defendant's phone ringing and did not remember defendant on the phone but was nonetheless able to remember that defendant had received a phone call and what defendant had said after the call.[13] The judge's supposed assurance, "I'm not being critical of you," in fact acknowledged that one might interpret his questions in such a way. Other phrases, such as "if you say it was her house" and "[w]ell, that's not what I'm hearing,"

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[12] On two separate occasions, defense counsel explicitly objected that the judge's questioning seemed prosecutorial. During Taylor's testimony, counsel stated: "Your Honor, and I've got to object. I think you're being very prosecutorial in this[.]" During Colley's testimony, defense counsel stated: "Your Honor, with all respect, I've got to object to this. It appears to me as though the judge is taking the role of the prosecutor." The Court of Appeals seems to have entirely overlooked defense counsel's clear objection to the judge's tone, inaccurately writing, "It is worth noting that no objection was raised to the trial court's tone." *Granderson*, unpub op at 21.

[13] The court asked:

> Okay. You don't remember the phone ringing—and I'm not being critical of you. I just want to understand what you're saying. You don't remember the phone ringing, you don't remember seeing [defendant] with the phone, but you do remember [defendant] saying he got a phone call and words to the effect, I'm glad I'm with you, because something happened or something went down?

further demonstrated that the judge did not find Taylor's testimony believable. In challenging Taylor's testimony regarding defendant receiving a phone call, the judge peppered Taylor with questions without even giving the witness a chance to respond: "Okay. Did you say what happened? Why? What do you mean, grandson? What are you talking about? Did you say anything like that?" This style of rapid-fire questioning, about a subject that did not require clarification, served only to discredit Taylor. There was nothing Taylor had done to deserve such intense confrontation by the judge. See *Stevens*, 498 Mich at 175-176; *Cole*, 349 Mich at 199. Taylor even expressed concern about the effect of the judge's combative nature, at one point hesitating and stating, "[W]ait a minute, you trying to confuse me."

Additionally, the judge appears to have believed that he could permissibly make substantive points or arguments during his questioning. For instance, when engaging Taylor with respect to who had legal title to the property, the judge declared: "All right. Back to my point." In the context of witness questioning, a judge is not tasked with making points or arguments; that responsibility is reserved for the litigants. See *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558-559; *Cole*, 349 Mich at 196. In perhaps an even more illustrative and concerning example, the judge responded to a defense objection: "You've alleged an alibi defense, . . . [and] it's not clear in my mind whether he paid the bill that day. First he thought he paid it, now he didn't pay it, . . . and I'm entitled to ask questions."[14] A judge is not "entitled" to test the validity of a party's claim or defense. A judge is *permitted* to ask questions of a witness, but when the judge chooses to

[14] The court suggested a similar entitlement during Lee's testimony: "I'm entitled to ask questions."

do so, the judge assumes the great responsibility of asking questions in accordance with the law. MRE 614(b); *Stevens*, 498 Mich at 174; *Young*, 364 Mich at 558; *Simpson*, 328 Mich at 564; Canon 3(A)(12). Questions that, in essence, advocate are not within that prescribed judicial authority. *Stevens*, 498 Mich at 174-175; *Young*, 364 Mich at 558; *Simpson*, 328 Mich at 564.

Defense counsel's objections, as well as the content and structure of the judge's questions, make it clear that the judge confronted a responsive witness, Taylor, in a hostile, prosecutorial fashion. That tone and demeanor had no place in this trial. Accordingly, this factor too weighs in favor of a determination that the court pierced the veil of judicial impartiality.

Although not necessary in reaching this conclusion, we also note that the judge's combative exchange with Taylor occurred against the backdrop of his exchanges with Lee and Colley, which exhibited similarly problematic aspects. In asking whether Lee had any documentation "at all" to substantiate the property transfer, the judge was signaling that a lack of documentation would indicate a lack of truthfulness. And as discussed previously, the court took an intimidating, threatening tone with Colley, asking whether he would be willing to be placed in a cell with allegedly rival gang members. In other places, the judge's comments were obviously skeptical of Colley's testimony. As had been the case with Taylor, the judge posed several leading questions, culminating with questions that revealed the judge's personal disbelief: "You didn't say, hey, I don't know, I don't know, I don't know, I don't know. You gave these other answers, correct?" On a few occasions, the judge interrupted Colley to drive home a point—that Colley had not told anyone that he was high at the time of the shooting—but what these exchanges drive home to us is

the judge's incorrect belief that his purview included witness impeachment. A judge should avoid the interruption of attorneys or witnesses, except to clarify. See *Stevens*, 498 Mich at 174. In this case, the judge did not take such care.

In sum, the judge's tone and demeanor were hostile, argumentative, and prosecutorial. Therefore, this factor weighs in favor of a determination that the court pierced the veil of judicial impartiality.

C. THE CONTEXT AND THE SCOPE OF THE JUDICIAL INTERVENTION

In *Stevens*, this Court directed that "a reviewing court should consider the scope of judicial intervention within the context of the length and complexity of the trial, or any given issue therein." *Id*. at 176.

In applying this factor to this case, the Court of Appeals seems to have misunderstood the full extent of our directive. The Court of Appeals concluded that extensive judicial questioning was appropriate solely because this trial was a "long and complex one" that spanned 18 days and involved eyewitness testimony, expert witnesses, DNA evidence, and other scientific analysis. *Granderson*, unpub op at 22. This is an incomplete application of our instruction in *Stevens*. In *Stevens*, we did note that in a long or complicated trial, "it may be more appropriate for a judge to intervene a greater number of times than in a shorter or more straightforward trial." *Stevens*, 498 Mich at 176. However, the focus is not solely on whether the trial *itself* was long or complicated. The *Stevens* Court explained that an appellate court must consider "the scope of the judicial conduct in the context of the length and complexity of the trial, *as well as the complexity of the issues therein*." *Id*. at 187-188 (emphasis added). In

other words, a reviewing court should not simply evaluate whether the trial as a whole was long or involved complicated issues. A reviewing court must *also* evaluate *the complexity of the particular issues* that were subject to judicial inquiry. "[A] judge's inquiries may be more appropriate when a witness testifies about *a topic* that is convoluted, technical, scientific, or otherwise difficult for a jury to understand." *Id*. at 176 (emphasis added). In contrast, when a witness testifies on a clear or straightforward issue, judicial questioning is less warranted, even if the testimony occurs within the context of a lengthy trial, or one that involves other complex but unrelated matters. Said differently, when testimony deals with a particular issue or topic that is not complicated or complex, the utility of judge-led questioning is more limited.

Applying this factor correctly leads to a different result than that reached by the Court of Appeals. Despite the length of this trial as a whole and the complexity of other unrelated issues, the specific testimony that was subject to the challenged judicial inquiry was not technical, convoluted, or scientific. Taylor testified about a relatively straightforward matter: his factual account of the events on the day of the shooting. The jury was capable of understanding and assessing this time line without significant judicial intervention. Yet the judge intervened extensively and inappropriately, as already explained.[15] Therefore, this

[15] We add that neither Lee's testimony nor Colley's testimony was complex. Lee testified to a similar factual time line as Taylor, which was not difficult for the jury to understand. The judge's question about whether Lee could produce any paperwork to substantiate her account did not clarify any technical or convoluted point, and the question was therefore unnecessary. See *Stevens*, 498 Mich at 176. Colley testified about factual matters in a way that arguably contradicted his prior statement. The prosecution was well-positioned to challenge these

factor also supports the conclusion that the judge pierced the veil of judicial impartiality.

D. THE EXTENT TO WHICH THE JUDGE'S CONDUCT WAS DIRECTED AT ONE SIDE MORE THAN THE OTHER

Additionally, in conjunction with the previous factor, "a reviewing court should consider the extent to which a judge's comments or questions were directed at one side more than the other." *Id*. at 176-177. "Judicial partiality may be exhibited when an imbalance occurs with respect to *either* the frequency of the intervention *or* the manner of the conduct." *Id*. at 177 (emphasis added). This inquiry is therefore twofold: in order to determine whether judicial questioning was imbalanced, a reviewing court must evaluate *both* the frequency of the questions *and* the manner in which they are asked. For instance, in *Stevens*, we noted that the judge's questions were imbalanced in frequency because they were directed at the defense witnesses more often than the prosecution witnesses. *Id*. at 188. But we also found an imbalance in manner and style: the judge's questioning of defense witnesses served to undermine their testimony, while the judge's questioning of the prosecution witnesses served to bolster the prosecution's case or further weaken the defendant's case. *Id*. at 188-189. See also *Cole*, 349 Mich at 194-195 (determining that judicial bias existed when the judge vigorously cross-examined defense witnesses but did not vigorously cross-examine prosecution witnesses). In other words, to assess whether judicial questioning was imbalanced, we do not simply look at the number of questions but also the nature of those questions.

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relatively basic inconsistencies, and the jury was fully able to come to its own conclusions on the matter, without judicial involvement. Nevertheless, the judge confronted Colley repeatedly, in argumentative fashion. This, too, was unwarranted. *Id*.

In this case, the judge's questions were imbalanced in both frequency and manner. As detailed previously, the judge questioned Taylor extensively and often did so in a contentious fashion that revealed the judge's disbelief in Taylor's testimony. The judge also engaged both Lee and Colley in a skeptical manner. When directed at defense witnesses, or defendant-friendly prosecution witnesses, the judge's questioning was frequent, as well as combative, hostile, and designed to impeach.

The prosecution's side of the case, however, was not subjected to equal judicial treatment. The judge asked a limited number of questions of prosecution-friendly witnesses, and the questions asked were generally clarifying in nature. Of particular note is the court's treatment of Youngblood, a key witness for the prosecution. Youngblood, like Colley, provided arguably inconsistent testimony, making representations at trial that conflicted with his earlier statements. But in contrast to the judicial barrage of questions aimed at Colley, who testified favorably for defendant, the judge did not ask a single question of Youngblood.[16] This discrepancy highlights the imbalance that occurred in this case. See *Stevens*, 498 Mich at 177; *Cole*, 349 Mich at 188-189.

In its analysis, the Court of Appeals failed to observe the stark difference between the trial judge's treatment of witnesses on opposing sides of this case. On the whole, the judicial questioning was imbalanced in both

[16] The prosecution argues that there was no need for the judge to question Youngblood because Youngblood's testimony was more extensive than Colley's. The comparative length of the witnesses' testimonies is not the issue. Rather, the concerning issue is that the judge questioned Colley in ways that emphasized inconsistencies in his testimony while the judge left untouched inconsistencies in Youngblood's testimony, thus subjecting the two sides to unequal judicial treatment.

frequency and manner, decidedly in favor of the prosecution and against the defense. This too supports a conclusion of judicial partiality.

E. THE PRESENCE OF A CURATIVE INSTRUCTION

"Finally, we consider the presence or absence of curative instructions." *Stevens*, 498 Mich at 190. A "curative instruction will often ensure a fair trial despite minor or brief inappropriate conduct." *Id.* at 177. However, a judge's administration of curative instructions does not always guarantee that a defendant has received an impartial trial; "in some instances judicial conduct may so overstep its bounds that no instruction can erase the appearance of partiality." *Id*. at 177-178. See also *In re Parkside Housing Project*, 290 Mich 582, 599-600; 287 NW 571 (1939) (holding that the effect of the judge's conduct was "too vitiating" to be corrected, even though the judge issued repeated instructions that he was present only in an advisory capacity and that the determination of the verdict was in the jury's hands). This factor is not considered in isolation; rather, "the totality-of-the-circumstances test requires that this factor be considered alongside the others." *Stevens*, 498 Mich at 190.

As already detailed, in this case, the judge delivered preliminary instructions that indicated that the judge might ask some questions of the witnesses and that the questions were not meant to reflect the judge's opinion but, rather, to develop issues that might not have been fully explored. In his final instructions, the judge explained that he did not intend to exhibit any opinion during the case and that if the jurors believed the judge had expressed such an opinion, it should be disregarded. Further, the judge reiterated some of these points before questioning Taylor and during his

questioning of Colley, indicating that he was entitled to ask questions but that they were not meant to reflect his personal position on how the case should be decided.

On the facts of this case, these instructions cannot cure the judicial bias that was shown throughout the trial. Although the preliminary instruction indicated that the judge would limit his inquiry to clarifying questions, the judge did not follow through on this assurance. As already described, the judge repeatedly challenged defendant's favorable witnesses in a manner that was not clarifying but, instead, combative and prosecutorial. This gave little meaning to the judge's preliminary and final instructions that he did not intend to express an opinion.

Even the judge's instructions during witness testimony could not right the ship given the extent and inappropriate nature of the questioning. In questioning Taylor, although the judge told the jury he had no preference, his lengthy badgering of the witness suggested the opposite. Given the importance of Taylor's testimony to defendant's alibi defense, the judge's supposedly curative instructions were left particularly empty. Similarly, during Colley's testimony, though the judge stated that he had no interest in the case's outcome, the judge engaged Colley in an impermissible fashion that suggested that the judge did indeed have an opinion on several aspects of Colley's testimony. The judge's comment during Colley's testimony that he was entitled to ask questions resembled more of a rebuke of defense counsel and a declaration of judicial authority, rather than a curative instruction. Indeed, such language was eerily similar to the language we criticized in *Stevens*, 498 Mich at 182, wherein the judge declared, " '[Defense counsel], if I have a question I can

ask a question, all right?' " The judge's statement during Lee's testimony also resembled more of a curt retort than a curative action when the judge declared that he was "entitled to ask questions" and that he "could care less" about the outcome of the case.

In essence, the judge's words repeatedly conflicted with his actions. Therefore, the judge's instructions did not cure his impermissible conduct. See *Stevens*, 498 Mich at 177-179; *In re Parkside*, 290 Mich at 599-600.

V. CONCLUSION

In this case, considering the totality of the circumstances, we conclude that it was reasonably likely that the judge's conduct with respect to defendant's alibi witness improperly influenced the jury by creating the appearance of advocacy or partiality against defendant.[17] The nature of the judicial questioning, the judge's tone and demeanor, the scope of the intervention in light of the relatively straightforward testimony at issue, and the imbalanced direction of the intervention all support our conclusion that the judge pierced the veil of judicial impartiality. Although the judge issued several curative instructions to the jury, these instructions were not enough to overcome the partiality the judge exhibited against defendant throughout the trial. Consequently, we reverse the judgment of the

[17] As detailed in this opinion, we conclude that the trial judge's treatment of Taylor created the appearance of advocacy or partiality against defendant. To reach this conclusion, we considered the totality of the circumstances, evaluating the judge's treatment of other witnesses, including Lee and Colley. See *Stevens*, 498 Mich at 164, 171-172. However, because the judge's treatment of Taylor is enough to satisfy defendant's claim of judicial impartiality, we need not determine whether the judge's treatment of Lee or Colley would have served as separate bases for concluding that the judge pierced the veil of judicial impartiality.

Court of Appeals and remand the case to the Saginaw Circuit Court for a new trial.[18] We do not retain jurisdiction.

MCCORMACK, C.J., and VIVIANO, CLEMENT, and CAVANAGH, JJ., concurred with BERNSTEIN, J.

MARKMAN, J. (*concurring in the judgment*). I agree with the majority that certain aspects of the trial judge's questioning in this case were inappropriate. However, I agree with Justice ZAHRA that this Court need not decide whether this inappropriate questioning violated defendant's constitutional rights under *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015), because the trial judge's episodic inappropriate questioning constituted an abuse of discretion under MRE 614(b) and defendant can show that "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Accordingly, I agree that a new trial is warranted, but only for the reasons provided in Justice ZAHRA's concurring opinion, which I join in full.[1]

I write separately for two primary reasons. First, I write to emphasize that the goal of judicial questioning

[18] Because we decide this case on the grounds of judicial partiality, we decline to address the other issues raised by defendant on appeal. Additionally, because the trial judge in this case has retired, we do not consider whether this case should be retried before a different judge.

[1] The majority declines to address whether on remand defendant should be retried before a different judge because the trial judge in the original proceeding has retired. While I agree with the majority's decision not to order that this case be retried before a different judge, I would decline to do so for the additional reason that appellate courts should only order retrial before a different judge in the most compelling cases of improper judicial questioning and I do not believe that the questioning here rose to that level.

is to assist the jury in its truth-seeking function without compromising the jury's ability to independently render a verdict. Thus, when engaging in judicial questioning, trial judges should consider (a) whether the answer to the question posed is likely to aid the jury in ascertaining the truth and thereby to render a just verdict that protects the innocent, deters and punishes the guilty, and ensures domestic tranquility; and (b) whether the asking of the question is likely to improperly influence the jury by suggesting that the judge has a personal opinion regarding the credibility of the witness or the strength of the parties' positions. Second, I am concerned that the majority opinion takes an unnecessarily negative tone toward judicial questioning and that, as a result, it may unfortunately make members of the bench hesitant to invoke their authority under MRE 614(b) to "interrogate witnesses." Because I believe that judicial questioning, when used appropriately, provides an indispensable aid to juries in their fundamental task of uncovering the truth, I would not unduly hamper a trial judge's ability to ask such questions by engaging in overly aggressive appellate review.

I. JUDICIAL QUESTIONING

This Court has long recognized the inherent authority of a trial judge to question witnesses in jury trials. See, e.g., *In re Stockdale's Estate*, 157 Mich 593, 606; 122 NW 279 (1909) ("We do not question the right or the duty of the circuit judge to question witnesses, and to see that the facts are properly brought before the jury[.]"); *People v Noyes*, 328 Mich 207, 212; 43 NW2d 331 (1950) ("The trial court was within his rights in questioning defendant's witnesses as well as the complaining witness."). This is consistent with the common

law of the United States as a whole, which has generally recognized the authority of a judge to question witnesses during jury trials. See, e.g., FRE 614(b), advisory committee notes ("The authority of the judge to question witnesses is . . . well established."); 1 McCormick, Evidence (7th ed), § 8, pp 37, 44. In 1978, that inherent authority was codified in MRE 614, which was modeled on FRE 614. MRE 614 provides, in relevant part:

> (a) Calling by Court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
>
> (b) Interrogation by Court. The court may interrogate witnesses, whether called by itself or by a party.

Therefore, this Court has properly recognized that judicial questioning is "generally appropriate under MRE 614(b)." *Stevens*, 498 Mich at 173.[2]

More recently, this Court amended MCR 2.513 as part of a larger jury-reform effort to, among other things, enable a judge to "fairly and impartially sum up the evidence" presented at trial. MCR 2.513(M). While judicial questioning long predates the 2011 enactment of the jury-reform amendments, it serves largely the same purpose as do those amendments, namely, to "assist those citizens who are performing their civic duty as jurors" and, more specifically, "to further the rule of law, and necessarily the search for

[2] While this case involves a criminal trial, a trial judge has the authority to question witnesses in both criminal and civil trials. Criminal cases are distinct from civil cases to the extent that criminal defendants have constitutional protections that are inapplicable to civil litigants. Nevertheless, I believe that the principles regarding judicial questioning set forth in this concurring opinion apply equally to criminal and civil cases.

truth upon which this depends, by affording jurors the fullest possible assistance of our legal system in apprehending the cases and controversies before them." MCR 2.512 through MCR 2.516, 489 Mich cxcvi, cxcviii (MARKMAN, J., concurring). In short, this Court has concluded that judicial questioning "advance[s] the judiciary's duty to assist the jury in ascertaining the truth," *People v Anstey*, 476 Mich 436, 456; 719 NW2d 579 (2006), and that the benefits of such questioning outweigh its costs. Thus, trial judges are entrusted to exercise their sound judgment to assist juries in the critical task of assessing the evidence presented and in rendering an accurate verdict that protects the innocent, deters and punishes the guilty, and ensures domestic tranquility.

However, judicial questioning is not intended to replace advocates' presentation of the evidence—which is the primary source of factual development at trial—but, rather, to supplement this presentation by filling in, or highlighting, gaps that may remain after examination by the parties.[3]

> Under the Anglo-American adversary trial system, the parties' counsel have the primary responsibility for finding, selecting, and presenting the evidence. However, our system of party-investigation and party-presentation has limitations. The system is a means to the end of disclosing truth and administering justice. In order to achieve that same end, the judge may exercise various powers to

[3] "[T]here may be some instances in which parties *do not want* jurors to be engaged. There are cases in which attorneys want confusion and doubt, where they want the jurors to nullify or render a verdict on the basis of passion unconnected to any facts. However, the role of the juror is to render a verdict on the basis of the law and the facts, and it is this Court's responsibility in its supervision of our state's justice system to bear *this* interest principally in mind so that the rule of law can be effected." 489 Mich at cxcviii (MARKMAN, J., concurring) (quotation marks omitted).

> intervene to supplement the parties' evidence. [McCormick, § 8, p 37 (citations omitted).]

Judicial questioning assists the jury in its search for the truth by "supplement[ing] the parties' evidence" in at least three ways. *Id*. First, judicial questioning can clarify unclear or unresponsive testimony from a witness. *Stevens*, 498 Mich at 175-176; see also, e.g., *Ray v United States*, 367 F2d 258, 261 (CA 8, 1966) ("Where the testimony is confusing or not altogether clear the alleged 'jeopardy' to one side caused by the clarification of a witness's statement is certainly outweighed by the desirability of factual understanding. The trial judge should strive toward verdicts of fact rather than verdicts of confusion."). Second, judicial questioning can better enable the jury to connect the evidence presented and to organize that evidence into a comprehensive whole to create a logical narrative of the allegations and events at issue. Third, judicial questioning can uncover new information that was not brought to light by the parties, whether intentionally or unintentionally. *Stevens*, 498 Mich at 173 ("[I]t is appropriate for a judge to question witnesses to produce fuller and more exact testimony or elicit additional relevant information."). Because "the primary objective of criminal procedure is to facilitate the ascertainment of truth," *Anstey*, 476 Mich at 456 (quotation marks omitted), a trial judge should not hesitate to exercise his or her authority to question witnesses in appropriate circumstances to assist the jury in its search for the truth.

Of course, as this Court has recognized, a trial judge's authority to question witnesses is not boundless or without reasonable limits. Central to the American legal system is the proposition that the jury is the fact-finder in most criminal and civil trials, not the

judge. See Const 1963, art 1, § 14; US Const, Ams VI and VII; see generally *People v Lemmon*, 456 Mich 625, 636-642; 576 NW2d 129 (1998). Indeed, in large part, "the preservation of the jury by constitutional amendment was designed as a limitation on judicial power." *Id.* at 639. "[B]ecause judges wield enormous influence over juries, judges may not ask questions that signal their belief or disbelief of witnesses." *United States v Tilghman*, 328 US App DC 258, 260-261; 134 F3d 414 (1998). See also *Stevens*, 498 Mich at 176. For the same reason, it is improper for judges to ask questions that signal their belief in the strength of the evidence presented against or in favor of a particular party. See *People v Bigge*, 297 Mich 58, 72; 297 NW 70 (1941) ("Once the door is open for allowing the opinion of the court to be impressed upon jurors that one charged with crime is guilty of the offense, the fundamental right of trial by jury is impaired."). Such questioning is inappropriate because it corrodes the independence of the jury by giving rise to the possibility that the jury's verdict is essentially the product of the judge's attitudes concerning the evidence presented, rather than the jury's evaluation of the evidence. See *United States v Perez-Melis*, 882 F3d 161, 165 (CA 5, 2018) ("The jury cannot be regarded as having freely come to its own conclusions about a witness's credibility when the court has already indicated, directly or indirectly, that it disbelieves his testimony.").

In summary, trial judges should bear in mind that the primary purpose served by judicial questioning is to assist the jury in its search for the truth. This search is indispensable to our justice system because "if the trial does not effectively develop the facts and comprehensibly present them to the fact-finder, trial justice is serendipitous," rather than a reliable judgment of a party's guilt or innocence. Strier, *Making Jury Trials*

More Truthful, 30 UC Davis L Rev 95, 99 (1996). However, it is equally important that the trial judge assist the fact-finder without also signaling to the jury its personal views concerning the evidence presented, as even such inadvertent signaling might unduly influence the jury and thus undermine its role as an independent fact-finder. While there is undeniably a tension between these competing judicial interests, I am confident that the trial judges of this state will, subject to the imperfections that will inevitably arise in any such balancing process, serve the critical interests of truth in the criminal-justice process by exercising their questioning authority in a manner that facilitates this purpose while also preserving and maintaining the integrity of the jury process.

II. APPELLATE REVIEW

Just as trial judges must be mindful of the purposes of judicial questioning when posing such questions, appellate judges must also be mindful of these purposes when reviewing a trial judge's decision to pose such questions. I agree with the majority that *Stevens* sets forth a number of appropriate factors for an appellate court to consider in determining whether, *under the totality of the circumstances*, a trial judge's questioning of witnesses was appropriate. However, there are certain aspects of *Stevens* and the majority opinion in this case that warrant concern and that require further explication so as to avoid unduly "chilling" the bench from engaging in appropriate judicial questioning of witnesses, questioning that furthers the truth-seeking function of the criminal trial.

First, while I agree with *Stevens* and the majority that the "central object of judicial questioning should be to clarify," 498 Mich at 173, I note that clarification

can come in many forms and, as previously discussed, the ultimate goal of this clarification is to assist the jury in discovering the truth and to thereby reach a just verdict. Therefore, I believe the majority oversimplifies matters when it asserts that "it is not the role of the court to impeach a witness or undermine a witness's general credibility" and that "[c]redibility is properly tested in the crucible of cross-examination, not by judicial inquisition." Witness credibility is inextricably intertwined with the jury's truth-seeking function, and therefore judicial questioning touching on witness credibility may well assist the jury in responsibly carrying out that function. Accordingly, judicial questioning with the intention or effect of impeaching a witness is not thereby improper. Rather, such questioning is improper only to the extent that the judge's questions communicate the judge's *personal opinion* regarding the witness's credibility. While the line is admittedly a fine one, appellate courts must be cautious in reviewing judicial questioning to distinguish between impeaching questions that communicate a trial judge's personal opinion of a witness's credibility and those that do not.

Second, while *Stevens* and the majority are correct that a judge's questioning should not favor or disfavor a particular party by reflecting that judge's personal opinion regarding the evidence presented, this does not mean that it is somehow improper for a judge to ask questions that reveal information harmful to one of the parties. "[A] question [from a judge] is not improper simply because it clarifies evidence to the disadvantage of the defendant. The rule concerning judicial interrogation is designed to prevent judges from conveying prejudicial messages to the jury. It is not concerned with the damaging truth that the questions might uncover." *United States v De La Cruz-Feliciano*, 786 F3d 78, 84 (CA 1, 2015) (quotation marks and citations omitted);

see also *Com v Festa*, 369 Mass 419, 422; 341 NE2d 276 (1976) ("There is no doubt that a judge can properly question a witness, albeit some of the answers may tend to reinforce the [prosecutor's] case, so long as the examination is not partisan in nature, biased, or a display of belief in the defendant's guilt."). The key inquiry, once again, is whether the questioning signals to the jury the judge's personal opinion as to the veracity of the witness or as to the strength or weakness of a party's case, not whether the question itself is intended to, or results in, harm to a particular party's case.

Third, while *Stevens*, 498 Mich at 173, 176, and the majority rightly note that the clarity of a witness's testimony and the complexity or simplicity of the subject matter of that testimony is relevant to determining whether judicial questioning has been appropriate, a witness's testimony that appears clear when read from a cold transcript does not necessarily signify that judicial questioning was inappropriate, even if such questioning was in some respects repetitive of questions posed by counsel. The trial judge has the advantage of observing tone and body language and therefore can discern a lack of clarity, or a lack of understanding, that may be imperceptible on appellate review. For example, if the witness mumbled or spoke quickly during a portion of his or her testimony, this may well justify repetitive judicial questioning yet not be apparent on the face of an appellate transcript. See *People v Paille #2*, 383 Mich 621, 627; 178 NW2d 465 (1970) ("We have often commented upon the fact that the judge who hears the testimony has the distinct advantage over the appellate judge, who must form judgment solely from the printed words."). Moreover, the judge may observe that a juror is conversing with another juror or is otherwise distracted during a key portion of a witness's testimony. In that situation,

having a witness repeat a previous answer might well aid the jury in its deliberative process. Because trial judges are simply better positioned to observe such specific factual circumstances than are appellate judges, appellate courts should be cautious in concluding that exercises in repetitive questioning, even on issues that might appear relatively straightforward, necessarily constitute an improper exercise of discretion under MRE 614(b).

Fourth, and relatedly, while *Stevens*, 498 Mich at 168, and the majority are correct that whether judicial questioning violates a defendant's constitutional right to a fair trial is reviewed de novo, when conducting that review, appellate courts must remain cognizant of the trial judge's superior ability, discussed above and throughout the criminal law, to determine which questions might be of greatest assistance and value to the jury. In other words, appellate courts should provide an ordinary measure of deference to a trial judge's exercise of authority under MRE 614 because trial judges are generally better situated than appellate judges to determine the propriety and value of asking particular questions that might assist the jury in its role as fact-finder. To the extent that there is uncertainty in an appellate record as to the factual circumstances under which judicial questioning has occurred, appellate courts should generally give some reasonable deference to the proposition that the questioning was warranted.

Fifth, notwithstanding this Court's references to the Code of Judicial Conduct in *Stevens*, 498 Mich at 174, and in this case, improper questioning that entitles a party to a new trial should only rarely result in a judicial-disciplinary proceeding. As already discussed, proper judicial questioning constitutes a vital tool in the ascertainment of the truth, and therefore trial judges

should not be reluctant, or even hesitant, to employ that tool when it is appropriate. The trial judge should not be disinterested or neutral in the search for truth in the criminal-justice process. However, employment of this tool is likely to be disincentivized if the trial judge is concerned that his or her questioning may result in charges of misconduct and accompanying disciplinary proceedings. As with any other exercise of judgment, there will be occasions on which a trial judge errs (as in the instant case) such that a party will be entitled to a new trial. I believe these will be rare occasions, as they have been with regard to our bench in countless other realms in which judgment must be exercised. In the end, trial judges are entitled to a strong presumption that any such errors were undertaken in good faith and do not more generally reflect on their fitness for the bench, as to me—most likely inadvertently—is suggested by the majority's overly casual references to the Code of Judicial Conduct. As this Court recently explained, "legal errors, standing alone, generally do not suggest the existence of judicial misconduct." *In re Gorcyca*, 500 Mich 588, 616; 902 NW2d 828 (2017). See also MCR 9.203(B) ("An erroneous decision by a judge made in good faith and with due diligence is not judicial misconduct."). Accordingly, that an appellate court has concluded that a trial judge's questioning of witnesses exceeded proper boundaries should not in the vast majority of cases result in disciplinary proceedings against that judge.

III. CONCLUSION

"None of the trial's functions are more central to its legitimacy than the search for truth," *Making Jury Trials More Truthful*, 30 UC Davis L Rev at 99, in order to protect the innocent, to deter and punish the guilty,

and to further "domestic Tranquility," US Const, pmbl. Judicial questioning, when used appropriately, constitutes a valuable tool for assisting jurors in their search for the truth. Thus, it is entirely appropriate for a judge to question witnesses under MRE 614(b), so long as the questioning does not signal to the jury that judge's personal opinion in a way that corrodes the jury's exercise of its function as the ultimate fact-finder. Within such boundaries, judges bear wide discretion to question witnesses, even if these questions touch on issues of credibility or reveal evidence that is damaging to a party's case. Moreover, appellate courts should afford reasonable deference to a trial judge's decision to question witnesses, because trial judges are generally better positioned than appellate judges to determine what questioning would be of most assistance and value to the jury. However, as discussed in both the majority and Justice ZAHRA's opinions, certain aspects of the trial judge's questioning in the instant case may have suggested to the jury the court's personal opinion regarding the credibility of witnesses and the strength of the parties' respective cases. Because this error was ultimately not harmless, I concur in the Court's judgment remanding for a new trial, albeit with significant reservations as to the overall nature of the majority's analysis.

ZAHRA, J., concurred with MARKMAN, J.

ZAHRA, J. (*concurring in the judgment*). I concur in the result reached by the majority; defendant's convictions should be reversed, and he should receive a new trial. Unlike the majority, however, I do not reach this conclusion because the trial judge pierced the veil of judicial impartiality under this Court's decision in

People v Stevens.[1] Rather, I concur in the result reached by the majority because the trial judge abused his discretion under MRE 614(b), an error that was not harmless. Accordingly, I write separately to express my view that there is a clear nonconstitutional basis for adjudicating defendant's claim.

Stevens provides a clear constitutional avenue of relief in the form of structural error when "judicial misconduct has denied the defendant a fair trial . . . ."[2] Under the *Stevens* standard, we are to consider the totality of the circumstances to determine whether "it is reasonably likely that the judge's conduct improperly influenced the jury by creating the appearance of advocacy or partiality against a party."[3] "In evaluating the totality of the circumstances, the reviewing court should inquire into a variety of factors, including the nature of the judicial conduct, the tone and demeanor of the trial judge, the scope of the judicial conduct in the context of the length and complexity of the trial and issues therein, the extent to which the judge's conduct was directed at one side more than the other, and the presence of any curative instructions."[4] As noted in *Stevens*, an "overall appearance of advocacy or partiality" can arise when the judge's questions are hostile.[5] This type of misconduct occurs where the judicial questioning "project[s] incredulity, bias and hostility."[6] I question whether the sporadic instances of

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[1] *People v Stevens*, 498 Mich 162; 869 NW2d 233 (2015).

[2] *Id*. at 168, citing *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991).

[3] *Stevens*, 498 Mich at 171.

[4] *Id*. at 172.

[5] *Id*. at 184.

[6] *Id*. at 186.

improper judicial questioning in this case violate the standard set forth in *Stevens* given that the challenged judicial conduct in *Stevens* was much more pervasive than in this case. It was the pervasive appearance of judicial bias that gave rise to a finding of structural error in *Stevens*.[7]

But I need not determine whether defendant is entitled to a new trial under *Stevens*. In general, courts should not reach constitutional issues in cases that can be resolved on nonconstitutional grounds.[8] And this case can be resolved on a nonconstitutional ground: the trial court's evidentiary error under MRE 614(b). Under MRE 614(b), "[t]he court may interrogate witnesses, whether called by itself or by a party." As aptly explained in Justice MARKMAN's concurrence, "the goal of judicial questioning is to assist the jury in its truth-seeking function without compromising the jury's ability to independently render a verdict."[9] Thus, judicial questioning has a proper role in the administration of justice.

But the mere fact that a trial court is authorized to ask questions does not mean that it has free rein and unfettered discretion to interrogate witnesses in any

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[7] Logically, there is a line between proper and improper judicial questioning. Proper questioning is not erroneous, and improper questioning is erroneous. And it makes little sense to conclude that crossing the line between proper and improper questioning abruptly transforms instances of "no error at all" into "structural error." Rather, there should be some range of middle terrain in which it is recognized that minor instances of improper questioning are erroneous but do not rise to the level of structural error.

[8] *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001); see *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993).

[9] *Ante* at 394-395 (MARKMAN, J., concurring).

manner it chooses.[10] This case involved a long and complex trial, spanning 18 days, with four defendants and a large amount of evidence and testimony, including eyewitness testimony, expert witnesses, DNA evidence, scientific analysis of bullet casings and weapons, and evidence of other events that bore relevance to this matter. This is the exact type of trial in which judicial questioning is generally appropriate, if not necessary, to ensure the judge has a comprehensive understanding of the testimony and can conduct the trial in an orderly fashion.

While I find no abuse of discretion with regard to the majority of his questioning, the trial judge did, at times, cross the line of acceptable questioning by interrupting and interjecting himself in the testimony of Philip Taylor, a key alibi witness for defendant. "At its core, an abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome."[11] An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of reasonable and principled outcomes.[12] In this case, there was no principled basis for the trial judge to repeatedly interrupt and mischaracterize, in the presence of the jury, Taylor's testimony regarding whether he had paid his water bill when he traveled with defendant to their

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[10] See, e.g., *United States v Roach*, 502 F3d 425, 441-442 (CA 6, 2007), and *United States v Flores*, 488 F Appx 68, 69 (CA 6, 2012) (reviewing for an abuse of discretion the trial courts' respective decisions to call and question witnesses under FRE 614(b), which substantially resembles MRE 614(b)); see also *United States v Adedoyin*, 369 F3d 337, 342 (CA 3, 2004); *McMillan v Castro*, 405 F3d 405, 409 (CA 6, 2005); *Fielding v United States*, 164 F2d 1022, 1023 (CA 6, 1947).

[11] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[12] *Id*.

municipal complex to allow defendant to execute a transfer of real property. As the majority explains, Taylor testified regarding his factual account of the events on the day of the crimes—a relatively simple, noncomplex matter. Nevertheless, the trial judge intervened extensively, which disrupted, rather than assisted, the jury's ability to determine the truth of the material matters to which Taylor testified.[13]

The trial court continued its questioning even in the face of objection from defense counsel that the court was appearing prosecutorial. In particular, Taylor testified that he "might have" paid his water bill on the day of the shooting, yet the trial judge pressed him on whether he had proof of payment, including whether any receipts he had were time stamped. Taylor's testimony as to what he recalled doing on the day of the shooting, such as whether he paid his water bill, was not material to whether defendant was with Taylor at the time of the shooting. But Taylor's credibility and veracity were paramount to defendant's alibi defense that he was with Taylor and Alesha Lee at the time of the shooting and that he therefore could not have been present at the crime scene. The trial court's questioning in this respect episodically crossed the line from judicial impartiality to advocacy. And the admission of evidence in response to such questioning amounted to an abuse of discretion. Because I conclude the trial judge abused his discretion when asking several of his questions posed to Taylor, I would hold this line of questioning to constitute error under MRE 614(b).

A preserved claim that a trial judge committed an abuse of discretion under the Michigan Rules of Evi-

[13] Another example of this unwarranted intervention is the trial judge's extensive probing into Taylor's activities at the bank and asking whether Taylor had proof of any transactions.

dence implicates the harmless-error standard for preserved, nonconstitutional error.[14] Accordingly, in such a case, remand for a new trial is only warranted when the defendant can show that "it is more probable than not that a different outcome would have resulted without the error."[15] Defendant has met his burden of establishing that it is "more probable than not" that the jury would have acquitted him absent the alleged improper questioning.[16] In particular, defendant's alibi rested on two categories of evidence: (1) text message correspondence between defendant and codefendant Terrance Demon-Jordan Thomas, Jr., and (2) Taylor's testimony that defendant was at city hall when DaVarion Galvin was shot to death. The evidence against defendant was not overwhelming, and the trial came down to a credibility determination. Because the trial judge interjected confusion into Taylor's testimony and injected improper doubt into Taylor's credibility, which was absolutely paramount to defendant's alibi defense, it is more probable than not that the jury would have acquitted defendant absent the improper questioning. For these reasons, I would grant defendant a new trial.

Because I would grant defendant relief on the nonconstitutional basis of this evidentiary error, I would not apply *Stevens*'s constitutional standard to determine whether the trial court's judicial questioning amounted to structural error.

MARKMAN, J., concurred with ZAHRA, J.

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[14] MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (reiterating "that [MCL 769.26] controls judicial review of preserved, nonconstitutional error").

[15] *Lukity*, 460 Mich at 495.

[16] *Id*.

GENESEE COUNTY DRAIN COMMISSIONER v
GENESEE COUNTY

Docket No. 156579. Argued on application for leave to appeal April 10, 2019. Decided July 18, 2019.

Genesee County Drain Commissioner Jeffrey Wright and others filed an action in the Genesee Circuit Court against Genesee County and the Genesee County Board of Commissioners, asserting a contract claim and claims for various intentional torts, including conversion and fraud. The drain commissioner and the county jointly purchased group health insurance coverage from Blue Cross Blue Shield of Michigan (BCBSM), and the county administered the plans. After BCBSM determined that the county's collective insurance premiums, including those paid by the drain commissioner, had exceeded the amount that should have been charged, BCBSM refunded the overpayment to the county, which the county deposited into its general fund. The drain commissioner demanded his office's share of the refunded premiums, which the county denied. Plaintiffs filed this action, and defendants moved for summary disposition of the intentional-tort claims and moved for partial summary disposition of the contract claim with regard to the damages sought that extended beyond the six-year period of limitations set forth in MCL 600.5807. The court, Geoffrey L. Neithercut, J., denied the motion with regard to the intentional-tort claims, but the court granted the motion with regard to the contract claim, concluding that damages were limited under MCL 600.5807 to those that accrued after October 24, 2005. The parties appealed in the Court of Appeals. The Court of Appeals, STEPHENS, P.J., and SAAD and BOONSTRA, JJ., affirmed the trial court's grant of partial summary disposition with regard to the contract claim but reversed the trial court's order with respect to the intentional-tort claims, reasoning that those claims had to be dismissed because intentional torts were not stated exceptions under the governmental tort liability act (the GTLA), MCL 691.1401 *et seq*. 309 Mich App 317 (2015). As the only remaining plaintiff, the drain commissioner thereafter amended his complaint, claiming that the county (the only remaining defendant) had been unjustly enriched when it retained his office's portion of the refunded health insurance

premiums. The county moved for summary disposition of the unjust-enrichment claim, arguing that the unjust-enrichment claim was also barred by the GTLA because the claim was, in effect, a claim for conversion, fraud, or a similar tort; the trial court denied the motion. On appeal, the Court of Appeals, SAWYER, P.J., and SERVITTO and RIORDAN, JJ., affirmed the denial, reasoning that the GTLA did not apply because the unjust-enrichment claim ultimately involved contract liability, not tort liability. 321 Mich App 74 (2017). The county sought leave to appeal, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1086 (2018).

In an opinion by Chief Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Under *In re Bradley Estate*, 494 Mich 367 (2013), claims seeking compensatory damages for breach of contract and claims seeking a remedy other than compensatory damages are not barred by the GTLA. The drain commissioner's unjust-enrichment claim was not barred by the GTLA because the claim was neither a tort nor based in contract and the drain commissioner sought restitution, not compensatory damages. To the extent that *Bradley Estate* implied that tort liability for purposes of the GTLA includes noncontractual liability without qualification, the case overstated the scope of tort liability.

1. MCL 691.1407(1) states that except as otherwise provided by the GTLA, a governmental agency is immune from tort liability if the agency is engaged in the exercise or discharge of a governmental function. The GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages. For that reason, claims seeking compensatory damages for breach of contract and claims seeking a remedy other than compensatory damages are not barred by the GTLA.

2. Unjust enrichment is different from actions in tort and contract. Restitution is the remedy for unjust enrichment; an unjust-enrichment claim does not seek compensation for an injury—that is, it does not seek compensatory damages—but to correct against one party's retention of a benefit at another's expense. In contrast, in a tort action, an injured party may seek compensatory damages for an injury caused by the breach of a legal duty to compensate the injured party for the injury caused by the defendant's wrongful conduct. And in a breach-of-contract action, an injured party may also seek compensatory damages for an injury caused by another party's breach of a contractual

obligation. Unjust enrichment evolved through the years from being a restitutionary claim with components in law and equity into a unified independent doctrine that uniquely corrects for a benefit received by the defendant rather than correcting for the defendant's wrongful behavior. Therefore, unjust enrichment, with a remedy of restitution, is a cause of action independent of contract or tort; it is neither a tort action nor a contract action, both of which seek compensatory damages. Both the nature of an unjust-enrichment action and its remedy—whether restitution at law or in equity—separate it from tort and contract.

3. In this case, the drain commissioner sought restitution to correct for the benefit the county unfairly received when it retained his office's portion of the refunded premiums. Consequently, because his claim did not seek compensation for an injury flowing from the county's civil wrong, liability was not in tort or contract, and therefore, the GTLA did not bar his unjust-enrichment claim. To the extent that *Bradley Estate* implied that tort liability includes noncontractual liability without qualification, the case overstated the scope of tort liability. *Bradley Estate* did not consider an action like that in this case—wherein liability arose from an unjust benefit received, not from a civil wrong—and the case was distinguishable because the petitioner in that case sought compensatory damages for injuries related to a civil wrong, not restitution.

Affirmed.

Justice MARKMAN, joined by Justice ZAHRA, concurring, agreed with the majority that the county was not entitled to governmental immunity under the GTLA because the drain commissioner's unjust-enrichment claim did not seek to impose tort liability. He wrote separately to express his disagreement with the majority's analysis, particularly its interpretation and application of *Bradley Estate*. Under *Bradley Estate*, for purposes of MCL 691.1407(1), "tort liability" means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages. To determine whether a claim involves tort liability, a court must consider the nature of the duty that gives rise to the claim and the nature of the liability the claim seeks to impose; if the wrong alleged is based on the breach of a contractual duty, then no tort has occurred and it would be unnecessary to consider the nature of the liability. The drain commissioner's unjust-enrichment claim sought restitution at law on the basis of an implied-in-law contract, which was premised on the common-law action of assumpsit. For that reason, Justice MARKMAN agreed with the Court of Appeals that the drain commissioner's unjust-enrichment

claim was premised on a contractual relationship and that the claim was therefore not barred by governmental immunity. Because he reached that conclusion, Justice MARKMAN considered it unnecessary to address whether every claim for unjust enrichment that is not grounded in the common-law action of assumpsit, or is not premised on a contractual relationship, is barred by governmental immunity. Justice MARKMAN disagreed with the majority's attempt to limit the scope of *Bradley Estate* by removing unjust enrichment from the contract/tort civil-wrong dichotomy and by instead declaring that unjust enrichment was an independent cause of action, outside of tort and contract. The majority's conclusion that unjust enrichment is an independent cause of action was contrary to *Bradley Estate*'s recognition that there are only two classes of wrong for which an individual may demand legal redress: those based on a breach of contract and those that arise independently of contract (that is, in tort). The binary analysis in *Bradley Estate* was clear, and the majority's conclusion that unjust enrichment was an independent cause of action, outside of contract and tort, confused and unsettled this framework. The central purpose of governmental immunity is to reduce depletion of the state's financial resources by avoiding a contest on the merits of those claims that are barred by governmental immunity. The majority's holding opens the door on future claims that other nontraditional tort claims against a public defendant are outside the *Bradley Estate* framework. By failing to treat *Bradley Estate* as legitimate precedent, the majority diminished its holding, incentivized further GTLA litigation over the meaning of "tort liability," imposed greater litigation costs on public defendants (contrary to the GTLA's central purpose), and introduced ambiguity and ad hoc judicial decision-making in the future. While Justice MARKMAN agreed that the drain commissioner's unjust-enrichment claim was not barred by the GTLA, he would have so held on the basis that the drain commissioner sought restitution as a legal remedy in the form of money damages, premised on an actual or implied contractual relationship with the county and that such a claim was not barred by the GTLA.

GOVERNMENTAL IMMUNITY — UNJUST ENRICHMENT — UNJUST-ENRICHMENT CLAIMS INDEPENDENT OF CONTRACT AND TORT — GOVERNMENTAL IMMUNITY DOES NOT APPLY.

The governmental tort liability act (the GTLA) provides governmental agencies and their employees with immunity from tort liability when engaged in the exercise or discharge of governmental functions; claims seeking compensatory damages for breach of contract and claims seeking a remedy other than compensatory damages are not barred by the GTLA; an unjust-enrichment claim

seeking restitution as a remedy is a cause of action independent of contract and tort—and therefore not barred by the GTLA—because it is neither a tort action nor a contract action, both of which seek compensatory damages (MCL 691.1401 *et seq*.).

Henneke, Fraim & Dawes, PC (by *Scott R. Fraim* and *Brandon S. Fraim*) for the Genesee County Drain Commissioner.

Plunkett Cooney (by *Mary Massaron*, *Josephine A. Delorenzo*, and *Hilary A. Ballentine*) for Genesee County.

Amici Curiae:

Clark Hill, PLC (by *Christopher M. Trebilcock* and *Robert N. Dare*) for the city of Flint.

Kickham Hanley PLLC (by *Gregory D. Hanley* and *Jamie Warrow*) for *Kickham Hanley PLLC*.

MCCORMACK, C.J. In this case, we consider whether a claim for unjust enrichment is barred by the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. A claim for unjust enrichment is neither a tort nor a contract but rather an independent cause of action. And the remedy for unjust enrichment is restitution—not compensatory damages, the remedy for tort. For both reasons, the GTLA does not bar an unjust-enrichment claim.

I. FACTS AND PROCEDURAL HISTORY

Defendant Genesee County served as an administrator for certain employee health insurance plans. Plaintiff Genesee County Drain Commissioner Jeffrey Wright[1] participated in this plan even though the office

[1] The plaintiff's first complaint listed 23 additional individuals and municipalities as plaintiffs, but they are no longer involved in this case.

of drain commissioner has statutory autonomy from the county. See MCL 46.173. The parties' insurer, Blue Cross Blue Shield of Michigan (BCBSM), conducted a multi-year audit that revealed that the county's collective insurance premiums, including those paid by the plaintiff, significantly exceeded the amount that should have been charged. The county held a public meeting about the overpayment—allegedly totaling millions of dollars—during which it accepted a refund from BCBSM. The county deposited the refund into its general fund.[2] The plaintiff demanded a proportionate share of the refund; the county denied his request, and this lawsuit followed.

The plaintiff's first complaint included claims based in contract and tort (specifically, conversion and fraud). The county moved for summary disposition under MCR 2.116(C)(7) and (8). The trial court held that (1) because of the six-year statute of limitations for breach-of-contract actions in MCL 600.5807, the plaintiff's damages were limited to those that accrued after October 24, 2005, and (2) the GTLA did not bar the plaintiff's tort claims. The Court of Appeals affirmed in part and reversed in part. The panel agreed with the

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All references in this opinion to "the plaintiff" are to Wright only. The first complaint also listed the Genesee County Board of Commissioners as a defendant, but the plaintiff's second amended complaint dropped the board as a defendant.

[2] A "general fund" is "[a] government's primary operating fund; a state's assets furnishing the means for the support of government and for defraying the legislature's discretionary appropriations." *Black's Law Dictionary* (10th ed), p 788. "A general fund is distinguished from assets of a special character[.]" *Id*. Money in a general fund is to consist of funds raised by a governmental unit "for the conduct of government and for governmental purposes, and not those funds . . . which incidentally fall into the hands of some governmental agent, while such agent is performing his lawful functions." *Pokorny v Wayne Co*, 322 Mich 10, 15; 33 NW2d 641 (1948).

trial court's holding on the contract claim but concluded that the plaintiff's intentional-tort claims were barred by the GTLA. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317, 334; 869 NW2d 635 (2015).

The plaintiff then amended his complaint to add an unjust-enrichment claim, alleging that the county had "wrongfully and unjustly retained a portion of the refunds under the [BCBSM] Plan that belong to [the plaintiff]," that the county "is not entitled to retain [the plaintiff's] portion of the refunds," that the county had been "unjustly enriched" by its wrongful retention of the plaintiff's portion, and that it would be inequitable for the county to retain the plaintiff's portion.

The county again moved for summary disposition, arguing that the plaintiff's unjust-enrichment claim was also barred by the GTLA. The trial court denied the motion, and the Court of Appeals affirmed. *Genesee Co Drain Comm'r v Genesee Co*, 321 Mich App 74; 908 NW2d 313 (2017). The panel concluded that the GTLA did not apply because "a claim based on the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability." *Id*. at 78. The defendant then sought leave to appeal in this Court. We directed the Clerk to schedule oral argument on the application and ordered the parties to address "whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment was not subject to governmental immunity under the [GTLA], see *In re Bradley Estate*, 494 Mich 367 [835 NW2d 545] (2013), because it was based on the equitable doctrine of implied contract at law." *Genesee Co Drain Comm'r v Genesee Co*, 501 Mich 1086 (2018).

II. THE GTLA AND *IN RE BRADLEY ESTATE*

Whether governmental immunity applies under the GTLA is a question of law that we review de novo on

appeal. *Ray v Swager*, 501 Mich 52, 61; 903 NW2d 366 (2017). We review grants and denials of summary disposition de novo too. *Id*. at 61-62. De novo review means that we review the legal issue independently, without required deference to the courts below. *People v Bruner*, 501 Mich 220, 226; 912 NW2d 514 (2018).

The GTLA provides governmental agencies and their employees with immunity from tort liability when engaged in the exercise of governmental functions. *Ray*, 501 Mich at 62. MCL 691.1407(1) states, "Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function."

In *In re Bradley Estate*, 494 Mich 367, this Court held that an action for civil contempt seeking compensatory damages against the respondent sheriff's department was barred by the GTLA. The Court reasoned that "the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a remedy may be obtained in the form of compensatory damages." *Id*. at 371. Thus, at least two categories of claims are not barred by the GTLA: those seeking compensatory damages for breach of contract and claims seeking a remedy other than compensatory damages.

III. RESTITUTION AND UNJUST ENRICHMENT

A. GENERAL PRINCIPLES

Unjust enrichment is a cause of action to correct a defendant's unjust retention of a benefit owed to another. Restatement Restitution, 1st, § 1, comment *a*, p 12. It is grounded in the idea that a party "shall not be allowed to profit or enrich himself inequitably at

another's expense." *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (quotation marks and citation omitted). A claim of unjust enrichment can arise when a party "has and retains money or benefits which in justice and equity belong to another." *Id*. (quotation marks and citation omitted).

The remedy for unjust enrichment is restitution. See, e.g., *Kammer Asphalt Paving Co, Inc v East China Twp Sch*, 443 Mich 176, 185; 504 NW2d 635 (1993) ("[U]nder the equitable doctrine of unjust enrichment, '[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other.' "), quoting Restatement Restitution, 1st, § 1, p 12 (second alteration in original); *City Nat'l Bank of Detroit v Westland Towers Apartments*, 413 Mich 938, 938 (1982) (discussing "equitable recovery on the claim of unjust enrichment"); 2 Restatement Restitution & Unjust Enrichment, 3d, § 49, p 176 ("A claimant entitled to restitution may obtain a judgment for money in the amount of the defendant's unjust enrichment.").[3]

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[3] Restitution can refer both to liabilities and to remedies, leading to misunderstanding about its correct meaning in some contexts. See 1 Restatement Restitution & Unjust Enrichment, 3d, § 1, comment *e*, p 8. This confusion has a likely historical cause: in the centuries before the Restatement, "[s]o long as legal obligations were classified by the procedures available to enforce them, what we now call restitution did not need an underlying theory of liability." *Id*. at § 4, comment *b*, p 29. Today, references to restitution are most common in the remedial context, such as statutes requiring a criminal defendant to pay a victim of his or her crime. See, e.g., MCL 780.766(2). When restitution refers to a cause of action, "[t]he restitutionary remedies and unjust enrichment are simply flip sides of the same coin" because "[t]he generative purpose of a restitutionary remedy is the prevention of unjust enrichment." *Alternatives Unlimited, Inc v New Baltimore City Bd of Sch Comm'rs*, 155 Md App 415, 454; 843 A2d 252 (2004). See also 1 Restatement Restitution & Unjust Enrichment, 3d, § 4, comment *b*, p 29 (explaining that the first Restatement of Restitution, in 1937, adopted the view "that liabilities and remedies drawn from law on the one hand, and

Contrast this with tort and contract. In a tort action, an injured party may seek damages for an injury caused by the breach of a legal duty. *Wilson v Bowen*, 64 Mich 133, 141; 31 NW 81 (1887). The remedy for the breach is compensatory damages. That is, the defendant compensates the injured party for the injury caused by the defendant's wrongful conduct. *State Farm Mut Auto Ins Co v Campbell*, 538 US 408, 416; 123 S Ct 1513; 155 L Ed 2d 585 (2003); *Rafferty v Markovitz*, 461 Mich 265, 271; 602 NW2d 367 (1999).

In a breach-of-contract action, an injured party may seek damages for an injury caused by another party's breach of a contractual obligation. As in tort, the remedy for the breach may be compensatory damages. Am Jur Legal Forms 2d, § 83:2. That is, remedies are "those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Kewin v Massachusetts Mut Life Ins Co*, 409 Mich 401, 414-415; 295 NW2d 50 (1980), citing 5 Corbin, Contracts, § 1007.

Unjust enrichment, by contrast, doesn't seek to compensate for an injury but to correct against one party's retention of a benefit at another's expense. And the correction, or remedy, is therefore not compensatory damages, but restitution. Restitution restores a party who yielded excessive and unjust benefits to his or her rightful position. 1 Restatement Restitution & Unjust Enrichment, 3d, § 1, comments *d* & *e*, pp 7-10.

Beyond the differences in remedy, unjust enrichment is a cause of action independent of tort and contract liability. Therefore, the plaintiff's claim for unjust enrichment is not a tort action seeking compensatory damages. And neither is it a contract action

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equity on the other, were best understood and described as components of a unified law of unjust enrichment").

seeking compensatory damages. See, e.g., 1 Restatement Restitution & Unjust Enrichment, 3d, § 1, comment *a*, p 3 ("The identification of unjust enrichment as *an independent basis of liability* in common-law legal systems—*comparable* in this respect to a liability in contract or tort—was the central achievement of the 1937 Restatement of Restitution.") (emphasis added); see also *Schirmer v Souza*, 126 Conn App 759, 765; 12 A3d 1048 (2011) (stating that "the doctrine of unjust enrichment is grounded in the theory of restitution, not in contract theory").

B. HISTORICAL CONTEXT

Unjust enrichment's historical roots help make sense of its modern identity. It has a long jurisprudential pedigree marking its development into an independent action with a restitutionary remedy. At the King's Bench, Lord Mansfield described the rationale behind unjust enrichment:

> In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. [*Moses v Macferlan*, 97 Eng Rep 676, 681; 2 Burr 1005 (KB, 1760).]

Before 1938, when the United States Supreme Court adopted the Federal Rules of Civil Procedure abolishing the division between law and equity, unjust-enrichment claims, though ascribed different labels, proceeded in both courts of law and equity.[4] See, e.g., Murphy, *Misclassifying Modern Restitution*,

[4] At the end of the nineteenth century, some legal scholars began to recognize that obligations considered quasi-contractual shared an underlying rationale with some equitable remedies in that both sought to repair an unjust enrichment. These ideas developed into the unified law

55 SMU L Rev 1577, 1599 (2002) (recognizing that "[b]oth the law courts and the equity courts entertained actions that were based on restitutionary principles"); see also *Livingston v Krown Chem Mfg, Inc*, 394 Mich 144, 147-150; 229 NW2d 793 (1975) (discussing the history of the distinction between legal and equitable claims). Claims of law included actions seeking a money judgment, such as for money had and received, money paid, quantum meruit, and quantum valebat.[5] 1 Dobbs, Law of Remedies (2d ed), § 4.1(1), p 556 (stating that "restitution claims for money are usually claims 'at law' "); see also *Misclassifying Modern Restitution*, 55 SMU Law Rev at 1600 (stating that "[t]he actions for money had and received, money paid, quantum meruit, and quantum valebat eventually were catalogued under the rubric of 'quasi-contract,' but it is important to appreciate that these actions were not based on principles of contract, but rather on principles of unjust enrichment" and that "[t]he 'quasi-contract' label apparently resulted from the fact that these actions developed in assumpsit, where contractual actions also developed"). These claims included an action for assumpsit and were quasi-contractual. Quasi-contract doctrine is itself a subset of the law of unjust enrichment. See Dobbs, § 4.2(3), pp 579-581.

By contrast, unjust-enrichment claims based in equity involved remedies other than money judgments, including the establishment of constructive trusts, equitable liens, subrogation, and accounting. Dobbs,

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of unjust enrichment and were adopted into the 1937 Restatement of Restitution. 1 Restatement Restitution & Unjust Enrichment, 3d, § 4, comment *b*, p 29.

[5] Limited exceptions to this general rule existed, such as when the money sought to be recovered was taken by abuse of a fiduciary or confidential relationship. See, e.g., *Cigna Corp v Amara*, 563 US 421, 439; 131 S Ct 1866; 179 L Ed 2d 843 (2011).

§ 4.3(1), pp 587-589; see also *Boden v Renihan*, 299 Mich 226, 235-236; 300 NW 53 (1941) (discussing constructive trusts and accounting as remedies for suits brought in equity). Thus, while all quasi-contract is premised on unjust enrichment, not all unjust enrichment is quasi-contract.

Unjust enrichment has evolved from a category of restitutionary claims with components in law and equity into a unified independent doctrine that serves a unique legal purpose: it corrects for a benefit received by the defendant rather than compensating for the defendant's wrongful behavior. Both the nature of an unjust-enrichment action and its remedy—whether restitution at law or in equity—separate it from tort and contract.

C. APPLICATION

The plaintiff claims that the county deposited money belonging to the plaintiff, among others, into its general fund, thereby enriching itself at the plaintiff's expense. Because the county's gain was unjust, the plaintiff seeks restitution through a claim of unjust enrichment. That claim would correct for the unfairness flowing from the county's "benefit received"—its unfair retention of the plaintiff's money, rather than for injury flowing from the county's "civil wrong"; the claim thus would impose no tort (or contract) liability. And the GTLA therefore does not bar it.

To the extent that *In re Bradley Estate* implied that tort liability encompassed noncontractual liability without qualification, our decision overstated the scope of "tort liability." But *Bradley* did not contemplate an action like this one, alleging liability not from a "civil wrong," but rather from a "benefit received."[6] In sum,

[6] Because the only issue in *In re Bradley Estate* was whether the GTLA barred the petition for indemnification damages for *civil con-*

the plaintiff's unjust-enrichment claim is based on the county's unjust benefit received—outside the scope of "civil wrongs."

And *In re Bradley Estate* is not an obstacle for the plaintiff for another reason. The plaintiff does not seek compensatory damages, but restitution. This Court's application of the GTLA in *In re Bradley Estate* depended on the understanding that the petitioner's civil-contempt petition sought compensatory damages for an injury:

> If [an] action permits an award of damages to a private party *as compensation for an injury* caused by the noncontractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable. [*In re Bradley Estate*, 494 Mich at 389 (emphasis added).]

Thus, our holding in *In re Bradley Estate* simply did not address an action like this one in which the plaintiff is seeking restitution for a benefit unfairly retained by the county, rather than compensatory damages for an injury. Because the plaintiff's unjust-enrichment claim is not a tort in name or in substance, the GTLA does not apply.

IV. CONCLUSION

Because unjust enrichment sounds in neither tort nor contract and seeks restitution rather than compen-

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tempt, its broader statement that " 'tort liability' as used in . . . the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract," *In re Bradley Estate*, 494 Mich at 371, was obiter dictum because it was unnecessary to decide the case once the Court held that "a civil contempt petition seeking indemnification damages under MCL 600.1721" was barred by the GTLA, *id*. at 393. But because the plaintiff's claim is not barred by the GTLA for alternative reasons, as discussed below, and no party asks us to overrule *In re Bradley Estate*, we do not engage this point further.

satory damages—the GTLA does not bar the plaintiff's claim. We affirm the judgment of the Court of Appeals.

VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

MARKMAN, J. (*concurring in the result*). The issue here is whether plaintiff Genesee County Drain Commissioner Jeffrey Wright's claim for unjust enrichment seeks to impose "tort liability" on defendant Genesee County for the purposes of MCL 691.1407(1) of the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. I agree with the majority that the unjust-enrichment claim here does not seek to impose tort liability so defendant is not entitled to governmental immunity as to that claim. However, I respectfully disagree with its interpretation and application of *In re Bradley Estate*, 494 Mich 367; 835 NW2d 545 (2013). Accordingly, while I concur with the result reached by the majority, I differ as to its reasons for reaching that result.

I. FACTS AND HISTORY

Plaintiff alleges that at the time relevant to this case plaintiff[1] and defendant[2] jointly purchased group health insurance from Blue Cross Blue Shield of Michigan (BCBS).[3] Both plaintiff and defendant paid

[1] The other plaintiffs, various municipalities and individuals, are not involved in this appeal. Any reference in this concurrence to "plaintiff" is exclusively to Genesee County Drain Commissioner Jeffrey Wright.

[2] Defendant Genesee County Board of Commissioners is not involved in this appeal. Any reference in this concurrence to "defendant" is exclusively to Genesee County.

[3] The record is unclear concerning the details of the contractual relationship between plaintiff, defendant, and BCBS. Plaintiff's counsel

premiums to BCBS for which BCBS provided health-care coverage to both plaintiff and defendant. However, unbeknownst to plaintiff, BCBS annually refunded to defendant the amount by which the premiums paid by both plaintiff and defendant exceeded the amount necessary to pay the costs of providing the coverage, and defendant placed these refunds in its general fund. When plaintiff later discovered that the excess premiums had been refunded to defendant, he sued defendant in October 2011 to recover his office's share. His claims included a contract claim and various intentional-tort claims, including conversion.

Defendant ultimately moved for summary disposition of the intentional-tort claims, as well as partial summary disposition of the contract claim to the extent that the damages sought extended beyond the six-year period of limitations. See MCL 600.5807. The trial court denied the motion for summary disposition of the intentional-tort claims and granted the motion for partial summary disposition of the contract claim. The parties then appealed the respective adverse rulings in the Court of Appeals, which affirmed in part and reversed in part. *Genesee Co Drain Comm'r v Genesee Co*, 309 Mich App 317; 869 NW2d 635 (2015). Concerning the intentional-tort claims, that court held that because "the Legislature did not include intentional torts in the GTLA's stated exceptions," "plaintiffs' intentional tort claims against defendant must be dismissed . . . ." *Id*. at 331-332. And concerning the contract claim, the court held that "plaintiffs have not come close to making a case for equitable estoppel to negate application of the statute of limitations under

represented at a motion hearing that "[a]ctually going back we're able to identify [that] it seems like the '70s is when this [relationship] was established."

MCL 600.5807." *Id*. at 333. Accordingly, the Court of Appeals reversed the trial court's denial of summary disposition with respect to the intentional-tort claims, affirmed the trial court's grant of partial summary disposition with respect to the contract claim, and remanded to the trial court for further proceedings. *Id*. at 334.

Following remand, plaintiff moved to add a claim for unjust enrichment. In particular, he alleged that "[d]ue to Genesee County's wrongful retention of the Genesee County Drain Commissioner's portion of the refunds, Genesee County has been unjustly enriched." In response, defendant moved for summary disposition of that claim, arguing that it was barred by governmental immunity because it effectively constituted a claim for conversion, fraud, or a similar tort. The trial court denied defendant's motion, and defendant again appealed in the Court of Appeals, which affirmed the trial court's order. *Genesee Co Drain Comm'r v Genesee Co*, 321 Mich App 74; 908 NW2d 313 (2017). The Court stated that under the doctrine of unjust enrichment, " 'the law will *imply a contract* to prevent unjust enrichment only if the defendant has been unjustly or inequitably enriched at the plaintiff's expense.' " *Id*. at 78, quoting *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006). The Court then concluded that "a claim based on the equitable doctrine of unjust enrichment ultimately involves contract liability, not tort liability" and that such a claim is "not barred by the GTLA." *Id*. Defendant subsequently sought leave to appeal in this Court, and we directed the Clerk to schedule oral argument on the application and ordered the parties to address "whether the Court of Appeals erred in holding that the plaintiff's claim of unjust enrichment was not subject to governmental immunity under the [GTLA], see *In re Bradley Estate*,

494 Mich 367 (2013), because it was based on the equitable doctrine of implied contract at law." *Genesee Co Drain Comm'r Jeffrey Wright v Genesee Co*, 501 Mich 1086 (2018).

II. STANDARDS OF REVIEW

"The applicability of governmental immunity is a question of law that this Court reviews de novo on appeal." *Beals v Michigan*, 497 Mich 363, 369; 871 NW2d 5 (2015). Moreover, we "review[] de novo a trial court's decision on a motion for summary disposition." *Bazzi v Sentinel Ins Co*, 502 Mich 390, 398; 919 NW2d 20 (2018).

III. ANALYSIS

A. GOVERNMENTAL IMMUNITY

"In 1964, the Legislature enacted [the] GTLA 'to make uniform the liability of municipal corporations, political subdivisions, and the state, its agencies and departments, when engaged in a governmental function.' " *Yono v Dep't of Transp*, 499 Mich 636, 645-646; 885 NW2d 445 (2016), quoting 1964 PA 170, title. MCL 691.1407(1) of the GTLA provides as follows:

> Except as otherwise provided in this act, a governmental agency is immune from *tort liability* if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed. [Emphasis added.]

Thereafter, in *Bradley Estate*, 494 Mich at 371, we held that " 'tort liability' as used in MCL 691.1407(1) of the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract, for which a

remedy may be obtained in the form of compensatory damages." Concerning the word "tort," we reasoned that "a 'tort' is an act that has long been understood as a civil wrong that arises from the breach of a legal duty other than the breach of a contractual duty." *Id*. at 381. "For example, English common-law courts have for centuries recognized a civil wrong as an infringement on private rights belonging to individuals and divided civil wrongs into two categories: those sounding in contract and those sounding in tort." *Id*. We explained that the word "liability" "refers to liableness, i.e., 'the state or quality of being liable.' " *Id*. at 385, quoting *Random House Webster's College Dictionary* (2001). "To be 'liable' means to be 'legally responsible.' " *Bradley Estate*, 494 Mich at 385 (brackets omitted), quoting *Random House Webster's College Dictionary* (2001). Considered together, " 'tort liability' as utilized in MCL 691.1407(1) means all legal responsibility arising from a noncontractual civil wrong for which a remedy may be obtained in the form of compensatory damages." *Bradley Estate*, 494 Mich at 385. We then summarized the following principles for "determining whether a cause of action imposes tort liability for purposes of the GTLA":

> Courts considering whether a claim involves tort liability should first focus on the nature of the duty that gives rise to the claim. If the wrong alleged is premised on the breach of a contractual duty, then no tort has occurred, and the GTLA is inapplicable. However, if the wrong is not premised on a breach of a contractual duty, but rather is premised on some other civil wrong, i.e., some other breach of a legal duty, then the GTLA might apply to bar the claim. In that instance, the court must further consider the nature of the liability the claim seeks to impose. If the action permits an award of damages to a private party as compensation for an injury caused by the non-

> contractual civil wrong, then the action, no matter how it is labeled, seeks to impose tort liability and the GTLA is applicable. [*Id*. at 389.]

Accordingly, we are obligated to apply the principles set forth in *Bradley Estate* to assess whether a claim for unjust enrichment is barred by governmental immunity.[4]

B. UNJUST ENRICHMENT

"This Court has long recognized the equitable right of restitution when a person has been unjustly enriched at the expense of another." *Mich Ed Employees Mut Ins Co v Morris*, 460 Mich 180, 198; 596 NW2d 142 (1999). See also *Buell v Orion State Bank*, 327 Mich 43, 56; 41 NW2d 472 (1950) ("The phrase 'unjust enrichment' is used in law to characterize the result or effect of a failure to make restitution of or for property or benefits received under such circumstances [so] as to give rise to a legal or equitable obligation to account therefor.") (quotation marks and citation omitted).[5] Because unjust enrichment is defined by reference to restitution, I examine the latter concept to give mean-

[4] I recognize that the instant case is somewhat unusual in the sense that both parties are governmental officials or entities, whereas the typical governmental immunity case involves a private party bringing a claim against a governmental official or entity. However, neither party has suggested that this is relevant to the pertinent analysis.

[5] Although we have referred to restitution as an "equitable" right, as explained herein, restitution may sound in either law or equity. The reference to an "equitable" right is best understood as a general reference to fairness under the law and not a reference to "equity" as a legal term of art. See *Alternatives Unlimited, Inc v New Baltimore City Bd of Sch Comm'rs*, 155 Md App 415, 457; 843 A2d 252 (2004) ("The word 'equity' (with its full grammatical paradigm) sometimes has a broadly diluted descriptive usage that ranges far beyond its more limited employment as a jurisdictional term of art.").

ing to the former. That is, to assess whether a claim for unjust enrichment is barred by governmental immunity, the relationship between unjust enrichment and restitution must be considered. The Third Restatement of Restitution and Unjust Enrichment generally discusses those legal doctrines as follows:

> Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant. While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula "at the expense of another" can also mean "in violation of the other's legally protected rights," without the need to show that the claimant has suffered a loss. [1 Restatement of Restitution and Unjust Enrichment, 3d, § 1, p 3.][6]

The word "restitution," in certain cases, may refer to a remedy for tort, see 1 Dobbs, Hayden & Bublick, Torts (2d ed), § 73, at 208 (explaining that a remedy for conversion may consist of a "restitutionary recovery for the gains the defendant made by converting the chattel"), or it may refer to a remedy for breach of contract, see Restatement Contracts, 2d, § 373(1), at 208 ("[O]n a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit

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[6] The Third Restatement proceeds to explain that unjust enrichment is an "independent basis of liability" separate from "contract or tort":

> The identification of unjust enrichment as an independent basis of liability in common-law legal systems—comparable in this respect to a liability in contract or tort—was the central achievement of the 1937 Restatement of Restitution. . . . The use of the word "restitution" to describe the cause of action as well as the remedy is likewise inherited from the original Restatement, despite the problems this usage creates. [Restatement of Restitution and Unjust Enrichment, § 1, p 3.]

that he has conferred on the other party by way of part performance or reliance."). In other instances, however, "restitution" may generally refer to a remedy for the failure to "do justice [under the law]." See *Marsh v Fulton Co*, 77 US 676, 684; 10 Wall 676; 19 L Ed 1040 (1870) ("The obligation to do justice rests upon all persons, natural and artificial, and if a county obtains the money or property of others without authority, the law, independent of any statute, will compel restitution or compensation."). See also Kull, *Restitution as a Remedy for Breach of Contract*, 67 S Cal L Rev 1465, 1478 (1994) ("Restitution . . . explains, for example, the obligation to repay money paid by mistake, or to indemnify a party who has discharged one's own debt; restitution in such cases imposes a liability that cannot be explained by either agreement (contract) or breach of duty (tort)."). This principle of "justice," which refers not only to rights protected by tort and contract law but also to rights protected by the court's sense of "justice under the law," may broadly be referred to as the law of unjust enrichment. See *Tkachik v Mandeville*, 487 Mich 38, 47-48; 790 NW2d 260 (2010) ("Unjust enrichment is defined as the unjust retention of 'money or benefits which in justice and equity belong to another.' "), quoting *McCreary v Shields*, 333 Mich 290, 294; 52 NW2d 853 (1952) (quotation marks omitted).[7]

" '[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for the plaintiff's claim' and the

[7] See also *Dep't of Human Servs ex rel Palmer v Unisys Corp*, 637 NW2d 142, 154 (Iowa, 2001) ("The doctrine of unjust enrichment serves as a basis for restitution. It may arise from contracts, torts, or other predicate wrongs, or it may also serve as independent grounds for restitution in the absence of mistake, wrongdoing, or breach of contract.") (citation omitted).

nature of the underlying remedies sought." *Great-West Life & Annuity Ins Co v Knudson*, 534 US 204, 213; 122 S Ct 708; 151 L Ed 2d 635 (2002) (brackets omitted), quoting *Reich v Continental Cas Co*, 33 F3d 754, 756 (CA 7, 1994). "In cases in which the plaintiff 'could *not* assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him,' the plaintiff had a right to restitution *at law* through an action derived from the common-law writ of assumpsit." *Great-West Life & Annuity*, 534 US at 213, quoting 1 Dobbs, Remedies (2d ed), § 4.2(1), p 571.[8] On the other hand, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity*, 534 US at 213. "But where 'the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general

[8] This Court has similarly observed that assumpsit constitutes an action at law. See *Hafner v A J Stuart Land Co*, 246 Mich 465, 470; 224 NW 630 (1929) ("Had [plaintiffs] sued at law, after rescission by their own act, recovery would be in assumpsit, as for money had and received, on the theory that those defendants to whom money had been paid held it for plaintiffs under implied promise to pay."). Courts of other states have similarly concluded that assumpsit is an action at law. See, e.g., *Scottsbluff v Waste Connections of Nebraska, Inc*, 282 Neb 848, 858; 809 NW2d 725 (2011) ("All quasi-contract claims developed out of the assumpsit form of action, which a party brought in a court of law. So we hold that any quasi-contract claim for restitution is an action at law.") (citations omitted); *Jones v Mackey Price Thompson & Ostler*, 355 P3d 1000, 1012 n 32; 2015 UT 60 (2015) ("The appropriate proceeding in an action at law for the payment of money by way of restitution is . . . in States retaining common law forms of action, an action of general assumpsit . . . .") (quotation marks and citations omitted).

creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the defendant.' " *Id*. at 213-214 (brackets omitted), quoting Restatement of Restitution, § 215, comment *a*, p 867. In short, restitution is a somewhat amorphous term that can refer in particular circumstances to a remedy for a tort, a remedy for a breach of contract, a remedy that sounds in law, or a remedy that sounds in equity. To resolve the instant case, I would assess the specific nature of the remedy that is implicated by plaintiff's unjust-enrichment claim.

Here, plaintiff has not alleged that the excess-premium refunds remain in the possession of defendant, and he has not sought equitable relief, such as a constructive trust. Rather, plaintiff has only sought a money judgment, the hallmark of restitution at law. Consequently, the relevant framework is restitution at law through assumpsit. " 'Assumpsit' is defined as '**1.** An express or implied promise, not under seal, by which one person undertakes to do some act or pay something to another <an assumpsit to pay a debt>. **2.** A common-law action for breach of such a promise or for breach of a contract.' " *Fisher Sand & Gravel Co v Neal A Sweebe, Inc*, 494 Mich 543, 564; 837 NW2d 244 (2013), quoting *Black's Law Dictionary* (9th ed), p 142. "With the adoption of the General Court Rules in 1963, assumpsit as a form of action was abolished." *Fisher Sand & Gravel Co*, 494 Mich at 564. "But notwithstanding the abolition of assumpsit, the substantive remedies traditionally available under assumpsit were preserved[.]" *Id*.

"Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract or it may be a general assumpsit upon a promise or contract *implied by law*." *Kristoffy v Iwanski*, 255 Mich 25, 28; 237 NW 33 (1931) (emphasis

added).[9] As further noted in 1 Palmer, The Law of Restitution (1978), § 1.2, p 7, an implied-in-law contract became commonly known as a "quasi-contract":

> [A] promise to pay money was "implied" as a means of allowing recovery in *assumpsit* for money paid by mistake, where there was no element of actual contract, and the development of quasi contract had begun. The fiction of a contract was being used to allow recovery in a contract form of action, and in retrospect the reason for doing so was to deprive the defendant of an unjust enrichment. [Citation omitted.]

" 'The right to bring this action [in assumpsit] for money exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential.' " *Mich Ed Employees Mut Ins Co*, 460 Mich at 198, quoting *Hoyt v Paw Paw Grape Juice Co*, 158

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[9] Assumpsit may also be brought upon a contract implied in fact. See *Hutchins v Vinkemulder*, 187 Mich 676, 681; 154 NW 80 (1915) ("Where a duty arises from the relation of the parties, there is ordinarily a promise, either implied in fact or created by operation of law, to perform that duty, and upon the breach of which an action of assumpsit may be maintained under proper pleadings."). There is a difference between an implied-in-law contract and an implied-in-fact contract, as this Court explained in *Cascaden v Magryta*, 247 Mich 267, 270; 225 NW 511 (1929):

> There are two kinds of implied contracts: one implied in fact, and the other implied in law. The first does not exist unless the minds of the parties meet, by reason of words or conduct. The second is *quasi* or constructive, and does not require a meeting of minds, but is imposed by fiction of law, to enable justice to be accomplished, even in case no contract was intended.

"A contract is implied in fact where the intention as to it is not manifested by direct or explicit words between the parties, but is to be gathered by implication or proper deduction from the conduct of the parties, language used or things done by them, or other pertinent circumstances attending the transaction." *Erickson v Goodell Oil Co, Inc*, 384 Mich 207, 212; 180 NW2d 798 (1970).

Mich 619, 626; 123 NW 529 (1909) (emphasis omitted). Elaborating on assumpsit, *Hoyt* stated:

> It is an equitable action, and can be maintained in all cases for money which in equity and good conscience belongs to the plaintiff.
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> * * *
>
> We understand the law to be well settled that the action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money, which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover; and that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action. [*Hoyt*, 158 Mich at 626 (quotation marks and citations omitted).][10]

Furthermore, the common law recognized a distinction between actions in assumpsit and tort, even when the conduct at issue might sustain both actions. For example, "[a]t common law, one might waive tort and sue in assumpsit in case the tort arose out of contract relations between the parties or the tort consisted of a conversion of plaintiff's property into money or money's worth." *Nelson & Witt v Texas Co*, 256 Mich 65, 71; 239 NW 289 (1931). That is, when

> the defendant has converted property of the plaintiff into money or money's worth, the plaintiff may waive the tort, and sue in assumpsit, treating the sale as made on his behalf. So, where defendant holds possession of property by virtue of contract relations with plaintiff, and converts

[10] Notwithstanding several references to "equity" in *Hoyt*, assumpsit remains an action at law. See note 8 of this opinion.

> such property, the plaintiff may, at his election, proceed in assumpsit. These are the only cases in which the plaintiff has election, under the common law. [*Janiszewski v Behrmann*, 345 Mich 8, 38-39; 75 NW2d 77 (1956) (quotation marks and citations omitted).]

There is thus a clear distinction between tort actions and actions in assumpsit—actions in assumpsit are premised on a contractual relationship, actual or implied, while tort actions are not. See, e.g., *Kristoffy*, 255 Mich at 28 ("Assumpsit may be upon an express contract or promise, or for nonperformance of an oral or simple written contract, or it may be a general assumpsit upon a promise or contract implied by law."); *Albee v Schmied*, 250 Mich 270, 271-272; 230 NW 146 (1930) ("The demand here, the tort having been waived, is in assumpsit, as upon promise and on contract. . . . The evidence must establish the tort although *the action is in contract*.") (emphasis added); *Old Ben Coal Co v Universal Coal Co*, 248 Mich 486, 493; 227 NW 794 (1929) ("The declaration is in assumpsit claiming damages for breach of contract. It is *an action ex contractu*, in contract, and arising upon contract.") (emphasis added).

To summarize, when a party has been unjustly enriched—by a tort, contract breach, or simply by an inequity that the courts are prepared to recognize—the other party is entitled to restitution. Furthermore, when such a remedy sounds in law and seeks to impose a contract implied in law, the proper framework of that remedy is the traditional framework of assumpsit.

With these principles in mind, I return to *Bradley Estate*. As noted previously, in *Bradley Estate*, 494 Mich at 389, this Court stated that the initial inquiry as to GTLA tort-liability claims is whether "the wrong alleged is premised on the breach of a contractual duty . . . ." This, I believe, is tantamount to asking whether the wrong alleged is premised on a contrac-

tual relationship. In the instant case, plaintiff's claim for unjust enrichment seeks restitution in the form of money damages and does not seek restitution in equity. Therefore, the claim seeks restitution at law on the basis of an implied-in-law contract, which, as explained, is premised on the common-law action of assumpsit. *Great-West Life & Annuity Ins Co*, 534 US at 213. And as also explained, the common-law action of assumpsit is premised on a contractual relationship, whether actual or implied. Accordingly, I agree with the Court of Appeals that plaintiff's claim for unjust enrichment is premised on a contractual relationship and that the claim therefore is not barred by governmental immunity. And as a result, there is no need to address whether *every* claim for unjust enrichment is or is not barred by governmental immunity. That is, it need not be addressed on this occasion whether all claims for unjust enrichment that are not grounded in the common-law action of assumpsit, or are not premised on contractual relationships, are barred by governmental immunity.[11]

IV. RESPONSE TO THE MAJORITY

Although I agree with the majority that the Court of Appeals should be affirmed, for the reasons set forth in this opinion, I disagree with the majority's attempt to limit the scope of *Bradley Estate* by concluding that an unjust-enrichment claim is not governed by the contract/tort civil-wrong dichotomy laid out in that case.

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[11] In *Kammer Asphalt Paving Co, Inc v East China Twp Sch*, 443 Mich 176, 187; 504 NW2d 635 (1993), we allowed the plaintiff subcontractor's claim for unjust enrichment to proceed against the defendant school district, explaining that "reasonable minds could find that defendant was unjustly enriched." Although we did not address the issue of governmental immunity in *Kammer Asphalt*, the analysis and result in that case are consistent with the position reached here.

First, the majority asserts that "the plaintiff's unjust-enrichment claim is . . . outside the scope of 'civil wrongs' " under *Bradley Estate*. I disagree that unjust enrichment can be removed from the contract/tort civil-wrong dichotomy under *Bradley Estate*. Therein, we explained that " '[i]t is customary in the law to arrange the wrongs for which individuals may demand legal redress into two classes: the first embracing those which consist in a mere breach of contract, and the second those which arise independent of contract.' " *Bradley Estate*, 494 Mich at 383 n 34, quoting Cooley, A Treatise on the Law of Torts (2d ed, 1888), p 2. The second type of wrong, we explained, sounds in tort. See *id*. at 384 ("[When] a party breaches a duty stemming from a legal obligation, other than a contractual one, the claim sounds in tort."). And 1 Restatement of Restitution and Unjust Enrichment, 3d, § 1, comment *a*, p 3 observes that "[w]hile the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula 'at the expense of another' can also mean '*in violation of the other's legally protected rights*' without the need to show that the claimant has suffered a loss." (Emphasis added.) As a result, when a claim for unjust enrichment is one grounded upon a " 'violation of [one's] legally protected rights,' " *id*., unjust enrichment is a "wrong[] for which individuals may demand legal redress," Cooley, p 2, under *Bradley Estate*. It follows that such a wrong either sounds in contract or in tort under *Bradley Estate*; the case leaves no leeway for such a wrong to be categorized as sounding entirely in something else; rather, a binary analysis was straightforwardly defined, but that analysis is now confused and unsettled by the majority's holding in this case.

Second, the majority asserts that the statement in *Bradley Estate*, 494 Mich at 371, that " 'tort liability' as

used in . . . the GTLA encompasses all legal responsibility for civil wrongs, other than a breach of contract" was merely obiter dictum "because it was unnecessary [therein] to decide the case once the Court held that 'a civil contempt petition seeking indemnification damages under MCL 600.1721' was barred by the GTLA[.]" Again, I disagree. While " '[i]t is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta and lack the force of an adjudication,' " *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 558; 25 NW2d 613 (1947), quoting *People v Case*, 220 Mich 379, 382-383; 190 NW2d 289 (1922), the identification of "contract" and "tort" as the two exclusive types of "civil wrongs" was, in my judgment, entirely necessary in the course of determining that the civil-contempt petition in *Bradley Estate* seeking indemnification damages did not seek contract liability and thus sought "tort liability" under the GTLA.[12]

Third, the majority states that "our holding in *In re Bradley Estate* simply did not address an action like this one in which the plaintiff is seeking restitution for a benefit unfairly retained by the county, rather than compensatory damages for an injury." Therefore, the majority reasons that "tort liability" under *Bradley Estate* is limited to cases in which the plaintiff seeks compensatory damages for an injury and here, because plaintiff is seeking restitution, the GTLA does not bar the claim. Again, I disagree. While I appreciate that *Bradley Estate* refers to "compensatory damages" as

[12] Indeed, if the quoted portion of *Bradley Estate* was dictum, the fact that "no party asks us to overrule *In re Bradley Estate*" would be of no moment, contrary to the emphasis given this point by the majority.

one of the hallmarks of a tort, as explained previously, the remedy for tortious conversion may consist of a "restitutionary recovery for the gains the defendant made by converting the chattel." 1 Dobbs, Hayden & Bublick, Torts (2d ed), § 73, p 208. Even though plaintiff here only seeks such a restitutionary remedy for tortious conversion, his claim nonetheless sounds in tort despite his failure to request compensatory damages.[13] The failure to seek compensatory damages and instead to seek a restitutionary remedy, which in many cases will be similar if not identical to a compensatory-damages remedy, cannot properly establish the sole ground for removing a claim from within the scope of "tort liability" in *Bradley Estate*.

Fourth, while I agree with much of the majority's thorough discussion of the law of unjust enrichment and restitution, I disagree with its conclusion that a claim for unjust enrichment is not governed by the contract/tort civil-wrong dichotomy of *Bradley Estate*. "[A] 'central purpose' of governmental immunity is 'to prevent a drain on the state's financial resources, by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity.' " *Costa v Community Emergency Med Servs, Inc*, 475 Mich 403, 410; 716 NW2d 236 (2006), quoting *Mack v Detroit*, 467 Mich 186, 203 n 18; 649 NW2d 47 (2002). If this Court now embarks upon the course of disregarding the contract/tort civil-wrong dichotomy by concluding that unjust enrichment stands apart from this dichotomy because it is not a "civil wrong," it establishes for future claims against public defendants

[13] As noted previously, the Court of Appeals determined at an earlier stage of the proceedings that plaintiff's conversion claim sought to impose "tort liability" under the GTLA, and that ruling is not presently at issue.

a very distinctive and uncertain legal premise allowing this Court more readily to conclude that other forms of nontraditional tort claims also stand apart from the *Bradley Estate* framework. And thus the majority (1) effectively diminishes this Court's decision in *Bradley Estate* while elevating the stature of its dissents, unsettling and confusing the law without, as appears to be its inclination, straightforwardly reversing the decision; (2) incentivizes litigation that will explore the new boundaries of the GTLA; and (3) imposes greater litigative costs on public defendants that will erode the primary legislative purpose of that act—all in support of the same result that would have adhered had the majority treated *Bradley Estate* as the legitimate precedent that it is. In place of a principled (and in my judgment, a correct) interpretation of "tort liability" in MCL 691.1407(1) in *Bradley Estate*, the majority introduces ambiguity and future judicial decision-making of an ad hoc character.

V. CONCLUSION

Unjust-enrichment and restitution claims that are premised on a contractual relationship are not barred by the GTLA. In the instant case, plaintiff's claim for unjust enrichment seeks restitution as a legal remedy in the form of money damages. His claim is premised on a contractual relationship, actual or implied, with defendant. Because such a claim against a governmental agency is not barred by the GTLA, plaintiff's specific unjust-enrichment claim is not barred. Accordingly, I concur with the majority's decision to affirm the Court of Appeals, albeit on significantly different grounds.

ZAHRA, J., concurred with MARKMAN, J.

PEOPLE v HAMMERLUND

Docket No. 156901. Argued on application for leave to appeal April 24, 2019. Decided July 23, 2019.

Jennifer M. Hammerlund was charged in the Kent Circuit Court with operating while intoxicated, third offense, MCL 257.625; and failing to report an accident resulting in damage to fixtures, MCL 257.621, for her involvement in a single-vehicle accident that she did not report to the police. Her abandoned vehicle was discovered by Officer Erich Staman of the Wyoming Police Department, who searched the vehicle, found that it was registered to defendant, and went to her home. According to Staman, he stood on her porch while she remained inside, approximately 15 to 20 feet away from the front door, and they had a short conversation during which defendant admitted to driving the car that caused the damage. When Staman asked defendant to produce her identification, she passed a card to him through a third party in the home. After verifying her information, Staman offered the identification card back to defendant. According to Staman, when defendant came to the door and reached out to take the card, he grabbed her by the arm and attempted to take her into custody for having failed to report her accident. Staman stated that when defendant pulled away, the momentum took him inside the home, where he handcuffed defendant and completed the arrest before taking her to jail. Breath tests administered at the jail indicated that defendant had a blood alcohol content over the legal limit. Defendant filed a pretrial motion to suppress evidence and dismiss the charges, arguing that Officer Staman had violated her Fourth Amendment rights by arresting her inside her home without a warrant and that the evidence gathered following the arrest was subject to the exclusionary rule. The trial court, Paul J. Sullivan, J., denied the motion, ruling that the arrest was constitutionally valid because defendant had voluntarily reached out of her open doorway, which was a public place for Fourth Amendment purposes under *United States v Santana*, 427 US 38 (1976). After a jury trial, defendant was convicted as charged, and she was sentenced to five years' probation and four months in jail for having violated MCL 257.625 and to a concurrent term of 60 days in jail for

having violated MCL 257.621. Defendant appealed, challenging the trial court's denial of her motion to suppress evidence. The Court of Appeals, MURRAY, P.J., and SAWYER and MARKEY, JJ., affirmed, holding that the arrest was constitutional under *Santana* and that the trial court had not erred by denying defendant's motion. *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 333827). Defendant sought leave to appeal in the Supreme Court, which ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1086 (2018).

In an opinion by Justice CAVANAGH, joined by Chief Justice MCCORMACK and Justices VIVIANO, BERNSTEIN, and CLEMENT, the Supreme Court, in lieu of granting leave to appeal, *held*:

Defendant was not subject to public arrest because she remained inside her home, where she maintained her reasonable expectation of privacy. Defendant's act of reaching out to retrieve her identification card did not expose her to the public as if she had been standing completely outside her house under *Santana*, and the circumstances were insufficient to justify the hot-pursuit exception to the warrant requirement. Because the arrest was completed across the Fourth Amendment's firm line at the entrance of the home, it was presumptively unreasonable, and the prosecution failed to overcome this presumption. The Court of Appeals judgment was reversed and the case was remanded to the trial court to consider whether evidence should be suppressed under the exclusionary rule.

1. The Fourth Amendment of the United States Constitution provides that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized. In order to be reasonable, an arrest must be justified by probable cause to believe that an offense has been or is being committed. Even when based on probable cause, however, a warrantless search or seizure inside a suspect's home is presumptively unreasonable, absent exigent circumstances. Warrantless arrests that take place in public upon probable cause do not violate the Fourth Amendment.

2. The officer had probable cause to arrest defendant for failing to report an accident that caused damage to fixtures under MCL 257.621(a), which is a misdemeanor. While probable cause alone may justify a warrantless public arrest, the same is not true

when it comes to arresting a suspect in the suspect's home. Under *Payton v New York*, 445 US 573 (1980), an officer must obtain a warrant or identify exigent circumstances that excuse the warrant requirement before entering a home to make an arrest. In this case, there was no dispute that defendant's arrest was completed inside her home. The lower courts erred by relying on *Santana* to conclude that defendant's Fourth Amendment rights remained intact because—unlike the defendant in *Santana*, who was standing in her open doorway when officers arrived—defendant was not "exposed to public view, speech, hearing, and touch, as if she had been standing completely outside her house." Defendant was never in a public place, and she possessed a reasonable expectation of privacy inside her home that she maintained throughout the encounter. It was unnecessary to determine how far defendant extended her arm or hand over the threshold because a Fourth Amendment analysis does not focus on such arbitrary calculations; the focus remains on determining whether a person sought to preserve his or her reasonable expectation of privacy. Defendant did not surrender her reasonable expectation of privacy when some portion of her hand or arm crossed the threshold to retrieve her property. Instead, her actions manifested an intent to stay inside, and Staman was aware of that intent. Defendant's expectation of privacy within her home was reasonable, and her action of reaching out over the threshold and retrieving her identification did not relinquish that reasonable expectation.

3. When officers have probable cause and exigent circumstances exist, it is reasonable under the Fourth Amendment for officers to enter a home without a warrant. Exigent circumstances exist when an emergency leaves law enforcement with insufficient time to obtain a warrant. While hot pursuit of a fleeing felon is one recognized example of exigent circumstances, there was not a legitimate hot pursuit in this case. It is unclear whether an officer with probable cause to arrest a suspect for a misdemeanor may rely on the hot-pursuit exception to make a warrantless home entry, and there was no suggestion of any emergency that would have entitled the police to enter defendant's home throughout the conversation up to the point when defendant reached out to retrieve her identification. Accordingly, the seizure in this case, which occurred beyond the "firm line at the entrance of the house," was prohibited under *Payton* because it was accomplished without a warrant, without consent, and without any exigent circumstances.

Court of Appeals judgment reversed; case remanded for further proceedings.

Justice ZAHRA, joined by Justice MARKMAN, dissenting, would have held that *Santana* was on point, applicable, and not meaningfully distinguishable from the facts presented in this case, given its holding that the doorway of one's residence is considered a public space for purposes of Fourth Amendment analyses. Under *Santana*, when the arrest was initiated after some part of defendant's person had extended beyond the constitutionally protected bounds of her home, defendant was "as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." Because the arrest was supported by probable cause, initiated in a public place in accordance with *Santana*, and properly completed inside defendant's home under the hot-pursuit exception to the warrant requirement, Justice ZAHRA would have affirmed defendant's convictions. If the warrantless entry into defendant's home and subsequent arrest were improper, the established facts were sufficient to hold that exclusion of the evidence obtained after the arrest would not be appropriate under the United States Supreme Court's decision in *New York v Harris*, 495 US 14 (1990). Thus, Justice ZAHRA would have decided this issue in the name of judicial efficiency.

CONSTITUTIONAL LAW — SEARCHES AND SEIZURES — AT THE THRESHOLD OF THE HOME.

A person who remains inside the doorway of his or her home is not subject to public arrest by an officer without a warrant if that person has manifested an intention to maintain his or her reasonable expectation of privacy in the home; a person's expectation of privacy is not relinquished merely by extending some portion of a hand or arm across the threshold of the doorway (US Const, Am IV).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Christopher R. Becker*, Prosecuting Attorney, *James K. Benison*, Chief Appellate Attorney, and *Andrew J. Lukas*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jason R. Eggert*) for defendant.

Amicus Curiae:

D. J. Hilson, *Kym L. Worthy*, *Jason W. Willams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan

CAVANAGH, J. In this case we must decide whether defendant's constitutional right to be free from unreasonable seizures was violated when a police officer entered her home to complete her arrest for a misdemeanor offense. The Court of Appeals concluded that defendant exposed herself to public arrest when she reached out her doorway to retrieve her identification and that when she pulled her arm back into her home the officer's entry was lawful as a "hot pursuit." We disagree. Defendant did not surrender her Fourth Amendment rights when she interacted with law enforcement at her doorway because she consistently maintained her reasonable expectation of privacy throughout the encounter, and further, the entry was not justified under the "hot pursuit" exception to the warrant requirement. The warrantless arrest was unreasonable under *Payton v New York*, 445 US 573; 100 S Ct 1371; 63 L Ed 2d 639 (1980). We reverse the Court of Appeals judgment and remand this case to the trial court for further proceedings not inconsistent with this opinion.

I. BACKGROUND

Defendant, Jennifer Marie Hammerlund, was involved in a single-vehicle accident in the early morning hours of September 30, 2015, on a highway exit ramp in Wyoming, Michigan. According to defendant, another driver cut her off, causing her to overcorrect and lose control of her car. Her vehicle scraped a cement barrier and left a dent on a metal guardrail. Defendant suffered only minor injuries; however, the car was no

longer drivable. She attempted to call her insurance company and then used a rideshare service to get home. She did not report the accident to police.

Soon after, Officer Erich Staman of the Wyoming Police Department was dispatched to the scene of a reported abandoned vehicle on the shoulder of the highway off-ramp. After observing the damage to the vehicle, as well as the guardrail and cement barrier, Officer Staman requested a tow truck and conducted an inventory search. He discovered that the vehicle was registered to defendant and that it contained paperwork bearing defendant's name, so he requested that officers from the Kentwood Police Department go to defendant's home to perform a welfare check.

In the meantime, according to defendant, she returned home, found that she was "really shaken up," and drank some alcohol. She then went into her room and went to bed. Only a few minutes later, the Kentwood officers arrived and told her roommate that they wished to speak with defendant. Defendant initially declined to leave her room; however, after her roommate spoke to the officers and reported back to defendant that the police would take her into custody and arrest the roommate for harboring a fugitive if she did not appear, defendant came to the door. After that, Officer Staman arrived at the home to "make contact" with defendant.

Officer Staman testified that when he arrived at defendant's home, he stood on her porch while she remained inside, approximately 15 to 20 feet away from the front door. He acknowledged that it "didn't appear that [defendant] wanted to come to the door . . . ." And, when asked whether defendant "made it pretty clear that she wasn't coming out of the home," he agreed, stating, "It seemed that she wasn't going to

come out." During their short conversation, defendant admitted to driving the car that caused the damage. When he asked defendant to produce her identification she was "reluctant" to give it to him so she passed it to him through a third party in the home. Officer Staman testified that defendant told him that she "thought [Officer Staman] might be trying to coax her out of the house."

After verifying her information, Officer Staman offered the identification card back to defendant. He explained:

> And then I had to give the I.D. back to her, so I made sure I gave it back to Ms. Hammerlund. In doing that she came to the door where I was standing and reached out to get the I.D. as I gave it back to her, at which point I grabbed her by the arm and attempted to take her into custody . . . [f]or the hit and run that she just admitted to.

He said that when defendant pulled away he grabbed her again and "the momentum" took him inside the home two to three steps where he handcuffed defendant and completed the arrest.

Following the arrest, Officer Staman placed defendant into the back of his patrol car. After she was advised of and waived her *Miranda*[1] rights, defendant provided further details about the crash, which she described to the officer as possibly a "road rage situation." Officer Staman detected a smell of intoxicants that was "moderate at best" and asked defendant if alcohol played a role in the crash. She opined that it had not, but did acknowledge drinking alcohol earlier in the night after finishing her shift as a bartender and later indicated that she thought her blood alcohol level might have been over the legal limit. When asked if she

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

had any alcohol to drink *after* the accident, defendant replied, "Absolutely not." Once transported to the county jail, defendant was given two successive breath tests, which indicated a blood alcohol content over the legal limit at .22 and .21, respectively. Consequently, defendant was charged with operating while intoxicated (OWI), third offense, MCL 257.625, and failing to report an accident resulting in damage to fixtures, MCL 257.621.

Defendant filed a pretrial motion to suppress evidence and dismiss the charges. In the motion, she argued that Officer Staman had violated her Fourth Amendment rights by arresting her inside her home without a warrant and that all the evidence gathered following that arrest was subject to the exclusionary rule. The trial court denied the suppression motion, concluding that the arrest was constitutionally valid pursuant to *United States v Santana*, 427 US 38; 96 S Ct 2406; 49 L Ed 2d 300 (1976). Specifically, it found that defendant was "in the middle of a consensual discussion with Officer Staman" when she "voluntarily approached him" and "voluntarily reached out of her door." Therefore, the court concluded that Officer Staman "was legitimately in that area and it did not violate the constitution for him to effectuate an arrest by grabbing her arm when she reached out of her doorway." The fact that the officer stepped inside defendant's home to complete the arrest did not change the result, according to the trial court, because the officer was "clearly in pursuit for the arrest at that point . . . ."

The case proceeded to trial. Defendant's theory of the case was that she became intoxicated only after the accident. However, she acknowledged that she did not tell any of the officers that she drank when she got home. Defendant's statements made to Officer Staman

in his patrol car, as well as her blood-alcohol-content test results, were admitted at trial. After a jury trial, defendant was convicted as charged, and she was sentenced to five years' probation and four months in jail for violating MCL 257.625 and to a concurrent term of 60 days in jail for violating MCL 257.621.

Defendant appealed, continuing to challenge the trial court's denial of her motion to suppress. The Court of Appeals, like the trial court, concluded that the arrest was constitutional under *Santana*, 427 US at 42, and that the trial court had not erred by denying defendant's motion. *People v Hammerlund*, unpublished per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 333827). Defendant sought leave to appeal in this Court, and we ordered oral argument on the application.[2]

II. STANDARD OF REVIEW

We review a trial court's findings of fact at a suppression hearing for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). We examine the facts as they were presented to the trial court at the time of the suppression hearing, not as supplemented by evidence presented at trial. *People v*

[2] In our order, we directed the parties to address "whether it is constitutionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest." *People v Hammerlund*, 501 Mich 1086, 1087 (2018). After receiving the benefit of briefing and oral argument, we find it improvident to consider this issue because the facts of this case do not lead to the conclusion that defendant subjected herself to a public arrest. That our order directed the parties to address the issue of constructive entry—which the dissent agrees need not be decided under the facts of this case—does not mean that we are imprudently or incorrectly deciding the very legal issues decided by the trial court and the Court of Appeals and briefed by the parties on appeal to this Court.

Kaigler, 368 Mich 281, 288; 118 NW2d 406 (1962). Our review of the trial court's application of Fourth Amendment principles, however, is de novo. *People v Slaughter*, 489 Mich 302, 310; 803 NW2d 171 (2011).

III. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. [US Const, Am IV.][3]

The touchstone of the Fourth Amendment is reasonableness. *Brigham City, Utah v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006); see also *People v Mead*, 503 Mich 205, 212; 931 NW2d 557 (2019) ("The Fourth Amendment demands nothing more or less than reasonableness."). In order to be reasonable, an arrest must be justified by probable cause. *Dunaway v New York*, 442 US 200, 208; 99 S Ct 2248; 60 L Ed 2d 824 (1979). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996).

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[3] The Michigan Constitution, Const 1963, art 1, § 11, provides coextensive protection to that of its federal counterpart. See *People v Mead*, 503 Mich 205, 212; 931 NW2d 557 (2019).

Even when based on probable cause, however, a warrantless search or seizure inside a suspect's home is presumptively unreasonable. *Payton*, 445 US at 586. In fact, the United States Supreme Court has recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Id*. at 585 (quotation marks and citations omitted). To protect against unreasonable intrusions into the home, a warrant is required to "interpose the magistrate's determination of probable cause between the zealous officer and the citizen." *Id*. at 602. In other words, "the Fourth Amendment has drawn a firm line at the entrance to the house," which "[a]bsent exigent circumstances . . . may not be reasonably crossed without a warrant." *Id*. at 590; see also *Kirk v Louisiana*, 536 US 635, 638; 122 S Ct 2458; 153 L Ed 2d 599 (2002) ("As *Payton* makes plain, police officers need either a warrant or probable cause plus exigent circumstances in order to make a lawful entry into a home."). The burden of overcoming the presumption of unreasonableness attached to a warrantless entry rests on the prosecution. *People v Oliver*, 417 Mich 366, 380; 338 NW2d 167 (1983).

Warrantless arrests that take place in public upon probable cause do not violate the Fourth Amendment. *United States v Watson*, 423 US 411, 423-424; 96 S Ct 820; 46 L Ed 2d 598 (1976). In Michigan, this standard applies when probable cause exists for a misdemeanor. See *People v Hamilton*, 465 Mich 526, 533; 638 NW2d 92 (2002) ("[P]robable cause to arrest for a *felony* is not required; rather, probable cause that a crime (felony or misdemeanor) has been committed is the constitutional requirement for an arrest."), overruled in part on other grounds by *Bright v Ailshie*, 465 Mich 770 (2002).

IV. ANALYSIS

As noted, the Fourth Amendment permits an arrest without a warrant in a public place as long as the police officer making the arrest possesses sufficient probable cause. *Watson*, 423 US at 423. The officer in this case had probable cause to arrest defendant for failing to report an accident that caused damage to fixtures. MCL 257.621(a). He personally observed damage to the guardrail and cement barrier near defendant's abandoned vehicle. Further, defendant admitted to him that she was driving the car that caused the damage and that she did not report the accident to law enforcement. This information was more than adequate to provide the officer with probable cause to believe that the misdemeanor offense had been committed.[4] Defendant does not argue otherwise.[5]

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[4] We take this opportunity to note that failure to report an accident resulting in damage to fixtures is a 90-day misdemeanor. Under Michigan law, therefore, Officer Staman was not statutorily authorized to arrest defendant. See MCL 764.15(1)(d) (A peace officer may make a warrantless arrest where "[t]he peace officer has reasonable cause to believe a misdemeanor punishable by imprisonment for more than 92 days or a felony has been committed and reasonable cause to believe the person committed it."). However, a statutory violation and a constitutional violation are not one and the same. See *Hamilton*, 465 Mich at 534 ("A number of decisions establish that statutory violations do not render police actions unconstitutional.").

[5] The dissent concludes that Officer Staman also possessed probable cause to arrest defendant for OWI, third offense, because he observed that defendant was "leaning against a wall as if to maintain balance," "that her speech was slurred prior to transporting her to the police station," and that she had previous OWI convictions. There are multiple problems with this conclusion. First, that defendant was slurring her speech and unstable on her feet could possibly provide probable cause to believe that she was under the influence when the crash occurred; however, considering the fact that defendant was in an accident in which her head collided with a steering wheel and the intervening time between the accident and the police contact, without more concrete facts it is a

While probable cause alone may justify a warrantless public arrest, the same is not true when it comes to arresting a suspect in her home. Under *Payton*, law enforcement must obtain a warrant or identify exigent circumstances that excuse the warrant requirement before entering a home to make an arrest. *Payton*, 445 US at 590. In this case, there is no dispute that Officer Staman completed defendant's arrest inside her home. Instead of viewing this as a straightforward *Payton* violation, the lower courts relied on *Santana* to find that defendant's Fourth Amendment rights remained intact because of her own actions before the arrest.

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stretch to conclude that any unsteadiness or warped speech stemmed from intoxication that was present at the time she operated the vehicle. Second, the record is vague about when exactly Officer Staman noticed defendant slurring her speech, and it is unclear whether it was while she remained inside her home or only after she was arrested. Third, relatedly, there is nothing in the record to indicate that Officer Staman was aware of defendant's prior OWI convictions before he made the arrest. The dissent speculates that Officer Staman "may well have been aware of" the prior convictions, but cites nothing in the record that supports such a statement other than the fact that OWI convictions are reported to the secretary of state under MCL 257.625(21)(a).

Further, what Officer Staman observed or discovered *after* the arrest is not relevant to whether the officer had probable cause to arrest in the first place. Probable cause to arrest exists where the facts and circumstances *known* to the officer would warrant a person of reasonable caution to believe that the offense was committed by the suspect. *Champion*, 452 Mich at 115. The dissent's reliance on *Devenpeck v Alford*, 543 US 146; 125 S Ct 588; 160 L Ed 2d 537 (2004), is misplaced. *Devenpeck*, as the dissent acknowledges, states that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the *known* facts provide probable cause." *Id*. at 153. As we have discussed, the facts that were *known* to Officer Staman at the time of the arrest were not sufficient to establish probable cause for OWI or any other identified felony. The dissent's position would allow the police to retroactively manufacture probable cause where none existed at the time the arrest was made. Most important, however, is that even if we were to conclude that the officer possessed probable cause to arrest defendant for OWI, it would not render this a constitutional arrest because there was no legitimate hot pursuit.

In *Santana*, undercover officers who had probable cause to believe the defendant had just been involved in an illegal purchase of heroin drove to the defendant's house and saw her standing in the doorway holding a brown paper bag. *Santana*, 427 US at 40. According to one officer, the defendant was "standing directly in the doorway—one step forward would have put her outside, one step backward would have put her in the vestibule of her residence." *Id*. at n 1. The officers pulled up within 15 feet of the defendant and got out of the vehicle while shouting "police" and displaying their identification. *Id*. at 40. The defendant retreated into her home, and the officers followed her inside and arrested her, discovering drugs in the bag and marked money on her person. *Id*. at 40-41. Before trial, the defendant successfully moved to suppress the evidence after the trial court ruled that a warrant was necessary to enter her home. *Id*. The United States Supreme Court reversed, concluding that (1) the arrest began in a public place, and (2) the police were in lawful hot pursuit when they entered the defendant's home because there was a realistic expectation that she would destroy the evidence. *Id*. at 43. Therefore, the arrest was constitutional because "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." *Id*.

A. PUBLIC ARREST

In our view, *Santana* is distinguishable from the instant case. Unlike the defendant in *Santana*, in this case defendant was not "exposed to public view, speech, hearing, and touch, as if she had been standing completely outside her house." *Id*. at 42. Defendant was never in a public place and possessed a reasonable

expectation of privacy inside her home that she maintained throughout the encounter. The lower courts erred by holding otherwise.

Initially, we do not agree with the Court of Appeals' conclusion that defendant "went further" than the *Santana* defendant to expose herself to the public by approaching the doorway and "extending her arm beyond the threshold" to retrieve her identification. *Hammerlund*, unpub op at 5. The *Santana* defendant stood squarely in the middle of her doorway. Here, the circuit court found only that defendant "reached out of her door" to retrieve her property. According to the record, all that breached the threshold was some portion of defendant's arm or hand.[6]

But the fact that some portion of defendant's arm or hand crossed the threshold does not tell us the constitutional significance of this fact. Should we consider her to be in public if her whole arm was outside the threshold? What if it was only her wrist or a couple of her fingers? Fortunately, an attempt to determine how far defendant extended her arm or hand over the threshold and what that might mean is an unneces-

[6] Testimony concerning how far defendant reached out or how much—if any—of her body was exposed to the public is ambiguous at best. When asked if he went inside to grab her arm, Officer Staman replied, "I stood on the outside of the porch when I initially grabbed it, and she had pulled away, which caused me to have to grab it again . . . ." On cross-examination, he stated: "I reached out to give her the I.D., and she reached out to grab it from me. That's when I grabbed ahold of her wrist." When asked where the "grab" took place, Officer Staman said, "I waited until her hand reached out to mine, so I didn't reach in to give it to her, I just held it out and she reached out to grab it from me." He testified that he did not think his hand "was ever inside the house . . . ." While the officer's testimony does not illuminate how far defendant reached out to retrieve her identification, we cannot say that the trial court's finding that defendant "reached out of her door" was clearly erroneous. *People v Custer*, 465 Mich 319, 325; 630 NW2d 870 (2001).

sary exercise.[7] Our Fourth Amendment analysis does not focus on such arbitrary calculations; our focus remains on determining whether a person sought to preserve her constitutionally protected reasonable expectation of privacy. See *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967).

It is beyond clear that defendant had a reasonable constitutional expectation of privacy within her home. *Payton*, 445 US at 587 ("Freedom from intrusion into the home or dwelling is the archetype of the privacy protection secured by the Fourth Amendment.") (quotation marks and citation omitted). Answering a knock at the door or speaking with officers does not destroy an occupant's right to maintain a reasonable expectation of privacy from unreasonable intrusion. *Kentucky v King*, 563 US 452, 470; 131 S Ct 1849; 179 L Ed 2d 865 (2011) ("[E]ven if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.").[8] The only question is whether defendant's expectation of privacy remained

[7] See *Sparing v Village of Olympia Fields*, 266 F3d 684, 689 (CA 7, 2001) ("Splitting fractions of an inch can be a very treacherous endeavor, producing arbitrary results. But we need not pull out our rulers and begin to measure. Under the Fourth Amendment, the point must be identified by inquiry into reasonable expectations of privacy.").

[8] The lower courts did not conclude that defendant exposed herself to public arrest by coming to the door or by talking to Officer Staman while standing 15 to 20 feet back from the door. Rather, the lower courts concluded that defendant subjected herself to public arrest only by extending her hand beyond the threshold when retrieving her identification. See *Hammerlund*, unpub op at 5 ("[D]efendant's act of reaching out to grab her identification . . . caused her to . . . expos[e] herself to a public arrest . . . ."). Accordingly, we need not decide whether her mere presence and interaction with Officer Staman at the door, and whether she did so voluntarily or as a result of coercion or deception, constituted exposure to public arrest.

intact when some portion of her hand or arm crossed the threshold to retrieve her property or if, by doing so, she somehow surrendered that expectation.

The lower courts compared this case to *Santana* to conclude that defendant did not have a reasonable expectation of privacy because she exposed herself to public arrest. See *Hammerlund*, unpub op at 5. *Santana* is distinguishable. In that case, the defendant was voluntarily standing in the middle of her open doorway before the police encounter even began; by doing so, she exposed herself to the public "as if she had been standing completely outside" and she did not have *any* reasonable expectation of privacy from the very beginning of the encounter. *Santana*, 427 US at 42. In contrast, defendant began this encounter inside her home—inside her bedroom—emerging only when she and her roommate were threatened with arrest, and then remaining 15 to 20 feet away from the doorway. When asked to provide her driver's license, she had her roommate pass it to Officer Staman while she remained away from the door. Defendant manifested an intent to stay inside, and Officer Staman was aware of that intention. Given her actions, she did not voluntarily and knowingly expose herself to the public as if she had been standing outside her house. Defendant's actions made clear that she was carefully preserving her expectation of privacy.

Nonetheless, the Court of Appeals affirmed the trial court's application of *Santana* to this case because it reasoned that defendant exposed herself to public arrest by approaching the door and reaching out to retrieve her identification. *Hammerlund*, unpub op at 5. But there is a fundamental difference between the reasonable expectation of privacy of a person who voluntarily stands in an open doorway and the reason-

able expectation of privacy of a person who remains inside the confines of her home, approaching the doorway only briefly and momentarily breaking the plane of the doorway with some portion of her arm or hand.[9] In other words, defendant did not surrender her expectation of privacy because she did not expose herself to public view, speech, hearing, and touch *as if she had been standing completely outside*. *Santana*, 427 US at 42.

Defendant manifested an intent to remain fully within her home by carefully standing several feet away from the door. She continued to manifest this intent when she approached the doorway briefly and only broke the plane of the doorway with some portion of her arm or hand. We think that society would recognize defendant's behavior as preserving a reasonable expectation of privacy. In fact, we would venture that what society would *not* view as reasonable is exactly what occurred in this case—that a person

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[9] See *United States v Flowers*, 336 F3d 1222, 1227 (CA 10, 2003), holding that the defendant was not subject to public arrest under *Payton* and *Kirk* and distinguishing *Santana*:

> The record shows that at the time of Flowers' arrest, and from the time that night at which the police officers first came to Flowers, Flowers was inside his home. Although Flowers put his arm and hand outside his house by extending them through the panel opening, the rest of his body did not cross his threshold. We believe that Flowers did not lose "the constitutional protection afforded to the individual's interest in the privacy of his own home," *Payton*, [445 US at 588,] by this limited exposure. Rather, Flowers showed a conscious intention to protect the privacy of his home by utilizing only the small hole in the wall.

The dissent directs its attention to the factual differences between this case and *Flowers*, but it disregards the *Flowers* court's focus on the defendant's limited exposure of his hand outside the home in connection with his conscious intention to maintain his reasonable expectation of privacy, which is what we find most relevant to the instant discussion.

suspected of a minor misdemeanor could be subjected to a warrantless arrest inside her home in the middle of the night.

To recap, defendant's expectation of privacy within her home was reasonable, and her action of reaching out over the threshold and retrieving her identification did not relinquish that reasonable expectation. Defendant was not exposed to public arrest, and accordingly, *Santana* is inapplicable to the facts of this case.

B. EXIGENT CIRCUMSTANCES

Beyond the fact that *Santana* does not apply because defendant did not leave the confines of her home or otherwise subject herself to public arrest, *Santana* is still inapplicable because there was no hot pursuit or need for immediate police action. When officers have probable cause and exigent circumstances exist, it is reasonable under the Fourth Amendment for officers to enter a home without a warrant. *Payton*, 445 US at 590. Exigent circumstances exist when an emergency leaves law enforcement with insufficient time to obtain a warrant. *Michigan v Tyler*, 436 US 499, 509; 98 S Ct 1942; 56 L Ed 2d 486 (1978). "Hot pursuit" of a fleeing felon is one recognized example of exigent circumstances. *Santana*, 427 US at 42-43. Unlike the lower courts, we do not believe that there was a legitimate hot pursuit in this case.

To begin, application of the hot-pursuit doctrine under the instant circumstances is suspect. See *Welsh v Wisconsin*, 466 US 740, 750; 104 S Ct 2091; 80 L Ed 2d 732 (1984) ("Our hesitation in finding exigent circumstances, especially when warrantless arrests in the home are at issue, is particularly appropriate when the underlying offense for which there is probable cause to arrest is relatively minor."). In fact, it is far

from well settled that an officer with probable cause to arrest a suspect for a misdemeanor may rely on the hot-pursuit exception to make a warrantless home entry. *Stanton v Sims*, 571 US 3, 6, 10; 134 S Ct 3; 187 L Ed 2d 341 (2013) (recognizing that the federal circuits are sharply divided on whether a necessary component of the hot-pursuit doctrine is the pursuit of a fleeing *felon* and that its own precedent was "equivocal" on the matter).[10]

However, even were we to characterize what occurred as a "pursuit," that pursuit would be far from a "hot" one. "What makes the pursuit 'hot' is 'the emergency nature of the situation,' requiring 'immediate police action.' " *Smith v Stoneburner*, 716 F3d 926, 931 (CA 6, 2013) (citation omitted). In *Santana*, immediate action was necessary both because police were pursuing a fleeing felon and because there was a reasonable fear that the defendant would destroy evidence if they did not act quickly. *Santana*, 427 US at 42-43. Here, defendant was suspected of a 90-day misdemeanor and there was no evidence of that crime that she could destroy. Indeed, all the elements of the crime were already known to the police. There is no suggestion that any emergency existed that would have entitled the police to enter defendant's home throughout the conversation up to the point when defendant reached out to retrieve her identification. We fail to see how defendant's interaction at the doorway created any kind of emergency, let alone one that would outweigh her expectation of privacy in her home.

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[10] Our Court of Appeals addressed this issue decades ago, opining that "the less serious nature of a misdemeanor offense militates against extending the hot pursuit exception to justify an unannounced entry into a private residence to make such an arrest." *People v Strelow*, 96 Mich App 182, 191; 292 NW2d 517 (1980).

The Court of Appeals held that, under *Santana*, the officer's pursuit of defendant was legitimate because he acted lawfully by attempting to grab her arm when she extended it beyond the threshold of her home. *Hammerlund*, unpub op at 6. As we have explained, critical to *Santana*'s holding was the fact that the defendant in that case was voluntarily in full public view when she first interacted with the police and before she retreated into her home. But, as previously discussed, defendant was not voluntarily exposed to public arrest at any point in the encounter. Therefore, unlike in *Santana*, when defendant pulled her arm away from the officer she did not thwart an "otherwise proper arrest" that had been "set in motion in a public place." *Santana*, 427 US at 42-43.

C. *PAYTON*

Because *Santana* is inapplicable, we return to *Payton*, which prohibits entry into a suspect's home without a warrant in the absence of an emergency situation. *Payton*, 445 US at 590. Defendant did not expose herself to public arrest or relinquish her reasonable expectation of privacy throughout the encounter and there was no hot pursuit, but Officer Staman conceded that defendant's arrest was completed inside her home. Since the seizure occurred beyond the "firm line at the entrance of the house," it was unreasonable because it was accomplished without a warrant, without consent, and without any exigent circumstances. *Payton* prohibits it.[11]

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[11] Although we disagree with the dissent that there was no evidence of coercion in this case, because defendant's arrest was completed in her home, we find it unnecessary to discuss or adopt the constructive-entry doctrine that defendant urges us to endorse. See *United States v Morgan*, 743 F2d 1158, 1166 (CA 6, 1984); *People v Gillam*, 479 Mich 253, 261-266; 734 NW2d 585 (2007).

V. CONCLUSION

Officer Staman completed defendant's arrest inside her home, the place where the Constitution most protects her freedom from unreasonable governmental intrusion. Defendant was not subject to public arrest because she remained inside, she maintained her reasonable expectation of privacy, and her act of reaching out to retrieve her identification did not expose her to the public "as if she had been standing completely outside her house," *Santana*, 427 US at 42. In addition, the circumstances were insufficient to justify the hot-pursuit exception to the warrant requirement. Because the arrest was completed across the Fourth Amendment's "firm line at the entrance of the home," it was presumptively unreasonable. *Payton*, 445 US at 586, 590. It is the prosecution's burden to overcome this presumption, *Oliver*, 417 Mich at 380, and when the government's interest is to arrest for a minor offense, the presumption that a warrantless entry into a home was unreasonable is difficult to rebut, *Welsh*, 466 US at 750. The prosecution failed to overcome this presumption, and the trial court and the Court of Appeals erred by concluding otherwise.

Accordingly, we reverse the Court of Appeals judgment and remand to the trial court for further proceedings. Whether suppression of evidence under the exclusionary rule is appropriate is an issue separate from whether defendant's Fourth Amendment rights were violated by police conduct. *People v Hawkins*, 468 Mich 488, 499; 668 NW2d 602 (2003). Because the trial court found no constitutional violation, it did not opine on the application of the exclusionary rule. We remand this case to the trial court to consider this issue.[12]

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[12] Amicus Curiae, the Prosecuting Attorneys Association of Michigan, urges this Court to conclude that the exclusionary rule must not apply

MCCORMACK, C.J., and VIVIANO, BERNSTEIN, and CLEMENT, JJ., concurred with CAVANAGH, J.

ZAHRA, J. (*dissenting*). The majority holds that defendant's arrest violated the United States Constitution because defendant never left the sanctity of her home—or otherwise relinquished the reasonable expectation of privacy inherent to the home[1]—when Officer Erich Staman began the process of arresting her. I respectfully dissent. I conclude that *United States v Santana*[2] is on point and applicable to the instant case and not, as held by the majority, meaningfully distinguishable from the facts presented in this case. In my view, nothing about the probable cause underlying the arrest or its location rendered it constitutionally deficient. But even if the warrantless entry into defendant's home and subsequent arrest were improper under *Payton v New York*,[3] the established facts are sufficient to hold that exclusion of the evidence obtained after the arrest is not appropriate under *New York v Harris*.[4] For these reasons, I would affirm defendant's convictions.[5]

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here pursuant to its reading of *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990). Unlike the dissent, we believe that it would be imprudent to decide this issue given that neither the trial court nor the Court of Appeals addressed this argument, and we leave that issue to the parties to raise and the trial court to decide on remand. We note, however, that the prosecution acknowledged in its supplemental brief that defendant's admissions following her arrest may be inadmissible under *Harris*.

[1] See *Payton v New York*, 445 US 573, 585-586, 589-590; 100 S Ct 1371; 63 L Ed 2d 639 (1980).

[2] *United States v Santana*, 427 US 38; 96 S Ct 2406; 49 L Ed 2d 300 (1976).

[3] See *Payton*, 445 US at 585-586, 589-590.

[4] *New York v Harris*, 495 US 14; 110 S Ct 1640; 109 L Ed 2d 13 (1990).

[5] This Court, in its May 30, 2018 order, required the parties to prepare supplemental briefs addressing a single issue: "whether it is constitu-

I. NO MEANINGFUL DISTINCTION FROM *UNITED STATES v SANTANA*

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

An arrest of a person, like all seizures (and searches), must therefore be reasonable to pass constitutional muster.[6] Warrantless searches and seizures that occur within a defendant's home are *presumptively* unreasonable.[7] Indeed, " 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.' "[8] As the United States Supreme Court stated in *Payton v New York*:

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tionally permissible for a police officer to compel, coerce, or otherwise entice a person located in his or her home to enter a public place to perform a warrantless arrest." *People v Hammerlund*, 501 Mich 1086, 1087 (2018). The majority does not address this question now because it has determined that defendant never left her home or otherwise relinquished her reasonable expectation of privacy prior to her arrest. Although I disagree with the majority's reasoning, I would also decline to address this issue because—having reviewed the record—I have found no evidence of coercion in this case.

Given that neither I nor the majority believes that the question posed to the parties in this Court's May 30, 2018 order is pertinent to these proceedings, the best course of action is to either deny defendant's application for leave or direct the parties to devote further briefing to the issues the majority now deems to be dispositive. For the reasons expressed in this dissent, I believe that the majority's chosen course of action is imprudent and legally incorrect.

[6] *Payton*, 445 US at 585.

[7] *Id*. at 586.

[8] *Id*. at 585-586, quoting *United States v United States Dist Court for the Eastern Dist of Mich*, 407 US 297, 313; 92 S Ct 2125; 32 L Ed 2d 752 (1972).

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.[9]

On the other hand, arrests made in public places are not afforded nearly the same level of protection under the Fourth Amendment.[10] Rather, in public settings, a police officer does not typically violate the Fourth Amendment by performing a warrantless arrest as long as it is supported by probable cause.[11] Critically, under the United States Supreme Court's decision in *United States v Santana*, the doorway of one's residence is considered a public space for purposes of Fourth Amendment analyses.[12] That is, a defendant does not have an "expectation of privacy" in the threshold separating the interior of his or her home from the outside world.[13]

In *Santana*, the police went to the defendant's house on the basis of information that she was in possession

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[9] *Payton*, 445 US at 589-590 (citation omitted).

[10] See *Santana*, 427 US at 42.

[11] *Id*.

[12] *Id*. at 40, 42.

[13] *Id*. at 42.

of marked money used to make a controlled purchase of heroin by an undercover agent.[14] Testimony established that, when the officers arrived, the defendant was "standing directly in the doorway[;] one step forward would have put her outside, one step backward would have put her in the vestibule of her residence."[15] The officers displayed identification and shouted "police," prompting the defendant to retreat into the vestibule of the house.[16] As she did, the defendant spilled two bundles of paper packets containing a white powder, later determined to be heroin.[17] The police followed the defendant into her home, restrained her, and asked her to empty her pockets.[18] The defendant produced $70 of marked money.[19] The defendant was charged with distribution of heroin, and she moved to suppress evidence recovered at the scene.[20] The Supreme Court of the United States determined that suppression was inappropriate because the arrest was "set in motion in a public place . . . ."[21] That is, the defendant was in a public place—the threshold of her home, where she had no reasonable expectation of privacy—when the police, armed with probable cause, sought to arrest her.[22] The defendant could not avoid an otherwise proper arrest by retreating into her home because law enforcement

[14] *Id*. at 39-40.

[15] *Id*. at 40 n 1.

[16] *Id*. at 40.

[17] *Id*. at 40-41.

[18] *Id*.

[19] *Id*. at 41.

[20] *Id*.

[21] *Id*. at 43.

[22] *Id*. at 42.

officers armed with probable cause for an arrest are within constitutional bounds to engage in a "hot pursuit" of a fleeing felon, even if that pursuit requires intrusion into the home.[23] The Supreme Court observed that "[t]he fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into Santana's house."[24]

In the present case, the majority makes much of the fact that defendant began her encounter with Officer Staman from a position within the interior of her home. But this factual distinction from *Santana*[25] is without legal significance. What mattered in *Santana* was that the arrest was *initiated* from a lawful point in a public place.[26] I would hold that Officer Staman complied with this aspect of *Santana* by initiating the arrest only after defendant voluntarily reached across the threshold of her home to retrieve her identification.[27]

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[23] *Id*. at 42-43. As the Supreme Court noted, the "hot pursuit" exception to the warrant requirement is a form of the exigent-circumstances exception. *Id*. & 43 n 3, citing *Warden, Maryland Penitentiary v Hayden*, 387 US 294, 298; 87 S Ct 1642; 18 L Ed 2d 782 (1967).

[24] *Santana*, 427 US at 43.

[25] See *id*. at 40.

[26] See *id*. at 42.

[27] Contrary to the majority's assertion, the conduct of other police officers prior to defendant's interaction with Officer Staman does nothing to affect this analysis. Defendant testified at trial that the officers who came to her door *before* Officer Staman's arrival threatened her and her roommate with arrest if defendant did not get out of bed and come to her door. Putting aside that this testimony is arguably inadmissible hearsay relating to the statements of her roommate and of the police officers—all of whom never testified during these proceedings—the officers' actions have no bearing on whether defendant maintained a reasonable expectation of privacy when she voluntarily reached across her threshold during her subsequent interaction with Officer Staman. Although I am troubled by defendant's testimony pertaining to the

The majority suggests that the record is unclear regarding how much of defendant's arm or body was on either side of the imaginary line dividing the protected area within the interior of the home and the unprotected public space outside. While defendant's exact position at the time the arrest was initiated has not been established with pinpoint accuracy, the uncontroverted record evidence shows that Officer Staman did not reach across the threshold of the house *at all* when defendant attempted to retake her identification. At the evidentiary hearing following defendant's motion to suppress,[28] Officer Staman testified, "I don't think my hand was ever inside the house when I handed [defendant] the I.D."[29] Rather, he only entered the house when he took hold of defendant and was pulled inside while attempting to complete the arrest. *Some part* of defendant's person, at the very least up to her wrist, had extended beyond the constitutionally protected bounds of her home; and from the record, it appears that there is no evidence that Officer Staman took hold of any part of defendant's person that remained inside the house at the moment when he initiated the arrest.

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conduct of the officers who preceded Officer Staman, her position inside the home before she spoke with Officer Staman does not invalidate the conclusion that, at the time of her arrest, defendant was "exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house." See *id*.

[28] Because the parties harbored some disagreement as to the pertinent facts at the initial suppression hearing, the trial court allowed for an evidentiary hearing to establish the relevant facts of the case.

[29] I cannot conclude that the record lacks clarity merely because Officer Staman testified that he did not "think [his] hand was ever inside the house when [he] handed [defendant] the I.D." Taken at face value, the testimony establishes that Officer Staman believed he initiated the arrest while defendant extended some part of her body outside. To the extent the phrase "I don't think" may be viewed as qualifying Officer Staman's testimony, the absence of any contradictory evidence looms large. Simply stated, Officer Staman's testimony is uncontroverted.

On this record, I disagree with the majority's assertion that defendant had a reasonable expectation of privacy at the time of the arrest.[30] In *Katz v United States*, the Supreme Court of the United States held that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[31] I discern no principled reason why the act of appearing at the doorway and *reaching outside* is not properly characterized as "knowingly expos[ing oneself] to the public." Several federal circuit courts agree. Consider *Sparing v Village of Olympia Fields*,[32] the case cited by the majority for the proposition that "an attempt to determine how far defendant extended her arm or hand over the threshold and what that might mean is an unnecessary exercise." In that case, the United States Court of Appeals for the Seventh Circuit explained a "doorway arrest" as follows:

> But what if the individual is not voluntarily standing *in* an open doorway, but answers a knock at the door, standing by a "fraction of an inch" behind an open doorway? We still apply *Santana*-type "public view, speech, hearing, and touch" analysis to aid in the determination of whether a reasonable expectation of privacy exists . . . .

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[30] I take further issue with the practical application of the majority's holding. If future arrests are initiated near the threshold of a defendant's home, is the defendant—who maintains a single foot inside the interior of the home—free from warrantless arrest simply because they "manifest[] an intent to stay inside, and [law enforcement is] aware of that intention"? Regardless, even if defendant subjectively intended to maintain a reasonable expectation of privacy while standing away from the door at the beginning of her interaction with Officer Staman, this expectation could not remain reasonable when she moved forward and voluntarily reached across the threshold of her home.

[31] *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967).

[32] *Sparing v Village of Olympia Fields*, 266 F3d 684 (CA 7, 2001).

> . . . [W]hen an individual voluntarily stands behind an open doorway—fractions of an inch "inside the home"—ordinarily, for purposes of the Fourth Amendment, she stands outside, in a public place.[33]

Sparing is not the only federal circuit case to hold that a person standing entirely inside the home by a small amount is in a "public place" for the purposes of the Fourth Amendment (and thus potentially subject to warrantless arrest). In *United States v Vaneaton*, the issue was whether "the police, acting with probable cause but without a warrant and while standing outside [the defendant's] motel room, could lawfully arrest [the defendant] while he was standing immediately inside the open doorway."[34] The United States Court of Appeals for the Ninth Circuit concluded that the arrest was lawful, reasoning that the defendant "exposed himself in a public place" because "he voluntarily opened the door and exposed both himself and the immediate area to them."[35] Similarly, in *United States v Council*, the United States Court of Appeals for the Eighth Circuit concluded that a warrantless arrest was lawful where the defendant was arrested "at the doorway of his camper."[36] The court explained that the precise placement of the defendant in relation to the doorway was not dispositive:

> Lest we become too preoccupied with the exact location of the individual in relation to the doorway, we make clear our general conclusion that [the defendant] forfeited any reasonable expectation of privacy during the exchange. When [the defendant] appeared at his doorway, he was not merely visible to the public, but was as exposed to public

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[33] *Id*. at 689.

[34] *United States v Vaneaton*, 49 F3d 1423, 1425 (CA 9, 1995).

[35] *Id*. at 1427.

[36] *United States v Council*, 860 F3d 604, 606-607 (CA 8, 2017).

> view, speech, hearing, and touch as if he had been standing completely outside his house.[37]

These courts properly applied the principles set forth in *Katz* and *Santana*.[38]

The *Santana* Court reasoned that the defendant was in a public place when she stood in the threshold of her home because "[s]he was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house."[39] So, too, was defendant in

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[37] *Id*. at 610-611 (quotation marks, citations, and brackets omitted).

[38] The majority's reliance on the decision of the United States Court of Appeals for the Tenth Circuit in *United States v Flowers*, 336 F3d 1222 (CA 10, 2003), is misplaced. In that case, the police learned that the defendant was selling alcohol (among other things) illegally from his home. *Id*. at 1223. Although the defendant was not initially aware that he was speaking to police, he interacted with them from behind a closed door. *Id*. at 1224. When the police requested that the defendant sell them wine, the defendant opened a panel adjacent to the door with a bottle of wine in hand and stated that the purchase would cost $3.00. *Id*. At that point, the police made themselves known and requested entry into the defendant's home. *Id*. The defendant obliged, and the police arrested him once inside the home. *Id*. The Tenth Circuit held that, absent exigent circumstances, the arrest violated the Fourth Amendment, stating:

> Although [the defendant] put his arm and hand outside his house by extending them through the panel opening, the rest of his body did not cross his threshold . . . . [The defendant] did not lose "the constitutional protection afforded to the individual's interest in the privacy of his own home . . . ." [*Id*. at 1227, quoting *Payton*, 445 US at 588.]

While the majority cites *Flowers* for its acknowledgment of the defendant's "conscious intention to maintain his reasonable expectation of privacy," that case is easily distinguishable because the defendant cannot be said to have been "exposed to public view, speech, hearing, and touch as if []he had been standing completely outside h[is] house" when he reached his arm through a panel next to an adjacent *but closed* front door. See *Santana*, 427 US at 42. As discussed, the circumstances involved in this case are quite different.

[39] *Id*., citing *Hester v United States*, 265 US 57, 59; 44 S Ct 445; 68 L Ed 898 (1924).

this case "exposed to public view, speech, hearing, and," clearly, "touch" as if no part of her was occupying the space within her home at the time of her arrest.[40] Officer Staman testified at trial that, during his initial interaction with defendant, "it was still dark, but you could see who [he] was talking to inside the house without any difficulty." No door or barrier impeded defendant's ability to speak to Officer Staman from a point initially between 10 and 20 feet within her home or her ability to reach across the threshold in an attempt to retake her identification, nor did any such barrier prevent Officer Staman from taking hold of some portion of defendant's hand or wrist without crossing the threshold himself. When Officer Staman initiated the arrest by taking hold of the part of defendant that crossed her threshold, it was of no consequence that some other portion of her body remained within the protected area of the home's interior. As was the case in *Santana*, the circumstances surrounding the arrest reveal that defendant's expectation of privacy was diminished to a point "as if she had been standing completely outside her house."[41]

II. PROBABLE CAUSE TO ARREST DEFENDANT

Having determined that the *Santana* holding is applicable under these facts, it is still necessary to determine whether Officer Staman had probable cause to arrest defendant[42] and whether a "hot pursuit" justified Officer Staman's entry into the home after initiating the arrest. I would hold that Officer Staman had probable cause sufficient to execute a public arrest

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[40] See *Santana*, 427 US at 42.

[41] See *id*.

[42] See *id*.

and that—regardless of the relatively fleeting "pursuit" leading into defendant's home—Officer Staman's entry after beginning the arrest was lawful.

As the majority articulates, "[p]robable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."[43] In this case, by the time Officer Staman attempted to perform the arrest at issue, he had already discovered an abandoned car registered to defendant bearing indication that it had been the cause of damage to public road fixtures. After Officer Staman arrived at defendant's residence, defendant made noncustodial prearrest statements that she was driving and that she had left the scene of the accident without reporting the damage. Probable cause was therefore clearly established as to defendant's involvement in failing to report an accident causing damage to fixtures.[44]

MCL 764.15 outlines several state-specific rules for conducting warrantless arrests. Under that statute, a police officer may conduct a warrantless arrest for any felony, misdemeanor, or ordinance violation committed in that officer's presence.[45] Felonies can form the basis for a valid warrantless arrest under MCL 764.15(1)(b) even when not committed in the officer's presence; but *misdemeanors* that are not committed in the officer's presence can only form the basis for a warrantless

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[43] *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). See also *Devenpeck v Alford*, 543 US 146, 152; 125 S Ct 588; 160 L Ed 2d 537 (2004), citing *Maryland v Pringle*, 540 US 366, 371; 124 S Ct 795; 157 L Ed 2d 769 (2003).

[44] See MCL 257.621.

[45] MCL 764.15(1)(a).

arrest under MCL 764.15(1)(d) when they are punishable by imprisonment for more than 92 days and when the arresting officer has "reasonable cause" to believe the person being arrested committed the misdemeanor. Here, Officer Staman went to defendant's home to investigate a suspected failure to report an accident causing damage to fixtures in violation of MCL 257.621, although the crime was not committed in his presence. Failure to report an accident causing damage to fixtures is only a 90-day misdemeanor.[46] Accordingly, it does not meet the criteria for a valid warrantless arrest under MCL 764.15(1)(d). The arrest at issue therefore constituted a *statutory* violation.

Nevertheless, as this Court stated in *People v Hawkins*:

> Irrespective of the application of the exclusionary rule in the context of a *constitutional* violation, the drastic remedy of exclusion of evidence does not necessarily apply to a *statutory* violation. Whether the exclusionary rule should be applied to evidence seized in violation of a statute is purely a matter of legislative intent.[47]

That is, "where there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied."[48] Nothing in the text of MCL 764.15 indicates that violations of the statute warrant application of the exclusionary rule. Thus, exclusion of evidence on the basis of violations of that statute is appropriate only if such violations establish "error of constitutional di-

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[46] MCL 257.621(a); MCL 257.901(1) and (2).

[47] *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003).

[48] *Id*. at 507.

mensions."[49] The majority appears to acknowledge as much in a footnote.[50]

Putting aside, for the moment, probable cause to arrest defendant for failure to report an accident causing damage to fixtures, precedent from the Supreme Court of the United States provides:

> [A]n arresting officer's state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause. That is to say, his subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause. As we have repeatedly explained, the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action. [T]he Fourth Amendment's concern with "reasonableness" allows certain actions to be taken in certain circumstances, *whatever* the subjective intent. [E]venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend upon the subjective state of mind of the officer.[51]

Regardless of the propriety of an arrest for defendant's failure to report an accident causing damage to fixtures, Officer Staman *also* had probable cause to initiate an arrest for operating a vehicle under the influence of intoxicating liquor, third offense, in violation of MCL 257.625(9)(c). The felony information and affidavit of probable cause in the record state that defendant

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[49] *Id*.

[50] See note 4 of the majority opinion.

[51] *Devenpeck*, 543 US at 153 (quotation marks and citations omitted). See also *United States v Anderson*, 923 F2d 450, 457 (CA 6, 1991) ("[K]nowledge of the precise crime committed is not necessary to a finding of probable cause provided that probable cause exists showing that a crime was committed by the defendants.").

had been convicted of operating while intoxicated twice in the past—once in 1998 and once in 2006.[52] Officer

[52] The majority suggests that defendant's prior two convictions cannot be relevant to the probable cause supporting the arrest because the record is unclear as to whether Officer Staman was actually aware of the convictions at the time of the arrest. See note 5 of the majority opinion. As a preliminary matter, Officer Staman may well have been aware of those convictions, having testified at the evidentiary hearing that, in order to determine the registered owner of the vehicle at the scene of the accident, he had to consult secretary of state records. See MCL 257.625(21)(a) (prior convictions for operating under the influence under MCL 257.625(1) are reported to the secretary of state).

Regardless, the majority's interpretation of *Devenpeck* ignores language from the Supreme Court's opinion stating that an officer's "subjective reason for making the arrest need not be the criminal offense as to which the *known* facts provide probable cause," and "the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken *as long as the circumstances, viewed objectively, justify that action*." See *Devenpeck*, 543 US at 153 (emphasis added; quotation marks omitted). This language is consistent with the Supreme Court's guidance in *Herring v United States*, which explained that exclusion is a tool of " 'last resort, not [of] first impulse . . . .' " *Herring v United States*, 555 US 135, 140; 129 S Ct 695; 172 L Ed 2d 496 (2009), quoting *Hudson v Michigan*, 547 US 586, 591; 126 S Ct 2159; 165 L Ed 2d 56 (2006). That is, the exclusionary rule is properly applied only where it results in "appreciable deterrence" of future Fourth Amendment violations. *Herring*, 555 US at 141 (quotation marks and citation omitted). Even when exclusion may facilitate some marginal degree of such deterrence, exclusion is not appropriate if the cost of applying the rule—"letting guilty and possibly dangerous defendants go free"—outweighs the potential benefit. *Id*. "[T]he rule's 'costly toll' upon truth-seeking and law enforcement objectives presents a high obstacle for those urging application of the rule." *Pennsylvania Bd of Probation & Parole v Scott*, 524 US 357, 364-365; 118 S Ct 2014; 141 L Ed 2d 344 (1998). Moreover, the *Herring* Court explained, "[t]he extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct." *Herring*, 555 US at 143. "[E]vidence should be suppressed 'only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that' " his or her conduct violated the Fourth Amendment. *Illinois v Krull*, 480 US 340, 348-349; 107 S Ct 1160; 94 L Ed 2d 364 (1987), quoting *United States v Peltier*, 422 US 531, 542; 95 S Ct 2313; 45 L Ed 2d 374 (1975).

Staman testified at the evidentiary hearing that when he was dispatched to the scene of the accident, he found defendant's vehicle abandoned, facing the wrong direction on an exit ramp from US-131, and showing signs that it had struck both of the protective barriers on the exit ramp. Defendant, herself, did not report the accident to the police. After Officer Staman arrived at defendant's home, he observed defendant leaning against a wall as if to maintain balance. He also noticed that her speech was slurred prior to transporting her to the police station.[53] A violation of

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Here, the record reveals no evidence that Officer Staman believed this arrest to be unlawful before proceeding in spite of such awareness. Indeed, from his testimony at the evidentiary hearing, it seems clear that—notwithstanding the probable cause or lack thereof pertaining to the offense of operating a motor vehicle under the influence of intoxicating liquor—Officer Staman believed that he was arresting defendant for a 93-day misdemeanor in compliance with MCL 764.15(1)(d). There is no flagrant or culpable conduct on the part of the police to deter in future cases. The circumstances existing at the time of the arrest were sufficient to establish probable cause, and Officer Staman's failure to recognize that he was able to arrest defendant for operating a vehicle while under the influence of intoxicating liquor should not be punished by implementation of the exclusionary rule.

[53] The majority believes that "more concrete facts"—aside from the nature of defendant's accident, the fact that defendant abandoned her crashed vehicle without contacting the police, defendant's use of a wall in a manner suggesting that she needed it to maintain balance, and defendant's slurred speech—are necessary to establish probable cause to believe that defendant was under the influence of intoxicating alcohol when the accident occurred. To be certain, one can imagine a scenario in which defendant imbibed alcoholic beverages only after returning home. The majority entertains such scenarios by speculating that defendant's slurred speech and unstable stance were due to the accident. But the United States Supreme Court instructs us that "[p]robable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent people, not legal technicians, act." *Kaley v United States*, 571 US 320, 338; 134 S Ct 1090; 188 L Ed 2d 46 (2014), quoting *Florida v Harris*, 568 US 237, 244; 133 S Ct 1050; 185 L Ed 2d 61 (2013) (quotation marks, citation, and brackets omitted). On the information available to Officer Staman and the circumstances present

MCL 257.625(9)(c) would constitute a felony. Thus, Officer Staman was statutorily authorized under MCL 764.15(1)(b) and (h) to arrest defendant, notwithstanding his mistaken belief that failure to report an accident to fixtures was a 93-day misdemeanor.

III. HOT PURSUIT

Moving forward, it becomes necessary to determine whether the arrest was improper under Fourth Amendment jurisprudence because it was completed *inside* defendant's home, even though Officer Staman initially took hold of defendant when she voluntarily extended her hand into a public space to retrieve her identification. The Court of Appeals accurately alluded to the holding in *Santana*, stating that "a suspect may not defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place."[54] As noted by the majority, there appears to be a divide in the federal courts as to whether the "hot pursuit" exception applies to warrantless entry into the home of a fleeing defendant suspected of committing a *misdemeanor*.[55] Indeed, our Court of Appeals has previously held that the "hot pursuit" exception to the warrant requirement did not allow for

at the time of the arrest, it was reasonable for him to conclude that defendant had been under the influence of intoxicating liquor at the time of her accident, particularly in light of her failure to report the accident to the police. This remains true regardless of other possible explanations for defendant's demeanor and her inexplicable failure to report her accident—an accident in which she collided with multiple protective barriers and left her damaged vehicle near the roadway facing the wrong direction. Given these facts, this arrest was not the product of a violation of the Fourth Amendment, but rather the result of sound investigatory police work.

[54] See *Santana*, 427 US at 43.

[55] See *Stanton v Sims*, 571 US 3, 6; 134 S Ct 3; 187 L Ed 2d 341 (2013).

entry into the home of a defendant suspected of committing a misdemeanor.[56]

In any event, this Court need not take a stance on this issue in the present case. As previously stated, Officer Staman would have had probable cause to believe that defendant operated a vehicle under the influence of intoxicating liquor—a felony where, as here, it is a defendant's third such offense[57]—before the arrest. Where Officer Staman had probable cause to believe that such a violation occurred, the "hot pursuit" exception would undoubtedly apply.[58] Accordingly, when Officer Staman took hold of defendant in a public place and defendant began to resist and pull away, Officer Staman could lawfully pursue defendant into her home to prevent her escape.[59] As stated by the

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[56] *People v Strelow*, 96 Mich App 182, 191; 292 NW2d 517 (1980).

[57] See MCL 257.625(9)(c).

[58] See *Devenpeck*, 543 US at 153.

[59] See *Santana*, 427 US at 43. The majority suggests that Officer Staman could not rely on the "hot pursuit" exception to the warrant requirement partly because there was no evidence that defendant could destroy, although it is worth noting that evidence in the form of defendant's measurable blood alcohol level would dissipate over time. Regardless, preventing the destruction of evidence is only *one* consideration in an analysis of exigent circumstances. See *Minnesota v Olson*, 495 US 91, 100; 110 S Ct 1684; 109 L Ed 2d 85 (1990). In *Olson*, the United States Supreme Court stated:

> The Minnesota Supreme Court applied essentially the correct standard in determining whether exigent circumstances existed. The court observed that "a warrantless intrusion may be justified by hot pursuit of a fleeing felon, *or* imminent destruction of evidence . . . , *or* the need to prevent a suspect's escape, *or* the risk of danger to the police or to other persons inside or outside the dwelling." [*Id*., quoting *State v Olson*, 436 NW2d 92, 97 (Minn, 1989) (emphasis added; citation omitted).]

Thus, while the arrest may not have been valid solely on the basis of an attempt to preserve evidence, entry into defendant's home was necessary to prevent the circumvention of a constitutionally proper arrest, which was initiated from a position outside the protected area inside the home.

Supreme Court in *Santana*, "[t]he fact that the pursuit here ended almost as soon as it began did not render it any the less a 'hot pursuit' sufficient to justify the warrantless entry into [defendant's] house."[60]

The arrest in this case was supported by probable cause, initiated in a public place in accordance with *Santana*, and properly completed inside defendant's home pursuant to the "hot pursuit" exception to the warrant requirement.

IV. APPLICATION OF *NEW YORK v HARRIS*

But even if the "hot pursuit" exception does not apply, defendant still would not be entitled to suppression of the evidence. Defendant is denied the relief she seeks by the United States Supreme Court's opinion in *New York v Harris*,[61] a case referred to by the majority in a single footnote. The majority remands the case to the trial court but does not decide this issue, noting that neither the trial court nor the Court of Appeals addressed the application of the exclusionary rule. Because the facts

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[60] *Santana*, 427 US at 43. I am cognizant of the rule that police cannot create the exigent circumstances relied on in entering a defendant's home. See *Kentucky v King*, 563 US 452, 462; 131 S Ct 1849; 179 L Ed 2d 865 (2011). Even so, that rule merely bars application of the exigent-circumstances exception—including pursuit of a fleeing felon—where the police "create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment . . . ." *Id.* As previously alluded to, the record does not support the notion that Staman ever engaged in or threatened to engage in conduct that would violate the Fourth Amendment. Rather, defendant voluntarily reached across her threshold to take back her identification after it was offered to her. There was no indication presented in the lower-court proceedings that defendant was improperly coerced into leaving the sanctity of her home on the basis of some show of authority or threat that removed the element of choice. The majority disagrees, see note 11 of the majority opinion, but it fails to cite any part of the record in support of its position.

[61] See *Harris*, 495 US at 17.

of the case have been sufficiently developed such that we *could* apply the holding in *Harris*, I believe that we should do so in the name of judicial efficiency.

In *Harris*, the United States Supreme Court explained that "the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects . . . protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime."[62] That is, "where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*," as long as the statement is not rendered inadmissible on some other grounds, e.g., coercion.[63] It seems clear, then, that because Officer Staman had probable cause to arrest defendant for failure to report an accident causing damage to fixtures and for operating a motor vehicle under the influence of intoxicating liquor, defendant's statements in Officer Staman's police cruiser—made after waiving her *Miranda* rights—would be admissible even if the arrest inside defendant's home violated the rule in *Payton*.[64] I see no reason why the rule in *Harris* would not extend to uphold the admissibility of defendant's blood-alcohol-level tests as well.

V. CONCLUSION

I would hold that there was no constitutional defect in the probable cause supporting the arrest and no

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[62] *Id.*

[63] *Id.* at 20-21.

[64] See *id.*

constitutional defect stemming from the location of the arrest. Even if a constitutional error did occur when Officer Staman entered the home to complete the arrest, the United States Supreme Court's holding in *Harris*[65] instructs that the exclusionary rule would not serve to bar admission of defendant's self-incriminating statements made in Officer Staman's police vehicle or to the blood-alcohol-level tests administered in this case. For these reasons, I believe the lower courts ultimately reached the correct conclusion. I would affirm defendant's convictions.

MARKMAN, J., concurred with ZAHRA, J.

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[65] See *id.*

THIEL v GOYINGS

Docket No. 156708. Argued on application for leave to appeal March 6, 2019. Decided July 24, 2019.

Matthew T. Thiel and Nikole M. Thiel brought an action in the Allegan Circuit Court against David L. Goyings and Helen M. Goyings, requesting that the court enjoin the Goyingses' construction of a home in the Timber Ridge Bay subdivision of Watson Township and order that the modular components of the home be removed or destroyed because the home violated the subdivision's restrictive covenants prohibiting the construction of modular homes. About a month after the suit was filed, William and Marcia Traywick joined as intervening plaintiffs. The Goyingses had selected Heritage Custom Builders, Cassidy Builders, Inc., and Ritz-Craft Corporation of Michigan, Inc., to design and build their home. Those builders specialized in systems-built homes constructed using a hybrid method of homebuilding that integrated modular components into on-site, stick-built construction. Through this method, part of the Goyingses' home was stick-built on-site, and three modular components were built off-site and delivered to the lot. In total, the completed home was to be composed of about 59% stick-built construction and 41% modular components. When the Goyingses' neighbors noticed delivery of modular components to the lot, Matthew Thiel and William Traywick contacted the Goyingses to inform them that installation of the modular home would violate the restrictive covenants and that they would take legal action. The Goyingses continued with the home's construction, and the modules were attached to a foundation of the same square footage as the assembled modules. The Thiels brought the instant lawsuit and moved for summary disposition, which the trial court denied. The case proceeded to a three-day bench trial, at which the court heard testimony from the parties and from a township building official, an appraiser, and the Goyingses' builder. The court, Margaret Zuzich Bakker, J., held that the restrictive covenants did not contemplate the type of hybrid home that the Goyingses had built and that the home was "sufficiently constructed, valued, and congenial as to allow it to remain." Plaintiffs appealed. In an unpublished per curiam opinion issued on August 8, 2017 (Docket No. 333000), the

Court of Appeals, HOEKSTRA, P.J., and MURPHY and K. F. KELLY, JJ., reversed, holding that the restrictive covenants were unambiguous and that the Goyingses' home was in clear violation of those covenants. The Goyingses sought leave to appeal in the Supreme Court, and the Supreme Court ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1030 (2018).

In an opinion by Chief Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Courts review restrictive covenants with a special focus on determining the restrictor's intent. Unambiguous restrictions must be enforced as written, but any uncertainty or doubt must be resolved in favor of the free use of property. In this case, the dispute was not about the definition of the word "modular"; rather, the dispute concerned how the subdivision's restrictive covenants defined a "modular home." The restrictive covenants stated, "All residences shall be stick built on site and no . . . modular home . . . will be erected on any of the Parcels unless provided for herein." A fair reading of a modifier like "modular" applies its meaning to the noun as a whole. The limiting factor is the extent to which the noun accepts the modifier. A homogenous or abstract thing often accepts the modifier wholly (a blue circle, a truthful statement); most things that exist in the real world have some degree of heterogeneity and fully accept modifiers within the bounds of reason (a red car, a friendly neighbor). And houses, like cars or people, are not just one thing. Accordingly, the most natural reading of the phrase "modular home" is a home that is mostly or generally modular. That is, a home is a modular home under the restrictive covenants if it is predominantly modular—more modular than not. If the phrase "pre-fabricated or modular home" were interpreted to include any home constructed using a modular or prefabricated component, that interpretation would render the covenant provision unenforceable because every home doubtless contains some prefabricated part. Additionally, reading the phrase "modular home" in the context of the other terms revealed that a modular home is of a kind with prefabricated homes, geodesic domes, berm-houses, mobile homes, shacks, and barns. The covenants' use of different terms also suggested an important difference between a permissible home and a prohibited one in how it comes to be built. The covenants' use of verbs like "move," "place," or "locate" suggested picking up something that already exists and plunking it down on the lot, fully formed. And a difference exists

between structures that are constructed versus erected: to construct a structure evokes forming or creating that structure by putting together its parts, whereas to erect a structure connotes assembling or raising it. In this case, the Goyingses' home was not a relocated residence because each modular component was merely a raw piece of construction material delivered to the lot, and the Goyingses' home was also not a manufactured housing unit because the common understanding of that term is a mobile home. The materials, workmanship, quality, and outward appearance of the Goyingses' home were indistinguishable from a site-built home. The language of the restrictive covenants supported the trial court's finding that there is a distinction between a modular or prefabricated home and a site-built home with modular or prefabricated components. Therefore, applying the covenants to the undisputed facts found by the trial court, the Goyingses' home was not a "pre-fabricated or modular home" as the restrictive covenants use that phrase because the Goyingses' home was mainly stick-built with modular components integrated into it. The Court of Appeals erred when it implicitly held that the restrictive covenants prohibited any home that contained a module.

Court of Appeals opinion reversed; trial court decision reinstated.

Justice VIVIANO, joined by Chief Justice MCCORMACK, concurring, agreed in full with the majority's opinion but wrote separately to explain that an alternate basis for reversal would be the Court of Appeals' erroneous conclusion that the only solution was to grant injunctive relief and order that the home be removed. The Court of Appeals based this conclusion on a case decided over 60 years ago, *Cooper v Kovan*, 349 Mich 520 (1957). *Cooper* merely recognized that the trial court in that case went too far in an effort to craft an equitable remedy, substituting its own judgment for that of the parties; *Cooper* did not divest trial courts of their equitable discretion to determine whether an injunction is the proper form of relief in light of all the facts, nor did *Cooper* bar consideration of all equitable defenses apart from the three expressly mentioned. However, the Court of Appeals erroneously interpreted *Cooper* as establishing a per se rule that absent three specific circumstances, a trial court must enforce by injunction a valid restrictive covenant. Justice VIVIANO concluded that this reading of *Cooper* conflicts with caselaw prior to *Cooper* and with general principles of equity and that the Supreme Court should, in an appropriate future case, clarify that *Cooper* did not abrogate the rule long recognized by the Supreme Court that the enforcement of a restrictive covenant is a matter of the trial court's discretion.

Justice MARKMAN, joined by Justice ZAHRA, dissenting, would have held that the Court of Appeals correctly determined that the Goyingses' home was a modular home and that the home violated the subdivision's restrictive covenant prohibiting the erection of modular homes. A review of the common and ordinary understandings of what comprises a modular home—and in particular the unanimous characterizations of professionals who were familiar with such homes—compelled the conclusion that the Goyingses erected a modular home in contravention of the restrictive covenant. The covenant specified that "no . . . modular home . . . be erected on any of the Parcels . . . ." Using dictionary definitions, the covenant proscribed the "fitting together of materials or parts" to create a "place of residence" that is "constructed using standardized units." In characterizing whether a home is modular, a litany of factors, each of which may be relevant, or even sometimes determinative, must be considered, including the proportion of the home that is comprised of modular units, the nature of the modular units, and the overall relationship of the modular units to the structure itself. In this case, three modular units were manufactured in a factory; these modular units were enclosed, freestanding structures that were identified as entire and discrete rooms adorned with doors, windows, cabinets, countertops, mirrors, and lighting and plumbing fixtures. And the modules were of such size and substantiality that there could be no home without them. Thus, the home comported with the plain and ordinary understanding of a modular home, regardless of whether it achieved the majority's own standard of "predominance." Moreover, the professional characterizations supported this understanding of modularity. Every professional source, beginning with the building contracts and ending with the inspections and evaluations, characterized the home as modular: the company with which the Goyingses contracted for site improvements described the home as modular in its contract, the building-permit application described the property as modular, the building permit gave the Goyingses permission to install a modular home, the uniform residential appraisal report prepared by an appraisal company stated that the home was modular, a building system approval report from the Michigan Department of Licensing and Regulatory Affairs classified the home as modular, the manufacturer of the home described itself as a modular-home manufacturer, a company that assisted with the erection of the home described it as modular, another company involved in the design process repeatedly referred to the home as modular, a township building official testified that there was "no doubt" that the home was modular, and another appraiser who was qualified as an expert witness in the area of residential

real estate appraisals testified that the home was modular. These characterizations should have been given considerable weight in determining whether the home was modular. Finally, with regard to the appropriate remedy for violation of the covenant, Justice MARKMAN agreed with the Court of Appeals that removal of the home was appropriate. When parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires that courts enforce the terms and conditions contained in such contracts. The Goyingses knowingly violated the covenant by erecting a modular home, and because the home could not be made nonmodular absent its removal, the only effective remedy was the removal or dismantling of the home.

Dykema Gossett PLLC (by *Todd C. Schebor*, *Krista L. Lenart*, and *Jill Wheaton*) for Matthew T. Thiel, Nikole M. Thiel, William Traywick, and Marcia Traywick.

Miller, Canfield, Paddock and Stone, PLC (by *James E. Spurr* and *Paul D. Hudson*) for David L. Goyings and Helen M. Goyings.

Amicus Curiae:

Bush Seyferth & Paige PLLC (by *Michael R. Williams* and *Brittney D. Kohn*) for the Modular Home Builders Association.

MCCORMACK, C.J. David and Helen Goyings designed and built a retirement home on a lakefront lot. Their neighbors insist that the Goyingses violated the subdivision's restrictive covenants that bar "prefabricated or modular home[s]" (along with mobile homes, berm-houses, geodesic domes, shacks, and barns) and that they must tear it down.

After a three-day bench trial, the trial court found no cause of action and dismissed the case. But the Court of Appeals concluded that the trial court erred when it held that the covenants "did not contemplate a home of the type built by Defendants." The Court of

Appeals reasoned that the Goyingses' home unambiguously fit the commonly understood definition of "modular" but never construed the disputed term used in the covenants—"modular home." The panel reversed and held that the trial court should have granted judgment in the neighbors' favor and ordered the Goyingses to tear down their new home.

We disagree. We reverse the Court of Appeals and affirm the trial court's dismissal of the case.

I. FACTS AND PROCEDURAL HISTORY

Timber Ridge Bay is a subdivision on the shores of Big Lake in Allegan County. Fourteen of the sixteen residential parcels within the subdivision are subject to Timber Ridge Bay's "Declaration of Restrictions, Covenants and Conditions," which was drafted by the developer and recorded with the county register of deeds in December 2006. At the time of trial, four homes had been built in the subdivision that were subject to these deed restrictions, covenants, and conditions.[1] Three of those belong to the Thiels, the Traywicks, and the Goyingses, respectively. The fourth homeowner has not joined in this litigation.

As relevant here, the covenants provide:

> **COVENANTS, RESTRICTIONS AND CONDITIONS**
>
> Section 1. Establishment of Restrictions. In order to provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein, the Parcels 1-14 shall be subject to the limitations set forth below:
>
> * * *

[1] There is also a fifth home located on the two parcels not subject to the restrictive covenants.

B. Building and Use Restrictions.

* * *

3. Relocated Residences. No residences, including modular, manufactured, mobile or prefabricated homes, may be moved from a location outside the Premises and placed or located within a Parcel within the Premises.

4. Manufactured Housing Units. No manufactured homes, whether classified as a mobile home, modular home, or otherwise, and no prefabricated homes shall be permitted on any Parcel in the Premises, regardless of which building codes are applicable to said homes.

* * *

C. Residential Dwelling Restrictions

* * *

4. Miscellaneous Provisions. The height of any building will not be more than four (4) stories. If any portion of a level or floor within a residence is below grade, all of the level or floor shall be considered a basement level. All residences shall be stick built on site and no geodesic dome, berm house, pre-fabricated or modular home, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein.

The third sentence of § 1.C.4 is the source of the plaintiffs' complaint: the plaintiffs contend that the defendants' home violates the prohibition against erecting a "pre-fabricated or modular home."

When the Goyingses built their new home on a lakefront lot, they selected Heritage Custom Builders, Cassidy Builders, Inc., and Ritz-Craft Corporation of Michigan, Inc., to design and custom-build it. These builders specialize in system-built homes constructed using a hybrid method of homebuilding that integrates

modular components into traditional, on-site, stick-built construction. The Goyingses custom-designed their home (including the modular components) using a computer-aided design program. They also selected the interior colors and finishes for the carpet, flooring, backsplashes, and countertops.

The majority of the home would be stick-built on-site. This included the entire lower-level walkout basement, garage, roof gables, roofing, front porch, stone columns, deck, and other portions of the home. But three modular components would be built off-site and delivered to the lot. Together these components matched the dimensions of the foundation and would be delivered on trailers, lowered into place using cranes, and secured to the foundation. From there, the components—described at trial as "just . . . raw piece[s] of construction material"—would require on-site construction to be incorporated into the home and to make the home habitable. After delivery of the system-built components, the general contractor would go on to install a furnace, water heater, plumbing, drain lines, and duct work throughout the entire home and complete the on-site construction to incorporate the modular components. All told, the completed home would be composed of about 59% stick-built construction and 41% modular components.

The Goyingses began to build. They dug the basement, poured the foundation, and began on-site construction of the lower level. But the neighbors took notice when the Goyingses' custom-designed modular components (which were to make up the bulk of the ground-floor living space) arrived on trucks. That same day, the plaintiffs intervened—Mr. Thiel called the defendants to tell them that installation of the modular home on their parcel would violate the covenants. The Goyingses brushed off the objection, telling Mr.

Thiel that a crane was scheduled to install the components the next morning and that they intended to move forward with construction. Mr. Traywick e-mailed the Goyingses to warn that the property owners would take legal action.

All the same, the crane arrived, and over the next two days it moved the modular components into place so that they could be incorporated into the site-built structure. The modules were attached to a foundation of the same square footage as the assembled modules. They completed the home construction with on-site stick-building to install plumbing, an electrical system, a furnace, shingles, a garage, gables, a porch, and a deck and finished the basement.

Plaintiffs Matthew and Nikole Thiel sued 10 days later, asking the Allegan Circuit Court to halt construction and order the modular components removed or destroyed. About a month after that, the Traywicks joined as intervening plaintiffs.

After the trial court denied the plaintiffs' combined motion for summary disposition, the case proceeded to a three-day bench trial. The court heard testimony from the Goyingses, the Traywicks, and the Thiels, as well as three other witnesses: a township building official, an appraiser, and the Goyingses' builder. The Court also received *de bene esse* deposition testimony from the attorney who drafted the restrictive covenant in 2006, Zachary Bossenbroek.

The parties do not dispute any of the trial court's factual findings. The court determined that the "home meets all of the standards and specifications of a stick-built home." It found that systems-building was a hybrid method of construction similar to modular construction but ultimately determined that "systems built" homes and "modular" homes occupied discrete

categories. It found that the testimony was uncontroverted that the overall quality of the Goyingses' home would equal or surpass that of homes that are stick-built on-site. The completed home would be indistinguishable from a stick-built home in material quality and workmanship because the modules were constructed out of the same materials as a stick-built home and the construction methods used in the factory were the same as those used to build a home on-site. The home was subject to the same residential building codes as a stick-built home. And the builder affixed the modules to the foundation just as it would a framed, stick-built home.

The court also found that the home's hybrid construction would not be visible. It would be visually attractive, and, from appearances, "it [would be] unlikely that anyone would know that the home had been built anywhere but on the property." The court also determined that although the plaintiffs believed "that knowledge that the construction of the home involved three modules would reduce the value of the other homes in the area," they did not present any evidence from an "appraiser, expert or other witness to support their belief."

Finally, on the basis of testimony from the plaintiffs and *de bene esse* deposition testimony from the covenants' drafter, the court determined that the purpose of the covenants was to protect the value of the parcels by maintaining a consistent standard of aesthetics, quality, and value for all homes built within the subdivision. The covenants prohibited manufactured homes, mobile homes, and modular homes on the basis of the assumption that such homes " 'are not typically going to be of a standard and of esthetic appeal as what a stick built home would be . . . .' "

The trial court held that although the restrictions, covenants, and conditions in the deed might not seem to be ambiguous in their wording, the covenants did not contemplate a home like the Goyingses built, which does not fit neatly into either the modular or stick-built category. Therefore, the court concluded that, reading the covenants as a whole and resolving all doubts in favor of the free use of the property, the Goyingses' home conformed to the intent of the drafter. It held: "While an entirely modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay, the home designed by [the Goyingses] is sufficiently constructed, valued, and congenial as to allow it to remain. A systems-built home of similar value, construction and congeniality shall be allowed on the Timber Ridge Bay properties."

The Court of Appeals reversed. The panel believed that the trial court incorrectly read an ambiguity into the covenant, reasoning that "the restrictive covenant was not rendered ambiguous for failure to specifically define 'modular.' " *Thiel v Goyings*, unpublished per curiam opinion of the Court of Appeals, issued August 8, 2017 (Docket No. 333000), p 6. The panel also concluded that the defendants' "tortured use of the term 'systems built' " did not require a different result because "the trial court correctly concluded that the two terms [modular and systems-built] were synonymous."[2] *Id*. at 4. The panel held that "[t]he restriction should have been accorded its ordinary and generally understood or popular sense, without technical refinement." *Id*.

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[2] In fact, the trial court stopped just short of finding that the two terms were interchangeable. It stated, "[T]he representative from the building contractor preferred the term 'systems built' to describe this particular construction, although it is clear that the term is similar to, if not synonymous with, modular."

And then the panel did just that. It chose a dictionary definition of "modular": "**1.** of or pertaining to a module or a modulus. **2.** composed of standardized units or sections for easy construction or flexible arrangement: *a modular home; a modular sofa*. . . ." *The Random House Dictionary of the English Language: Second Unabridged Edition*. But the panel then based its holding only on the isolated definition of "modular" without ever construing the relevant covenant term "modular home." And given the definition of modular, the panel concluded that the "defendants' home was in clear violation of the unambiguous restrictive covenant . . . ." *Thiel*, unpub op at 6. The house had to come down.

The defendants sought leave to appeal in this Court. We ordered oral argument on the application, directing the parties to file supplemental briefs addressing

> (1) whether the defendants' home is a "modular home" as defined by Timber Ridge Bay's "Declaration of Restrictions, Covenants and Conditions"; and (2) if so, whether the violation was a technical violation that did not cause substantial injury, *Cooper v Kovan*, 349 Mich 520, 530 (1957). [*Thiel v Goyings*, 501 Mich 1030, 1030 (2018).]

II. DISCUSSION

A. LEGAL BACKGROUND

Negative covenants are grounded in contract. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). Therefore, the interpretation of restrictive covenants is a question of law that this Court reviews de novo. *Terrien v Zwit*, 467 Mich 56, 60-61; 648 NW2d 602 (2002). This means that we review the legal issue with fresh eyes, without any required deference to the courts below.

Courts review restrictive covenants with a special focus on determining the restrictor's intent. "[W]e are not so much concerned with the rules of syntax or the strict letter of the words used as we are in arriving at the intention of the restrictor, if that can be gathered from the entire language of the instrument." *Tabern v Gates*, 231 Mich 581, 583; 204 NW 698 (1925). We determine the intended meaning of the chosen language by reading the covenants "as a whole rather than from isolated words" and must construe the language "with reference to the present and prospective use of property . . . ." *Donnelly v Spitza*, 246 Mich 284, 286; 224 NW 396 (1929); see also *Seeley v Phi Sigma Delta House Corp*, 245 Mich 252, 253; 222 NW 180 (1928) ("The language employed in stating the restriction is to be taken in its ordinary and generally understood or popular sense, and is not to be subjected to technical refinement, nor the words torn from their association and their separate meanings sought in a lexicon."). And we enforce unambiguous restrictions as written. *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 214; 737 NW2d 670 (2007). Thus, we consider challenges to restrictive covenants in a contextualized, case-by-case manner.

It is a bedrock principle in our law that a landowner's bundle of rights includes the broad freedom to make legal use of her property. *O'Connor v Resort Custom Builders, Inc*, 459 Mich 335, 343; 591 NW2d 216 (1999). Restrictive covenants are at once in tension with and complementary to this right: deed restrictions allow landowners to preserve the neighborhood's character. And the failure to enforce the deed restriction thus deprives the would-be enforcer of a valuable property right. *Bloomfield Estates*, 479 Mich at 214. But enforcing a restriction beyond the restrictor's

intent deprives the landowner of an even more fundamental property right—his right to legal use of his own property.

Weighty interests are at stake, but the balance tilts in favor of the right to control one's own land. Unambiguous covenants must, of course, be enforced as written, but any uncertainty or doubt must be resolved in favor of the free use of property. *Stuart*, 454 Mich at 210.

B. THE RESTRICTIVE COVENANTS

This is not a dispute about the definition of the word modular. On that point, we agree with the plaintiffs—there is a generally understood definition of modular, and it's a lot like the definition the Court of Appeals used. It's also not a dispute about whether modular homes are nice. The Goyingses' home certainly seems to be, but that's beside the point. This isn't a dispute about the facts at all—the parties do not challenge the trial court's factual findings. The dispute is about how the covenants define a *modular home*—that is, when does a home with modular components cross the line and become a modular home? How do we know a "modular home" when we see one?

1. THE TERM "PRE-FABRICATED OR MODULAR HOME" MUST BE DEFINED IN CONTEXT OF THE RESTRICTIVE COVENANTS

The record sets up a continuum between an entirely stick-built home on one side and an entirely modular one on the other. The trial court ruled that the covenants prohibited only *entirely* modular homes. The defendants suggest that the most natural reading prohibits a home that is *mostly* modular. The Court of Appeals didn't engage the question but concluded that the Goyingses' home was "in clear violation of the

unambiguous restrictive covenant" even so. *Thiel*, unpub op at 6. And the plaintiffs have suggested that the defendants' home is modular by any definition or, when pressed, that a home is modular if its footprint is modular or if the "meat" of it is modular (and, they say, the defendants' home fits both definitions).

This interpretive dispute raises the question: how modular does a home need to be to be a modular home? But it is not a question to answer in the abstract; rather, its answer is grounded in the text of the covenants.

a. TERMS OF THE COVENANTS

The restrictive covenants state, "All residences shall be stick built on site and no . . . modular home . . . will be erected on any of the Parcels unless provided for herein." The Court of Appeals concluded that "modular" means "**1.** of or pertaining to a module or a modulus. **2.** composed of standardized units or sections for easy construction or flexible arrangement: *a modular home; a modular sofa. . . .*" *The Random House Dictionary of the English Language: Second Unabridged Edition*. Every modern dictionary we consulted provides about the same definition. The trial court did not find that the term had a specialized meaning here. And although all homes are, to some extent, built with standardized units for ease of construction—two-by-fours are all two inches by four inches; drywall sheets all come in standardized sizes—we also recognize that the parties have accepted that the "units" in this litigation are the three modules delivered by truck and lowered by crane. We assume for the sake of argument that those modular components, although custom-designed, were to some extent "standardized" for ease of construction. The definition of "modular" on its own is unambiguous.

But, of course, a modifier is just an abstraction until it acts on a noun—the question is when a *home* is *modular*. Stringing together bare definitions would mean that a "modular home" could be defined as "a dwelling that is composed of standardized units or sections for easy construction or flexible arrangement." This definition doesn't advance the ball much. Even though we agree on the meaning of "standardized units or sections," the definition begs the same question: how much of the home must be "*composed of*" these standardized units for it to be a modular home under the covenants? Or, again, how modular must a modular home be?

Grammar helps. When an adjective modifies a noun, we implicitly understand it to modify the whole noun. And what it means to modify the whole noun depends on the noun. So an "orange trapezoid" probably describes a solid-colored geometric shape. A "mean, orange cat" describes a grumpy feline with orange fur, no matter that its eyes might be white and its paws might be black, because we understand that cats are not often monochromatic.[3] If we want to modify less than the whole noun, or express the modification in finer detail, we might employ an adverb to modify the adjective—a bright orange cat, or a partly orange cat.

In the same way, the most natural reading of the phrase "modular home" is a home that is mostly or generally modular.[4] And because we understand that a

[3] And of course this understanding requires that we are comparing traits along a single dimension—apples to apples. Thus, the dissent's counterexamples don't work: a blueberry muffin refers to the flavor of the muffin (more blueberries than cranberries, for instance). A sugary drink is more sugary than savory.

[4] The dissent criticizes this standard as contravening the covenants, but we fail to see how. A home that is more modular than not is

"home," like a cat, is a heterogeneous object, a mobile home would still be a mobile home under these covenants even if it had a custom-built, handcrafted porch. It takes more than standardized roof trusses to make a prefabricated house. A brick house needn't have a brick roof. And so on.

Courts seek to find a fair reading of contract language —not a strict one—because strict constructionism destabilizes the whole enterprise of contract law. Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 39-41 and 355-358. Brittle, hyperliteral interpretations make agreements fragile and impractical. These covenants show why: if we interpreted "pre-fabricated or modular home" to include any home constructed using a modular or prefabricated component, we would render the covenant provision unenforceable. Every home in the neighborhood doubtless contains some prefabricated part—the Traywicks have a prefabricated basement wall system, and, as the circuit court found, any modern home is constructed using prefabricated components like "trusses, foundation, cabinets, etc." Courts do not enforce deed restrictions when the would-be enforcer has unclean hands. "It is the policy of the courts of this State to protect property owners who have not themselves violated restrictions in the enjoyment of their homes and holdings . . . ." *Carey v Lauhoff*, 301 Mich 168, 172; 3 NW2d 67 (1942) (quotation marks and citation omitted). We reject such extreme readings for good reason—this sort of cartoonish strict constructionism would read the restrictive covenants out of existence.

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reasonably characterized as "modular," while a home that is less modular than not is, conversely, reasonably characterized as *not* modular. We would have a different case if the covenants used different language. But we seek a fair reading of the language the drafter used; we cannot rewrite the restrictive covenants to achieve the result we judges think the drafter intended.

b. CONTEXT OF THE COVENANTS

If the words of the covenant are the foundation, the surrounding text is the framing that gives structure and defines inside from outside. Words "should not be construed in the void, but should be read together to harmonize the meaning, giving effect to the [agreement] as a whole." *G C Timmis & Co v Guardian Alarm Co*, 468 Mich 416, 421; 662 NW2d 710 (2003), quoting *Gen Motors Corp v Erves (On Rehearing)*, 399 Mich 241, 255; 249 NW2d 41 (1976) (opinion by COLEMAN, J.). The plaintiffs' complaint is grounded in § 1.C.4, which provides miscellaneous residential dwelling restrictions:

> 4. Miscellaneous Provisions. The height of any building will not be more than four (4) stories. If any portion of a level or floor within a residence is below grade, all of the level or floor shall be considered a basement level. *All residences shall be stick built on site and no geodesic dome, berm house, pre-fabricated or modular home, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein*. [Emphasis added.]

The other terms in the list alongside modular home are contextually important. Under the doctrine of *noscitur a sociis*, a thing is known by the company it keeps. *Koontz v Ameritech Servs, Inc*, 466 Mich 304, 318; 645 NW2d 34 (2002). And so a modular home is of a kind with prefabricated homes, geodesic domes, berm-houses, mobile homes, shacks, and barns.

We know that the covenants proscribe modular homes, along with these others like them. But the restrictive covenants also *prescribe* certain characteristics for homes in the neighborhood. This no-modular-home provision sits among several other requirements for residential dwellings. And these are also contextually meaningful: a compliant home will meet minimum

square footage requirements (1400 square feet for a one-story residence, 1800 for a one and one-half story residence, and 2400 for a two-story residence) and be constructed using "[a]cceptable exterior materials," which "include cedar, brick, vinyl, aluminum, field stone, drivit and any other material considered to be a premium building component," and all construction must be done by residential homebuilders licensed by the state of Michigan.

c. THE REST OF THE COVENANTS

Finally, the meaning of the term "modular home" in the restrictive covenants as a whole is important. The restrictive covenants refer to modular homes two other times. When a document repeatedly uses a term or phrase, we assume that it carries the same meaning throughout. See 11 Williston, Contracts (4th ed), § 32:6, p 709 ("Generally, a word used by the parties in one sense will be given the same meaning throughout the contract in the absence of countervailing reasons."); *Robinson v Lansing*, 486 Mich 1, 17; 782 NW2d 171 (2010) (applying the canon of consistent usage to statutory language).

Section 1.B.3 includes modular homes as one subset within the category of relocated residences. That provision, titled "Relocated Residences," provides:

> No *residences*, including modular, manufactured, mobile or prefabricated homes, may be *moved* from a location outside [Timber Ridge Bay] and *placed* or located within a Parcel within [Timber Ridge Bay]. [Emphasis added.]

Similarly, § 1.B.4, titled "Manufactured Housing Units," provides: "No *manufactured homes*, whether classified as a mobile home, modular home, or other wise, and no prefabricated homes shall be permit-

ted . . . ." (Emphasis added.) Thus, as used in these sections, a "modular home" can be relocated and can be considered a subset of "manufactured homes" or "manufactured housing units."[5]

This too: in each instance, the restrictive covenants use a pattern of specific verbs to refer to modular homes and their peers—the covenants state that modular, manufactured, mobile, or prefabricated homes may not be *moved*, *placed*, *located*, or *erected* within a parcel in Timber Ridge Bay.[6] In contrast, the covenants refer to *construction* when discussing allowed structures.[7] The covenants' use of different terms suggests an important difference between a permissible home and a prohibited one in how it comes to be built—which makes sense given that the covenants require that all residences be "stick built onsite." Using verbs like *move*, *place*, or *locate* suggests picking up a thing that already exists and plunking it down on the lot, fully formed.

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[5] Mobile and manufactured homes are built on an automotive-type frame that incorporates an axle or metal chassis. Additionally, some manufactured homes could be called modular, in the sense that a mobile or manufactured home can be a double- or triple-wide unit—two or three manufactured home units put together. On the other hand, most modular homes are not manufactured homes because they do not conform to the proper building codes (federal standards set by the United States Department of Housing and Urban Development) and lack the chassis or axle used to transport manufactured homes.

[6] Similarly, the covenants state that "[t]emporary buildings *are allowed* prior to and during the construction of the residential dwelling for a total period not to exceed twenty-four (24) months." (Emphasis added.)

[7] The only apparent exception is in § 1.D.2: "Setback Lines. No building will be erected on any other Parcel nearer to the street line . . . than permitted by the setback requirements . . . ." This usage can still cohere with the others, because § 1.D.1 defines "building" using a nonexhaustive list. For example, a lot owner could erect a greenhouse as her permitted outbuilding.

A closer question is whether there is a meaningful difference between a structure that is *constructed* versus *erected*. The two words, though rough synonyms, have distinct undertones.[8] *To construct* evokes forming or creating a structure by putting together its parts. *To erect* connotes assembling or raising a structure.

This reading makes sense in the context of the restrictive covenants: a geodesic dome can be purchased in a kit and assembled, as can a berm house.[9] And the term "barn-raising" calls to mind the framed walls of a barn or shack pulled upright with ropes.

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[8] Their dictionary definitions reflect their distinct qualities, while also recognizing a degree of overlap. See, e.g., *Webster's New Twentieth Century Dictionary Unabridged* (2d ed) (defining "construct," in pertinent part, as "1. to put together the parts of in their proper place and order; to build; to form; as, to *construct* an edifice; to *construct* a telescope" and defining "erect," in pertinent part, as "2. (a) to raise, as a building; to construct; to build; as, to *erect* a house or a church; to *erect* a fort; (b) to put together the component parts of, as of a locomotive, a printing press, a dynamo, or other machine; to assemble"); *Webster's Third New International Dictionary, Unabridged Edition* (1966) (defining "construct," in pertinent part, as "to form, make, or create by combining parts or elements : BUILD, FABRICATE" and defining "erect," in pertinent part, as "to put up (as a building or machine) by the fitting together of materials or parts : cause to stand ready for use : BUILD . . . ; *specif* : to hoist and bolt in place fabricated parts of (a ship's structure) before riveting or welding"); *Webster's New International Dictionary of the English Language Unabridged* (2d ed) (defining "construct," in pertinent part, as "**2.** To put together the constituent parts of (something) in their proper place and order; to build; form; make; as, to *construct* an edifice" and defining "erect," in pertinent part, as "**1.** To raise, as a building; to build; construct; as, to *erect* a house . . . **4.** To raise and place in an upright position; to set upright; rear; as, to *erect* a pole, a flagstaff, a statue, etc."); *The Oxford English Dictionary* (2d ed) (defining "construct," in pertinent part, as "**1.** . . . To make or form by fitting the parts together; to frame, build, erect" and defining "erect," in pertinent part, as "**III.** To set on a foundation, construct, establish. **7.** To set up (a building, statue, framework, etc.); to rear, build").

[9] Admittedly, the geodesic dome and berm house seem to be mentioned by name in the miscellaneous provision to make doubly sure that no one stick-builds an Epcot dome or a hobbit hole that otherwise complies with the restrictive covenants.

Similarly, some modular construction requires mere assembly (e.g., a triple-wide trailer or an entirely modular home) or to be set up or raised (e.g., a manufactured home). The trial court recognized this distinction: "[A]n *entirely* modular, premanufactured or prefabricated home cannot be moved onto the properties located within Timber Ridge Bay . . . ." (Emphasis added.)

d. THE PURPOSE OF THE COVENANTS

Finally, even an unambiguous term must be construed relative to the drafter's intent. *Tabern*, 231 Mich at 583. The restrictive covenants' stated purpose is "to provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein . . . ."

e. A DEFINITION

With this text and context, we can put the pieces together to determine where the restrictor intended to draw the line. First, the covenants categorically bar landowners from moving or placing relocated residences or manufactured homes onto a parcel. These categorical restrictions apply to any structure that may be considered, without substantial further construction, to be a home or residence upon delivery.

The covenants also impose construction and design standards beyond these categorical restrictions. We agree with the trial court that, at a minimum, an entirely prefabricated, manufactured, or modular home cannot be placed on or moved to a lot in Timber Ridge Bay. But the language of the covenants imposes a more stringent standard than the trial court found. A fair reading of a modifier like "modular" applies its meaning to the noun as a whole. The limiting factor is the extent to which the noun accepts the modifier. A

homogenous or abstract thing often accepts the modifier wholly (a blue circle, a truthful statement); most things that exist in the real world have some degree of heterogeneity and fully accept modifiers within the bounds of reason (a red car, a friendly neighbor). And houses, like cars or people, are not just one thing.

The most natural reading of the prohibition in § 1.B.4 against "modular home[s]" and "prefabricated homes" is to prohibit homes that are mostly modular or prefabricated. That is, a home is a modular home under the restrictive covenants if it is predominantly modular—more modular than not.

The covenants enforce construction standards from the opposite side, too: homes in the subdivision must be stick-built on-site. The stick-built requirement forecloses the loophole for the 33% modular, 33% prefabricated, and 34% site-built franken-home. In short, a home must be predominantly stick-built on-site, and a home built using predominantly modular construction cannot be erected in Timber Ridge Bay. These are, of course, questions of fact for the jury or fact-finder.

And the covenants suggest that in close cases a court has other tools.[10] It may consider whether the home

[10] Although the dissent makes much of the "professional characterizations" in this case, none of those characterizations help us answer the question presented here—when does a home constructed with modular components become a modular home under the restrictive covenants? The opinions of the township's building official, the appraiser, and the author of Heritage Custom Builders' blog are of limited usefulness, since none of those characterizations was made in the context of the restrictive covenants at issue.

And the remaining "professional characterizations" cited by the dissent merely confirm that some portion of the home is modular. For example, on the building-permit application, the box "modular" was checked—but a builder would check this box for any home that contained a modular component. Expert testimony at trial made clear that the function of the check box is *not* to provide a definitive description of

otherwise complies with building standards of the neighborhood and whether the home threatens the

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a home's essential character but to "alert[] the building inspector that there is a different type of inspection that has to be done" on the modular portion. See generally Mich Admin Code, R 408.31101 *et seq*.

Modular components are inspected differently because they are preapproved by the state before being installed—the "Building System Approval Report" refers to this preapproval process for a "premanufactured unit" under Part 11 of the Construction Code Commission General Rules. Mich Admin Code, R 408.31106(4) defines "premanufactured unit" as

> an assembly of materials or products intended to comprise all or part of a building or structure, and that is assembled, at other than the final location of the unit of the building or structure, by a repetitive process under circumstances intended to insure uniformity of quality and material content. The term includes a mobile home.

True enough, as the dissent notes, "the 'type of unit' to be inspected was characterized [in the Building System Approval Report] as '[m]odular.' " But the "unit" in question *was a module*. And we can all agree that the modules themselves are modular.

The dissent's other professional sources suffer the same flaw: JM Quality Construction, LLC, " 'specializ[es] in modular set up,' " and it did, in fact, set up modular components. Ritz-Craft, the company that manufactured the modular components, might describe itself as a " 'modular home manufacturer,' " but the Goyingses did not purchase a modular home from Ritz-Craft; they contracted with Cassidy Builders and Heritage Custom Builders to construct a home that incorporated Ritz-Craft modules. Michael Coeling, the general manager of Cassidy Builders, testified that Ritz-Craft is "a supplier to Cassidy Builders through the design arm of Heritage Custom Builders just in the same way that Carter Lumber is one of our suppliers or Shoemaker Heating and Cooling is one of our suppliers through a subcontractor."

Though all these sources demonstrate that the Goyingses' home is partly modular, they provide no guidance as to whether the modular components were extensive enough to violate the restrictive covenants. To be sure, these characterizations would be dispositive if we were to interpret the covenants as prohibiting any structure that contains a module. But none of us thinks that is the correct lens. Our disagreement is narrower—whether the covenants prohibit homes that are "substantially modular" or "predominantly modular." And the sources on the dissent's bulleted list don't shift the balance on that question.

"congenial occupancy" or "value of the Parcels" in the subdivision.[11]

2. THE GOYINGSES' HOME IS NOT A "PRE-FABRICATED OR MODULAR HOME" UNDER THE RESTRICTIVE COVENANTS

Applying the covenants to the undisputed facts found by the trial court, we conclude that the defendants' home is not a "pre-fabricated or modular home" as the restrictive covenants use that term.

The plaintiffs did not establish that the Goyingses' home violates either of the two narrow restrictions. The home does not fit the definition in § 1.B.3 of "relocated residence"—the modules were not a "residence" when placed on the lot. According to the builder, each component was "just a raw piece of construction material" and was "[n]ot even close" to being habitable without extensive on-site construction. The trial court expressly found as much: "The modules here are not a residence as they are delivered; additional construction is required to add in the electrical, duct work, plumbing, roof, and the various components that make a house a habitable home."

Nor does the Goyingses' home breach the prohibition in § 1.B.4 against "manufactured housing units." The

[11] But appeal to congeniality is out of place on this record—the trial court stated that "[t]he aesthetics, quality and value are of the same standards as the other homes which exist and will be built within the subdivision." And the plaintiffs have not challenged that finding. To the contrary, they emphasize that such subjective considerations "would . . . creat[e] chaos in the enforcement of the Restrictive Covenant." We agree. The freedom to contract and rule of law are impaired—not protected—if enforcement of restrictive covenants in Timber Ridge Bay turns on a judge's gut feeling that a home threatens "congenial occupancy" of the neighborhood or her intuition of what it means to be "substantially" modular. We think our interpretation of the language of these restrictive covenants protects the parties on *both* sides of the contract because it constrains judicial discretion rather than amplifying it.

plaintiffs have not argued that the Goyingses' home is a "manufactured home" or "manufactured housing unit," nor would their home fit the common understanding of those terms—"manufactured home" is an industry euphemism coined for mobile homes. The Goyingses' home does not fit the covenants' categorical use of the term "modular home" because their home is not a manufactured housing unit, nor could the three modular components fairly be called a "residence" when delivered to the construction site.

Finally, with a definition of a "modular home" drawn from the text and context of the restrictive covenants, we can assess this home according to the undisputed facts. We reject the trial court's conclusion that the covenants apply only to "entirely modular" homes. As the plaintiffs say, it's unclear whether such a thing exists. This too-narrow reading is just as divorced from the restrictive covenants' language as the too-broad reading we already rejected.

That said, the language of the restrictive covenants supports the trial court's finding that there is a distinction between a modular or prefabricated home and a site-built home with modular or prefabricated components. And the trial court found that the defendants' home was mainly stick-built, with modular components integrated into it.

We agree. The Court of Appeals erred when it held that the defendants' home violated the unambiguous terms of the covenant and that "the only solution was to grant injunctive relief and order that the nonconforming home be removed." *Thiel*, unpub op at 6. The panel found that this result was self-evident, given the dictionary definition of the word "modular." But the panel set up a straw man: it cited a definition of modular that all could agree upon and concluded that if the modular components used here fit that definition,

then, *ipso facto*, the Goyingses' home was a modular home. This faulty reasoning allowed the panel to wrap up its analysis before it ever reached the parties' dispute: how to construe the term "modular *home*." As a result, it provided no textual support for its implicit conclusion that the covenants prohibit any home that contains a module.

There is nothing ambiguous about the terms "modular" or "home," or even "modular home." And we find that the fairest reading of the unambiguous terms of the restrictive covenants is to prohibit homes that are predominantly composed of modular components. The Goyingses' home is not a "modular home" as the restrictive covenants use the term.[12]

III. CONCLUSION

The Timber Ridge Bay restrictive covenants unambiguously prohibit modular homes. The materials,

[12] The dissent arrives at the contrary conclusion by adopting a standard that a modular home is one that "was substantially fit or fixed together using standardized, transportable, and prefabricated components for easy construction." But the dissent's guidance regarding how to apply this standard demonstrates that it is a subjective one left to a reviewing judge's whims. By allowing for "a litany of factors" to be considered and weighed in whatever way a court deems appropriate, the dissent's approach would allow for essentially unchecked judicial discretion. It seems to us that *that* approach, not ours, leads to uncertainty about what the covenants mean—thereby contravening the intentions of the parties—by leaving it to judges on a case-by-case basis to determine which "factors" support the conclusion that the home is modular and which do not and how to weigh each factor. Some areas of law resist black-and-white interpretations—as the dissent explains, legal terms of art like reasonableness, custody, and proportionate sentencing (and even the equitable remedy the plaintiffs seek) chafe against bright-line rules. But in this case, we undertake the unremarkable task of assigning plain meaning to unambiguous contractual language. We prefer to rely on the text and context of the covenants. And the text of these restrictive covenants would buckle under the weight of the dissent's interpretive approach.

workmanship, quality, and outward appearance of the defendants' home are indistinguishable from a site-built home. And modular components don't necessarily make a modular home. The covenants give us text and context to determine what a modular home is. A fair reading of those covenants prohibits a home that is more modular than not. And the Goyingses' home is mostly not modular.

For these reasons, we reverse the opinion of the Court of Appeals and reinstate the decision of the trial court.

VIVIANO, BERNSTEIN, CLEMENT, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

VIVIANO, J. (*concurring*). I concur in full with the majority's decision in this case. I write separately to explain what I believe would be an alternate basis for reversal, namely, the Court of Appeals' erroneous conclusion that "where defendants' home was in clear violation of the unambiguous restrictive covenant, the only solution was to grant injunctive relief and order that the non-conforming home be removed."[1] For this holding, the Court of Appeals relied upon its prior decision in *Webb v Smith*,[2] which in turn relied upon a

[1] *Thiel v Goyings*, unpublished per curiam opinion of the Court of Appeals, issued August 8, 2017 (Docket No. 333000), p 6. The dissent apparently agrees with this assertion, having repeated some variant of it several times. See *post* at 526 ("[I]t must be removed, as the Court of Appeals correctly concluded."), 542 ("I agree with the Court of Appeals that the appropriate remedy in this case is the removal of the home."), 546 ("Given the circumstances of the instant case, the only effective remedy is the removal or dismantling of the home."), 546 ("I agree with the Court of Appeals that no other remedy will more reasonably suffice and that the 'only solution [is] to grant injunctive relief and order that the non-conforming home be removed.' "), and 555 ("I would affirm the Court of Appeals' determination that the home be removed.").

[2] *Webb v Smith (After Second Remand)*, 224 Mich App 203, 211; 568 NW2d 378 (1997).

case from our Court, *Cooper v Kovan*.[3] Since *Cooper* was decided just over 60 years ago, the Court of Appeals has interpreted our decision in that case as establishing a per se rule that, absent three specific circumstances, a trial court must enforce by injunction a valid restrictive covenant.[4] While *Cooper* is not a model of clarity, the Court of Appeals' reading of *Cooper* conflicts not only with our caselaw prior to *Cooper*, but also with general principles of equity. In an appropriate future case, I believe the Court should clarify that *Cooper* did not abrogate the rule long recognized by our Court that the enforcement of a restrictive covenant is a matter of the trial court's discretion.

Cooper, decided in 1957, involved a restrictive covenant limiting certain lots to residential use.[5] The plaintiffs in that case, nearby residential property owners, sought to enjoin defendants from building a shopping center on certain lots subject to the restriction.[6] The trial court, in an effort to craft an equitable remedy, entered an injunction that, rather than barring the defendants from building on the restricted lots completely, permitted the defendants to build their shopping center on some, but not all, of the restricted lots.[7] This Court explained that the trial court's remedy raised the question of "whether the circuit judge sitting in equity had power to effect such a compromise in the face of and at the expense of existing and valid residential restrictions, or whether such planning must be left to planning boards and private develop-

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[3] *Cooper v Kovan*, 349 Mich 520; 84 NW2d 859 (1957).

[4] See notes 15 and 16 of this opinion.

[5] *Cooper*, 349 Mich at 523-524.

[6] *Id*.

[7] *Id*. at 525-526.

ers."[8] In reaching the latter conclusion, the Court made the following statement:

> We are unable to find that this power lies in judicial hands. As equitable exceptions to the general rule that the courts will enforce valid restrictions by injunction we find these: (a) Technical violations and absence of substantial injury; (b) Changed conditions; (c) Limitations and laches. 26 CJS Deeds, § 171.[9]

After concluding that the defendants had not established any of these three defenses, the Court remanded for entry of an injunction enforcing the restrictive covenant.[10]

But there is a serious deficiency in *Cooper*'s analysis. In particular, Corpus Juris Secundum, which *Cooper* cited, does not provide support for a rule limiting the court's discretion to consideration of these three defenses. *Cooper* simply recited the subheadings listed in the treatise under "**§ 171. —Enforcement.**" In the edition of the treatise in effect at the time *Cooper* was decided, these subheadings were:

> a. In general
>
> b. Technical violations and absence of substantial injury
>
> c. Changed conditions
>
> d. Limitation; laches[.][11]

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[8] *Id*. at 530.

[9] *Id*.

[10] *Id*. at 533. Notably, the trial court in *Cooper* had concluded that the restrictions "should be enforced." *Id*. Thus, this Court was not required to weigh upon the trial court's decision of whether to enforce the restrictions, but only upon whether the trial court erred by entering an injunction that departed from the terms of the parties' covenant and that neither party sought.

[11] 26 CJS (1956), Deeds, § 171, p 1172.

Looking to the body of § 171, however, it is clear that the treatise did not treat these three defenses as the only considerations for a court to weigh when determining whether enforcement of a restrictive covenant is appropriate. For example, under the "a. In general" subheading, the treatise listed the following circumstances in which enforcement may not be appropriate:

> Restrictive covenants, to be enforceable in equity, must be reasonable. Further, they must not be vague or uncertain, nor may the right to relief be doubtful; and where a restrictive covenant is being used as a means of annoyance or oppression, equity may cancel it. . . . Equity will withhold its hand where such a restrictive is sought to be created by parol, where the reason for the enforcement of the covenant has entirely ceased, or where the consequences of enforcement would be inequitable . . . .[12]

Moreover, regarding whether enforcement of a restrictive covenant by injunction is appropriate, the treatise guided the reader to 43 CJS, Injunctions, § 87, which specifically discussed the enforcement by injunction of "**Covenants as to Use of Property.**"[13] 43 CJS (1945), Injunctions, § 87, p 583, provided that "the enforcement by injunction of restrictive covenants as to the use of land is a matter of discretion with the court and not a matter of absolute right, and is governed by the same general rules which control equitable relief by specific performance." Thus, the section of the Corpus Juris Secundum cited by the Court in *Cooper* does not support the conclusion that a court's discretion is limited to only certain considerations when determining whether to issue an injunction enforcing a restrictive covenant.

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[12] *Id*. at 1175.

[13] *Id*. at 1174-1175 ("The right to enjoin violations of restrictive covenants as to the use of land is discussed in Injunctions § 87[.]").

Despite the flaw in its analysis, this Court has not revisited *Cooper* in the years since it was decided.[14] The Court of Appeals, however, has interpreted *Cooper* as establishing a per se rule requiring enforcement of a restrictive covenant by injunction unless one of the three exceptions mentioned in *Cooper* is present. In *Webb*, the Court of Appeals explained that "[i]n *Cooper* . . . our Supreme Court set forth three equitable exceptions to the general enforcement rule: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches."[15] Since *Webb*, numerous unpublished Court of Appeals decisions have held, in even stronger terms, beyond consideration of these three defenses, that *Cooper* eliminated a trial court's discretion in this area.[16] At least one Michigan treatise has also inter-

[14] The dissent also takes issue with *Cooper*, but for a different reason. In particular, the dissent asserts that, by recognizing an equitable defense for "technical violations," *Cooper* "stands out as a distinct outlier in this Court's jurisprudence . . . ." See *post* at 549. The dissent is right that *Cooper* made us an outlier but for the wrong reason—as it has been interpreted by the Court of Appeals, the *Cooper* rule contradicts centuries of our common-law jurisprudence in this area and leading treatises. Dispensing with more of the trial court's equitable discretion merely because our Court has not cited *Cooper* for this reason is not only unsound but also would make our rule even more aberrational.

[15] *Webb*, 224 Mich App at 211.

[16] See, e.g., *Upper Long Lake Estates Ass'n v Scheid*, unpublished per curiam opinion of the Court of Appeals, issued June 28, 2005 (Docket No. 253234), p 2 ("There are three equitable exceptions to the general enforcement rule: (1) technical violations and absence of substantial injury, (2) changed conditions, and (3) limitations and laches."); *Thom v Palushaj*, unpublished per curiam opinion of the Court of Appeals, issued August 23, 2007 (Docket No. 268074), p 5 ("[T]he Supreme Court in *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957), only identified three equitable exceptions to the general rule of enforcing deed restrictions: (1) technical violations and the absence of substantial injury, (2) changed conditions and (3) limitations and laches."); *Millpointe of Hartland Condo Ass'n v Cipolla*, unpublished per curiam

preted *Cooper* as setting forth the only three equitable considerations in this context.[17] Occasionally, however, Michigan courts post-*Cooper* have hinted at the trial court's discretion in enforcing restrictive covenants.[18]

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opinion of the Court of Appeals, issued May 11, 2010 (Docket No. 289668), p 3 ("[T]he only established equitable reasons for the courts not to enforce it would be if the only violation was a harmless technical one, if there are changed conditions, or limitations and laches. See *Cooper v Kovan*, 349 Mich 520, 530; 84 NW2d 859 (1957).").

[17] 3 Michigan Civil Jurisprudence (2019 rev), Building Restrictions, § 34, p 563 ("Michigan recognizes certain exceptions to its general policy of enforcing valid real property restrictions; specifically, a violation of an otherwise valid restrictive covenant may be allowed by a court to remain under any of the following circumstances: (1) The violation is a technical one and there is an absence of substantial injury; (2) The violator shows the existence of changed conditions; or (3) Enforcement may be avoided due to limitations or laches."). See also Hosler, *Equitable Exceptions to Enforceability of Restrictive Covenants by Injunction in Michigan*, 42 Mich Real Prop Rev 9, 9 (2015) ("[I]n Michigan, there are three equitable exceptions to the general enforcement by injunction of valid, unambiguous deed restrictions. The Michigan Supreme Court created these three exceptions in 1957 in *Cooper v Kovan*, and they remain the current standard: (1) Technical violations and absence of substantial injury; (2) Changed circumstances; and (3) Limitations and laches.").

[18] See, e.g., *Sun Oil Co v Trent Auto Wash*, Inc, 379 Mich 182, 191; 150 NW2d 818 (1967) (holding that the question of whether to enforce a restriction "is a traditional equity action which does not lend itself to summary disposition"); *Becker v Richards*, unpublished per curiam opinion of the Court of Appeals, issued August 3, 2004 (Docket No. 245423), p 6 ("Although it is settled that owners of property, to which restrictive covenants have attached, may invoke a court's equitable jurisdiction to enforce even *de minimis* violations, *Terrien v Zwit*, 467 Mich 56, 65; 648 NW2d 602 (2002); *Oosterhouse v Brummel*, 343 Mich 283, 289; 72 NW2d 6 (1955), whether to grant relief is still within the discretion of the trial court. 'Courts of equity . . . grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case.' *Id.* at 290. This does not mean the trial court must employ a balancing test but requests for equitable relief may denied [sic] on the basis of equitable defenses. *Webb, supra* at 211, citing *Cooper, supra* at 530."). See also 10A Michigan Pleading & Practice (2d ed, 2018 rev), Injunctions, § 76:75, pp 898-899 ("Whether building restrictions will be enforced depends entirely on the facts in each particular case and on the

Reading *Cooper* in light of our prior caselaw, it is clear that *Cooper* did not set forth a rule limiting the trial court's discretion to consideration of only three specific equitable defenses. Prior to *Cooper*, our Court consistently recognized that the decision whether to enforce a restrictive covenant by injunction is a matter left to the discretion of the trial court, sitting in equity. For example, in *Baxter v Ogooshevitz*, the Court stated, " 'The enforcement in a court of equity of restrictive covenants in a deed is not a matter of absolute right, and is governed by the same general rules which control equitable relief by specific performance.' "[19] Again, in *Cherry v Bd of Home Missions of Reformed Church in US*, we explained that "[c]ourts of equity in passing upon cases of this character grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case."[20] And, in *Oosterhouse v Brummel*,[21] none of Cooper's equitable defenses was present, but the Court held that whether to issue an injunction was "a matter for the discretion of the trial chancellor" and depended upon "the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case."[22] Multiple other

accomplishment of an equitable result in light of the surrounding circumstances.").

[19] *Baxter v Ogooshevitz*, 205 Mich 249, 256; 171 NW 385 (1919).

[20] *Cherry v Bd of Home Missions of Reformed Church in US*, 254 Mich 496, 500; 236 NW 841 (1931).

[21] *Oosterhouse v Brummel*, 343 Mich 283; 72 NW2d 6 (1955).

[22] *Id*. at 290. In light of the fact that *Cooper* was decided less than two years after *Oosterhouse*, and since both were unanimous decisions and were decided by many of the same justices, I believe *Cooper* can hardly be read as overturning *Oosterhouse* and the centuries of common-law jurisprudence that preceded it *sub silentio*.

cases decided before *Cooper* recognized the same principle.[23]

Nor is this principle limited to the context of an injunction enforcing a restrictive covenant. Our Court has long recognized that an injunction, as an equitable remedy, is never available as of right but is always left to the discretion of the trial court.[24] This is true regardless of the context in which an injunction is sought, whether by a party seeking to enjoin a nuisance,[25] an

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[23] See, e.g., *Windemere-Grand Improvement & Protective Ass'n v American State Bank of Highland Park*, 205 Mich 539, 548; 172 NW 29 (1919) ("The right and duty of a chancery court to enforce restrictions under its equitable jurisdiction is not absolute. In the exercise of such jurisdiction the same general equitable considerations and rules are recognized as move the court in passing upon applications to compel specific performance of contracts."); *Putnam v Ernst*, 232 Mich 682, 687; 206 NW 527 (1925) ("These building restriction cases present such wide difference in facts that, in equity, but few rules can be applied generally. In the main, each case must be determined on its own facts."); *Johnstone v Detroit, G H & M R Co*, 245 Mich 65, 86; 222 NW 325 (1928) ("[S]pecific performance of building restrictions by injunction is not a matter of absolute legal right, but is governed by equitable considerations."); *Harrigan v Mulcare*, 313 Mich 594, 607; 22 NW2d 103 (1946), quoting *Cherry*, 254 Mich at 500.

[24] See *Howard v Lovett*, 198 Mich 710, 717; 165 NW 634 (1917) ("The writ of injunction is not a writ of right, but its issuance rests in sound judicial discretion[.]"); *Hasselbring v Koepke*, 263 Mich 466, 480; 248 NW 869 (1933) ("In cases where a mandatory injunction is sought, the rule in England, and generally in this country, and particularly in Michigan, is that the court will balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case.") (citations omitted).

[25] See *Roy v Chevrolet Motor Car Co*, 262 Mich 663, 668-669; 247 NW 774 (1933) ("Granting injunctive relief is within the sound discretion of the court. . . . 'And in granting injunctions against nuisances, as in other cases of relief by injunction, the court may properly be guided by the consideration of the relative convenience and inconvenience of the parties; and if it appears that the benefit resulting to the plaintiff from the granting of the writ will be slight as compared with the injury to the defendant, the relief may be denied and the plaintiff left to the pursuit of his remedy at law.' "), quoting 1 High, Injunctions (4th ed), § 740, p 703.

encroachment,[26] interference with an easement,[27] or any other wrong. This principle flows from the equitable roots of the remedy—just as a court of equity exercised its discretion in determining the appropriate relief under any given set of circumstances, so trial courts today must exercise discretion in deciding whether an equitable remedy, such as an injunction, is appropriate.[28]

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[26] See *Kratze v Indep Order of Oddfellows*, 442 Mich 136, 142; 500 NW2d 115 (1993) ("Fashioning an appropriate remedy where a structure encroaches on the land of another poses special problems and has resulted in special solutions. In such cases the approach is to balance several factors—the relative hardship to the parties and the equities between them—and to grant or deny the injunction as the balance may seem to indicate.") (quotation marks and citations omitted).

[27] See *Hasselbring*, 263 Mich at 480 (explaining, in the context of an action to enjoin interference with an easement, "that the court will balance the benefit of an injunction to plaintiff against the inconvenience and damage to defendant, and grant an injunction or award damages as seems most consistent with justice and equity under all the circumstances of the case").

[28] See *Holland v Miller*, 325 Mich 604, 611-612; 39 NW2d 87 (1949) ("Granting injunctive relief is within the sound discretion of the court. . . . Broadly speaking the sound discretion of the court is the controlling guide of judicial action in every phase of a suit in equity. So the granting of equitable relief is ordinarily a matter of grace, and whether a court of equity will exercise its jurisdiction, and the propriety of affording equitable relief, rests in the sound discretion of the court, to be exercised according to the circumstances and exigencies of each particular case.") (quotation marks and citations omitted). See also 43A CJS, Injunctions, § 24, pp 38-39 ("The grant of, or the refusal to grant, an injunction invokes the court's equitable powers. . . . The propriety of granting an injunction depends on the facts of each particular case, and on general principles of equity."). See also *Fenestra Inc v Gulf American Land Corp*, 377 Mich 565, 593; 141 NW2d 36 (1966) ("[A]lthough the procedural distinctions between law and equity have been abolished in this State since January 1, 1963 . . . , the substantive elements of a cause of action and the kind of remedy available must still be determined by reference to the substantive law of actions in law and equity as they existed before the merger.").

Contrary to the dissent's charge, I do not traffic in " 'vague equit[ies]' " or encourage judicial navel-gazing. Instead, I am simply recog-

It is true that, in the context of a restrictive covenant, our Court has consistently held that enforcement of valid restrictions is favored by public policy and that, as a general rule, we will enforce such restrictions by injunction.[29] Accordingly, we have warned against courts refusing to enforce a restrictive covenant merely because the violation is *de minimis* or because the plaintiff cannot show actual damages.[30]

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nizing a legal principle that is centuries old and well settled in our law. I did not think this was a controversial point since it is the very reason that courts of equity sprung up in the first place. See Rehnquist, *The Supreme Court* (New York: First Vintage Books ed, 2002), pp 157-158 ("To mitigate the harshness of some of the results reached in the common-law courts, the king's chancellor began dispensing a second brand of justice known as 'equity.' An injunction—which is nothing more than a court order directed to a party and requiring the party either to do something or not to do something—was a creature of the courts of equity, and because of this, one was never automatically entitled upon a showing of a particular set of facts to obtain an injunction; it was a matter of discretion with the court, based on a careful weighing of all the surrounding circumstances."). I do not share the dissent's evident distaste for the exercise of sound judicial discretion that has always been inherent in a trial court's decision whether to grant an injunction, and I am not willing to so lightly discard venerable principles of equity under the guise of enforcing the parties' agreement.

[29] See *Signaigo v Begun*, 234 Mich 246, 251; 207 NW 799 (1926) ("[T]his court has not hesitated in proper cases to restrain by injunction the invasion of these valuable property rights."); *Johnstone*, 245 Mich at 74 ("Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate."); *Carey v Lauhoff*, 301 Mich 168, 172; 3 NW2d 67 (1942) ("As a rule, we will uphold a restriction whenever it remains of any substantial benefit to the parties objecting to its violation, provided they are not estopped by their conduct from making such objection.") (quotation marks and citation omitted); *Oosterhouse*, 343 Mich at 287 ("Once such restrictions are imposed, however, to all who have come to us in aid thereof, come to us lacking inequity, showing unchanged conditions, together with a reasonable zeal in maintaining the continuing vitality of the restrictions, we have responded with jealousy and alacrity.").

[30] See *Oosterhouse*, 343 Mich at 287 ("The doctrine of *de minimis*, as applied to real property and interests therein, must be applied with the

But these cases never disavowed the principle that trial courts must exercise their discretion in determining whether enforcement by injunction is equitable. Indeed, the cases recognizing this principle have simultaneously recognized that enforcement of restrictive covenants also requires the exercise of discretion.[31]

Our Court's jurisprudence, adhering to these two principles which may appear to be in tension, accords with the principles recognized by leading treatises. This tension is evident in Tiffany on Real Property:

> An injunction *typically is an appropriate remedy* for breach of a restrictive covenant *but such relief is not automatic*, and the presumption in its favor does not displace a trial court's traditional discretion when it sits in equity. Injunctive relief remains subject to sound judicial discretion even where restrictive covenants and real property rights are concerned.[32]

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utmost caution."); *Terrien*, 467 Mich at 65 ("This all comes down to the well-understood proposition that a breach of a covenant, no matter how minor and no matter how *de minimis* the damages, can be the subject of enforcement.").

[31] As evidenced in the footnotes above, the same cases stating the general rule that Michigan courts will enforce deed restrictions have also expressly recognized that the trial courts must exercise their equitable discretion in doing so. See, e.g., *Johnstone*, 245 Mich at 74 ("Restrictions for residence purposes, if clearly established by proper instruments, are favored by definite public policy. The courts have long and vigorously enforced them by specific mandate."); *id.* at 86 ("[S]pecific performance of building restrictions by injunction is not a matter of absolute legal right, but is governed by equitable considerations."); *Oosterhouse*, 343 Mich at 287 ("Once such restrictions are imposed, however, to all who have come to us in aid thereof, come to us lacking inequity, showing unchanged conditions, together with a reasonable zeal in maintaining the continuing vitality of the restrictions, we have responded with jealousy and alacrity."); *id.* at 290 ("We are not, of course, passing at this stage of the case upon the propriety of an injunction. That will be a matter for the discretion of the trial chancellor after all matters of defense have been heard.").

[32] 3 Tiffany, Real Property (3d ed, Sept 2018 update), § 858 (emphasis added).

Other treatises have also recognized that enforcement of restrictive covenants by injunction, as with other equitable remedies, is a matter left to the discretion of the trial court,[33] while also noting that enforcement of a deed by injunction is generally appropriate and does not require a showing of actual damages.[34]

Understanding these principles underlying the enforcement of restrictive covenants, this Court's decision in *Cooper* makes sense. The Court in *Cooper* merely recognized that the trial court in that case went too far in an effort to craft an equitable remedy, substituting its own judgment for that of the parties.[35] *Cooper* did not divest trial courts of their equitable

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[33] See, e.g., 2 Restatement Property, 3d, Servitudes, § 8.3, comment *b*, pp 494-495 ("Judges have wide discretion in selecting remedies to provide full and appropriate relief to an injured party, and in states with merged law and equity jurisdictions, may mix remedies formerly exclusive to law or equity."); 42 Am Jur POF3d 463, 477, § 7 ("Whether injunctive relief will be granted to restrain the violation of a restrictive covenant is a matter within the sound discretion of the court, to be determined in light of all the facts and circumstances."); 57 ALR 336, 337, § 231 ("[E]ach case in which this remedy is requested is decided upon its particular facts and a consideration of the conduct of the parties in the light of equitable principles, and for this reason any rule as to when a mandatory injunction will or will not be granted would be too general to be useful. It is only by a study of the cases, and especially of those cases in which a mandatory injunction is refused, that an answer can be gained as to when this remedy will be granted."); 43A CJS, Injunctions, § 182, p 204 ("[N]ot every violation of a restrictive agreement relating to the use of realty will be restrained, and each case depends on its own circumstances.").

[34] 43A CJS, Injunctions, § 186, p 210 ("[T]he right to enjoin the breach of restrictive covenants does not depend upon whether the covenantee will be damaged by the breach, as the mere breach is sufficient ground for interference by injunction."); 42 Am Jur POF3d 463, 477, § 7 (same).

[35] See *Oosterhouse*, 343 Mich at 288 ("We do not substitute our judgment for that of the parties, particularly where, as in the instant case, restrictive covenants are the means adopted by them to secure unto themselves the development of a uniform and desirable residential area.").

discretion to determine whether an injunction is the proper form of relief in light of all the facts, nor did *Cooper* bar consideration of all equitable defenses apart from the three expressly mentioned, such as waiver,[36] estoppel,[37] or unclean hands.[38]

Because I agree with the majority that the Court of Appeals erred by determining that defendants' home was modular, I concur in full with the majority opinion. But even if the Court of Appeals had correctly concluded that defendants' home violated the restrictive covenant, I would still reverse on the basis of the Court of Appeals' erroneous holding that "the only solution

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[36] See *Margolis v Wilson Oil Corp*, 342 Mich 600, 603; 70 NW2d 811 (1955) ("Abandonment of restrictions by permitted violations and resultant change of character of the neighborhood amounts to a waiver."). Indeed, *Cooper* itself mentioned that "[t]he court below found no invalidation of the restrictions by laches or *by waiver*, and we concur," *Cooper*, 349 Mich at 531 (emphasis added), further supporting the conclusion that the Court in *Cooper* did not intend to disavow all equitable defenses aside from the three expressly mentioned.

[37] See *Taylor Avenue Improvement Ass'n v Detroit Trust Co*, 283 Mich 304, 311; 278 NW 75 (1938) ("As a rule, we will uphold a restriction wherever it remains of any substantial benefit to the parties objecting to its violation, provided they are not estopped by their conduct from making such objection."); 42 Am Jur POF3d 463, 482, § 10 ("In the context of an action for breach of covenant, estoppel may be invoked as an equitable defense where the plaintiff has observed the defendant dealing with his property in a manner inconsistent with his rights and makes no objection, while the defendant changes his position in reliance on the plaintiff's silence.").

[38] *Zelinski v Becker*, 318 Mich 209, 215; 27 NW2d 615 (1947) ("Courts protect property owners seeking to enjoin violation of restrictive covenants contained in their deeds where the plaintiffs have not themselves violated restrictions in the enjoyment of their homes and holdings.") (quotation marks and citation omitted); 42 Am Jur POF3d 463, 498, § 17 ("Where the party seeking to enforce the terms of a restrictive covenant is himself guilty of violating the covenant, the court may invoke the doctrine of unclean hands to estop that party from enforcing the covenant against the defendant.").

was to grant injunctive relief and order that the non-conforming home be removed," and I would remand this case to the trial court so that it could exercise its discretion in determining an equitable remedy.[39]

MCCORMACK, C.J., concurred with VIVIANO, J.

MARKMAN, J. (*dissenting*). I respectfully dissent. This case concerns what constitutes a "modular home," but that is not essentially what is at issue. Rather, the central focus of this case is upon the ability of free individuals to determine their rights and duties (and in this case, the nature of their residential environment) with one another through voluntarily-entered-into contracts. "[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in

[39] The dissent ignores the long line of cases from our Court, discussed herein, which hold that the decision whether an injunction is an appropriate remedy is a matter for the trial court's discretion. Instead, the dissent apparently undertakes its own review of the equities and summarily concludes that there are "no contrary equitable considerations in the Goyingses' favor . . . ." However, as our caselaw makes clear, since the trial court is accorded discretion in this area, making such a determination in the first instance is not the proper function of an appellate court. See *Oosterhouse*, 343 Mich at 290 ("*We are not, of course, passing at this stage of the case upon the propriety of an injunction. That will be a matter for the discretion of the trial chancellor after all matters of defense have been heard.* Courts of equity . . . grant or withhold injunctive relief depending upon the accomplishment of an equitable result in the light of all of the circumstances surrounding the particular case.") (emphasis added). Thus, even if I agreed with the dissent that defendants' home violated the restrictions, I would remand to the trial court for further proceedings that would allow (1) the parties to present evidence and arguments concerning the appropriate remedy and (2) the trial court to exercise its discretion in determining the appropriate remedy in this case.

such contracts . . . ." *Bloomfield Estates Improvement Ass'n, Inc v Birmingham*, 479 Mich 206, 213; 737 NW2d 670 (2007). The parties here contracted by means of a covenant that prohibited the erection of modular homes within their subdivision, and defendants acted in violation of this straightforward prohibition. Because this Court must accord regard to the parties' free and voluntary agreement, defendants cannot be permitted to erect such a home, and when they have done so in breach of their promise, it must be removed, as the Court of Appeals correctly concluded.

I. FACTS AND PROCEDURAL HISTORY

Defendants, David and Helen Goyings, are owners of a parcel of lakefront property in the Timber Ridge Bay subdivision, located in Watson Township, Michigan. Fourteen of the sixteen residential parcels located in Timber Ridge Bay are subject to covenants. These covenants were recorded in the Allegan County register of deeds on December 7, 2006, and the Goyingses purchased their property with full knowledge of these. Relevant to this appeal, the covenants provide:

> **COVENANTS, RESTRICTIONS AND CONDITIONS**
>
> Section 1. Establishment of Restrictions. In order to provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein, the Parcels 1-14 shall be subject to the limitations set forth below:
>
> * * *
>
> B. Building and Use Restrictions.
>
> * * *
>
> 3. Relocated Residences. No residences, including modular, manufactured, mobile or prefabricated homes,

may be moved from a location outside the Premises and placed or located within a Parcel within the Premises.

4. Manufactured Housing Units. No manufactured homes, whether classified as a mobile home, modular home, or otherwise, and no prefabricated homes shall be permitted on any Parcel in the Premises, regardless of which building codes are applicable to said homes.

* * *

C. Residential Dwelling Restrictions

* * *

4. Miscellaneous Provisions. The height of any building will not be more than four (4) stories. If any portion of a level or floor within a residence is below grade, all of the level or floor shall be considered a basement level. All residences shall be stick built on site and no geodesic dome, berm house, pre-fabricated or modular home, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein.

On October 1, 2014, the Goyingses entered into a contract with Cassidy Builders, Inc., for the construction of a "29-11 x 56 modular home on 9 ft. walk out basement."[1] Cassidy would build accessory portions of the home, such as the garage, deck, and porch, but Ritz-Craft Corporation of Michigan, Inc., was identified as the manufacturer of the home. Ritz-Craft describes itself as a "Modular Home Manufacturer." The home was further described as "modular" in an application for a building permit; the application characterized the home as a "single family modular with 24 x 24 attached garage, 22 x 6 front porch, 12 x 12 deck." Ritz-Craft thereafter constructed three modules for the home in its indoor facility in Jonesville, Michigan.

[1] Capitalization altered.

Once completed in June 2015, the modules were transported from Ritz-Craft's facility to the Goyingses' property.[2] Another construction company, JM Quality Construction, LLC, assisted in the construction process. JM advertises that it "[s]peciali[zes] in modular set up." The home was to be 59% stick-built, 41% modular, and appraised at $330,000.[3]

On June 18, 2015, within two weeks of the modules being received at the subdivision site, plaintiffs filed suit against the Goyingses, seeking to enforce the covenant prohibiting modular homes and requesting that the trial court enter an order enjoining any further construction of the home. The parties proceeded to trial, with the Goyingses' own appraiser and a building official for Watson Township testifying that the home was modular. The General Manager for Ritz-Craft testified that the home is "systems built" but acknowledged that "[t]here is no difference" in terms of the structure between a "totally modular home" and one that "contains modules but is . . . systems built . . . ." Moreover, because portions of the home had been manufactured off-site, the Single State Construction Code Act, MCL 125.1501 *et seq*., required that, prior to transport to the Goyingses' property, the modules had to be inspected and approved by the state of Michigan. A subsequent Building System Approval Report prepared under the act also classified the home as modular.

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[2] Contrary to the majority's repeated assertions, it was never established at trial that the modules were " 'just . . . raw piece[s] of construction material[.]' " In fact, the record reveals that the modules arrived at the Goyingses' property furnished with a bathtub, plumbing and lighting fixtures, cabinets, countertops, and mirrors already installed.

[3] As acknowledged even by the majority, the modules "ma[d]e up the bulk of the ground-floor living space[.]" That is, the base of the home itself was comprised of the modular units, such that there could be no viable home without them.

The trial court ultimately entered an order dismissing plaintiffs' claims against the Goyingses, concluding that the home did not violate the covenant because the covenant "did not contemplate a home of the type built by [the Goyingses]." However, the Court of Appeals reversed, concluding that the home was, in fact, modular, in breach of the covenant, and thus required to be removed. *Thiel v Goyings*, unpublished per curiam opinion of the Court of Appeals, issued August 8, 2017 (Docket No. 333000).

II. STANDARD OF REVIEW

The interpretation of covenants, as with other forms of contracts, presents a question of law that this Court reviews de novo. *Terrien v Zwit*, 467 Mich 56, 61; 648 NW2d 602 (2002). A trial court's findings of fact are given deference and reviewed for clear error. *Cooper v Kovan*, 349 Mich 520, 526; 84 NW2d 859 (1957).

III. ANALYSIS OF VIOLATION

Plaintiffs alleged that the Goyingses violated § 1.C.4 of the covenants, which provides, in relevant part:

> All residences shall be stick built on site and no geodesic dome, berm house, pre-fabricated or modular home, mobile home, shack or barn will be erected on any of the Parcels unless provided for herein.

A review of the common understanding of the term "modular home" plainly compels the conclusion that the Goyingses erected a modular home in contravention of this provision. " 'Because of the fundamental policy of freedom of contract, . . . parties are generally free to agree to whatever specific rules they like, and in most circumstances it is beyond the competence of . . . the courts to interfere with the parties' choice.' "

Port Huron Ed Ass'n v Port Huron Area Sch Dist, 452 Mich 309, 319; 550 NW2d 228 (1996), quoting *Dep't of Navy v Fed Labor Relations Auth*, 295 US App DC 239, 248; 962 F2d 48 (1992).

A. COVENANTS

"Restrictions for residence purposes," as at issue here, "are particularly favored by public policy and are valuable property rights." *Livonia v Dep't of Social Servs*, 423 Mich 466, 525; 378 NW2d 402 (1985). They are often "means adopted by [parties] to secure unto themselves the development of a uniform and desirable residential area." *Oosterhouse v Brummel*, 343 Mich 283, 288; 72 NW2d 6 (1955). A restrictive covenant, defined as a "[p]rovision . . . limiting the use of the property and prohibiting certain uses," *Black's Law Dictionary* (6th ed), is one of these "means," *Oosterhouse*, 343 Mich at 288. It "represents a contract between" two parties concerning the use of real property. *Bloomfield Estates*, 479 Mich at 212.

Accordingly, principles of contractual interpretation apply in reviewing such a covenant. *Stuart v Chawney*, 454 Mich 200, 210; 560 NW2d 336 (1997). The primary task of this Court in interpreting a contract "is to give effect to the parties' intention at the time they entered into the contract." *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). "[W]here a term is not defined in a contract, we will interpret such term in accordance with its commonly used meaning." *Bloomfield Estates*, 479 Mich at 215 (quotation marks and citation omitted). Terms "must be interpreted by common sense and common usage . . . ." *Burkman v Trowbridge*, 9 Mich 209, 210 (1861). Thus, courts must engage in fair and reasonable, rather than strict, interpretation. See *B Siegel Co v Wayne Circuit*

Judge, 183 Mich 145, 153; 149 NW 1015 (1914); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012).

The majority concludes that the covenant at issue in this case proscribes homes that are "predominantly modular." It reasons that the term "modular" is an adjectival modifier of the noun "home." Therefore, because "modular" is not itself modified by an adverb, we must presume that "modular" modifies "home" as a whole, which the majority equates to the quality of predominance. Thus, it concludes, a home must be "mostly or generally modular" in order to violate the covenant that forbids modular homes. However, by adopting its own rule of "predominance," the majority altogether fails to discern the plain and ordinary—the most reasonable—meaning of the term "modular home," ultimately contravening the obvious intentions of the parties as set forth in their covenants.[4] In my view, this

[4] Notably, the majority fails to support its rule of "predominance" with any grammatical, legal, or even logical authority. Rather, it summarily asserts a semantic conclusion that when an adjective modifies a noun, that noun is "mostly or generally" characterized by the substance of that adjective. But there are far too many contrary examples to this supposed "rule" to consider it as self-evident in the least, much less as one that should be generally applied. A blueberry muffin is a muffin that *contains* blueberries, but it is not "mostly or generally" baked using blueberries; a "sugary drink" *contains* sugar, but is not necessarily 50.1% sugar; a car might be described as being of a particular coloration on the basis of its exterior despite the fact that its full surface area, including interior and underbody, is not "predominantly" that color; and a neighbor whose lack of cordiality is reflected only on rare occasions might nonetheless be deemed as lacking in cordiality based exclusively upon these aberrant contacts. There are too many further and obvious examples that could be cited. Thus, the majority's threshold logic draws no support from ordinary exercises of the American-English language, and it has no provenance in the law of this state or any other jurisdiction of which we have been made aware. It is an incorrect proposition that a home is not "modular" unless modular units make up at least 50.1% of that home. Instead, a structure may fairly be characterized, *as it has been here by all relevant partici-*

case is quite simple, made unnecessarily complex by the majority and ultimately decided wrongly as a result—there is a covenant that prohibits the erection of a modular home within a particular subdivision, and one party to the covenant has erected a modular home where it was prohibited from doing so.

B. "MODULARITY"

In settling upon its own standard of modularity, the majority has disregarded the plain and ordinary meaning of the term "modular home." There are three separate references to "modular home" within the covenants. Section 1.C.4 provides that "no . . . modular home . . . will be erected on any of the Parcels," and §§ 1.B.3 and 1.B.4 list modular homes as subsets of specified "Relocated Residences" or "Manufactured Housing Units" that are not permitted to be located or placed upon any covered parcel. While the term "modular home" has the same meaning in each of the provisions, see 11 Williston, Contracts (4th ed), § 32:6, p 709, the context of each use is different. For example, whereas § 1.B.3 contemplates an entire structure being picked up, moved, and relocated onto a parcel on the premises, § 1.C.4 prohibits a modular home from being erected on a parcel in the subdivision. In my judgment, these prohibitions most reasonably are understood as addressing two forms of residential construction: (a) that by which the whole home is constructed elsewhere and transported onto a parcel; and (b) that by which the home is erected, module by module, upon a parcel. Because plaintiffs alleged that the Goyingses violated § 1.C.4, we must ascertain what

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pants in the process (except by the Goyingses themselves and even inconsistently on their part) as "modular" on the basis that some significant part of the home is comprised of modular units.

precisely the parties intended in providing that no modular home be "erected" upon the parcel at issue in the Timber Ridge Bay subdivision.

Section 1.C.4, in its prohibition of modular homes, sets forth three defining terms: home, modular, and erect. First, a "home" is "one's place of residence." *Merriam-Webster's Collegiate Dictionary* (11th ed). Second, "modular" is defined as "constructed with standardized units or dimensions for flexibility and variety in use." *Merriam-Webster's Collegiate Dictionary* (11th ed).[5] Third, to "erect" means (a) "to put up by the fitting together of materials or parts : [to] BUILD" or (b) "to fix in an upright position." *Merriam-Webster's Collegiate Dictionary* (11th ed). Thus, by specifying that "no . . . modular home . . . be erected on any of the Parcels," § 1.C.4 proscribes the "fitting together of materials or parts" to create a "place of residence" that is "constructed using standardized units." This is the most ordinary and reasonable understanding of modularity: a home is modular when it is a place of residence that was substantially fit or fixed together using standardized, transportable, and prefabricated components for easy construction.[6]

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[5] The Court of Appeals cited a similar definition of "modular" from *The Random House Dictionary of the English Language: Second Unabridged Edition*: "composed of standardized units or sections for easy construction or flexible arrangement . . . ." *Thiel*, unpub op at 6.

[6] Other states have characterized the term "modular home" in a similar fashion. See, e.g., *Henry v Chambron*, 304 SC 351, 352; 404 SE2d 518 (App, 1991) (describing a modular home as one that "is built off site and is transported to its intended location in as many as twenty sections"); *Vester v Banks*, 257 Ga App 26, 28; 570 SE2d 586 (2002) (defining modular home as "a factory-fabricated, transportable structure, consisting of units that are brought in on a trailer, to be constructed on top of a permanent foundation at the site for residential use"); W Va Code § 37-15-2(j) (2018) (" 'Modular home' means any structure that is wholly, or in substantial part, made, fabricated, formed or assembled in manu-

Yet the majority condemns this understanding, concluding that it "doesn't advance the ball much," opting instead for its own rule of "predominance." But its dismissiveness is grounded upon its own failure to give even passing consideration to the notion that the standard identified in lay dictionaries cannot operate in splendid isolation; rather, it is necessarily given meaning and informed by a litany of factors, each of which might be relevant, or even sometimes determinative, in assessing whether under the totality of circumstances a residence is reasonably characterized as "modular"—that is, as substantially fit together using standardized, transportable components for easy construction. Among some of the most obvious of these factors are: the proportion of the home that is comprised of modular units;[7] the specific nature of the modular units—whether these constitute raw building materials, e.g., two-by-fours, trusses, doors, or windows, or rather are comprised of prefabricated and freestanding room-like units that are designed for ordinary residential purposes; and the overall relationship of the modular units to the structure itself—whether these comprise the essential living quarters of the home or are largely ancillary components or attachments. Each of these—as well as other—pertinent factors should be assessed and weighed in the balance of characterizing a modular home.[8] This assessment is

facturing facilities for installation or assembly and installation on a building site and designed for long-term residential use . . . .").

[7] I do not disagree with the majority that proportions may be helpful in guiding an assessment of modularity; I take issue principally with its "percentage threshold" rule that anything less than 50.1% modularity properly establishes a dwelling as nonmodular.

[8] Of course, this Court must give deference to the trial court's factual findings, *Cooper*, 349 Mich at 526, and in this case, the trial court determined that the home was not modular. However, the trial court was operating under an erroneous understanding of modularity para-

necessarily undertaken along a spectrum rather than viewed as black or white.[9]

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phrased by the majority as being applicable only to "*entirely* modular homes." Significant deference can hardly be accorded when the threshold legal standard has been misapprehended. See *People v Daoud*, 462 Mich 621, 641; 614 NW2d 152 (2000).

[9] The majority asserts that a virtue of its "predominance" test is that it leaves no room to be "left to a reviewing judge's whims," as presumably it perceives to be a flaw of the test set forth by this dissent. Perhaps the majority is correct in assessing the virtues of its own standard; perhaps, however, as I believe it to be so, this supposed virtue is more than overcome by its principal flaw—it is simply an arbitrary and wrong test. Even accepting the majority's self-characterization of its own test, simplicity of application is not the equivalent of accuracy or appropriateness of a legal test; drawing a line at some random point in the sand is not tantamount to that line being drawn correctly. As illustrations, this Court might adopt an equally black-or-white test that a suspect is in "custody" for *Miranda* purposes only when he or she has been handcuffed; it might conclude that a person possesses a legitimate expectation of Fourth Amendment privacy only when it can be shown that he or she possesses an ownership of an area; it might adopt a bright-line court rule that the trial court may ask any question of a witness it desires, or it might adopt a rule forbidding any questions at all; or it might adopt judicial sentencing guidelines in which consideration of a convicted person's criminal history and conduct produces a single unalterable sentence rather than a mere sentencing range. None of these or countless other tests that could easily be imagined would be viewed as particularly virtuous because little had been "left to a reviewing judge's whims." While constraining the scope of judicial discretion is, in my judgment, generally a strengthening aspect of the rule of law—see, e.g., the exchanges between myself and the majority justices concerning their replacement of Michigan's discretion-limiting sentencing guidelines with the discretion-enhancing abolition of these guidelines in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), and *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017)—not every realm of the law allows for black-or-white legal tests as opposed to more nuanced totality-of-circumstances or assessment-of-factors tests. In the present context, rather than adopting an entirely novel test of "predominance," I would give due regard to the spectrum along which a finding of modularity must necessarily take place, evaluating each home on the basis of factors understood to define what comprises a modular home, that is, assessing on the basis of these factors whether the home was substantially fit together using prefabricated components for ease of construction.

Applying this standard and attendant factors, it is readily apparent that the Goyingses erected a modular home in contravention of § 1.C.4. Three modular units were manufactured by Ritz-Craft in a factory in Jonesville, Michigan. They were by no means minute components or raw building materials that necessitated any difficult or tedious process of affixation to create a livable structure. Rather, these units were enclosed and freestanding structures that were identified as entire and discrete rooms adorned with doors, windows, cabinets, countertops, mirrors, and lighting and plumbing fixtures. These were of sufficiently substantial construction that each had to be loaded onto its own large trailer for transport to the subdivision and, upon arrival, each of the three required a crane to align and affix them into place.

Indeed, the modules were of such size and substantiality that there could be no home without them; each was intrinsic and indispensable to the ultimate residential structure. Together, their square footage of 1866 square feet perfectly matched that of the ultimate foundation. And when affixed, the modules would comprise the fundamental living quarters of the home, including the dining room, living room, kitchen, main bathroom, utility closet, two bedrooms, master bathroom, and master bedroom. Thus, the portion of the home that was modular in terms of materials—already a substantial portion in the majority's own arithmetical terms—constituted an essential portion of the home; while the stick-built portions accessorized or enhanced the home with a garage, deck, porch, roof, and an unfinished basement, the modules comprised its core. Absent the modules, the remaining assortment of disconnected stick-built structures could serve little purpose—they would simply surround an open space. Accordingly, the modular components cannot

fairly be described as having been integrated into the overall home; rather, these became the essential home.

This critical fact perhaps most distinguishes the Goyingses' home from the traditional stick-built home, where its frame or core is constructed stick-by-stick, not room-by-room. Thus, because the Goyingses' home was indispensably contingent upon the attaching together of freestanding modular components, it comports with the plain and ordinary—and most reasonable—understanding of what comprises a modular home, regardless of whether it achieves the majority's own standard of "predominance."

C. CHARACTERIZATIONS

Unremarkably, the professional characterizations in this case support this understanding of modularity. Yet, the majority's analysis makes not a single mention of these. Since it was merely a figment of the Goyingses' imagination, the home has been considered to be nothing other than modular. Indeed, every professional source, beginning with the building contracts and ending with the inspections and evaluations, has characterized the home as modular, and it is particularly compelling that most of these characterizations *preceded* the instant litigation. I would accord considerable weight to the following characterizations:

- The Goyingses contracted with Cassidy Builders regarding "site improvements for 29-11 x 56 modular home on 9 ft. walk out basement."[10]
- The "Application For Building Permit" filed with Watson Township provided a "brief description of project[:] single family modular with 24 x 24 attached garage, 22 x 6 front porch, 12 x 12

[10] Capitalization altered.

deck."[11] Moreover, the box for "modular" was checked in the "project description" section of the application.

- The Building Permit issued by Watson Township gave permission to "[i]nstall[] [m]odular." The permit specified that the home was to be a "Modular on an Unfinished Basement w[ith] a Minimum of One Egress, Three Bedrooms, Two Full Baths, Front Porch, Back Deck, Two Stall Attached [Garage]." Of course, as indicated earlier, the three bedrooms and two full baths were contained entirely within the modules.
- The "Uniform Residential Appraisal Report" prepared by C. Douglas Snell of John A. Meyer Appraisal Company provided that "[t]he subject dwelling is a modular house."
- In the "Building System Approval Report" conducted by the Michigan Department of Licensing and Regulatory Affairs, the "type of unit" to be inspected was characterized as "[m]odular."
- Ritz-Craft was identified as the "[m]anufacturer" in the Goyingses' contract with Cassidy Builders, which specified no other manufacturer. Ritz-Craft describes itself as a "modular *home* manufacturer." (Emphasis added.)
- JM Quality Construction assisted with the erection of the modular home. JM describes its business as "specializing in modular set up."
- Heritage Builders, in its blog, repeatedly referred to the home as a "modular home."
- Kirk Scharphorn is a building official for Watson Township and expert witness in construction

[11] Capitalization altered.

codes and inspections. Before trial, Mr. Scharphorn submitted an affidavit stating that the home is modular. At trial, Mr. Scharphorn testified: "There is no opinion. There is no doubt. It's a modular home." He further testified, "It's just a modular with additions on it." According to Mr. Scharphorn, these stick-built additions "make[] [the home] more attractive, but it's a modular unit that has had add-ons to dress it up and [it's] very nice."

- Douglas Snell appraised the home and was qualified as an expert witness in the area of residential real estate appraisals. At trial, when asked what the home is, Mr. Snell testified, "It is a modular house."

And yet the majority, in its application of its own standard, fails even to note, much less take into consideration, these characterizations.[12]

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[12] The majority concludes that because these various characterizations were offered for purposes separate from the interpretation of the covenant, "none of [these] characterizations help us answer the question presented here—when does a home constructed with modular components become a modular home under the restrictive covenants?" However, that each of these classifications occurred outside the litigative context, in fact, strongly supports the conclusion that the home is indeed modular. Each of these sources established how the term "modular home" is employed in ordinary custom, practice, and commerce, which is fully reflective of how the term would most reasonably have been employed in the covenant itself. In other words, these characterizations make pointedly clear that the majority's standard of "predominance" is entirely estranged from the plain and ordinary understanding of what comprises a modular home in the real world in which contracts and covenants operate. Moreover, while it is correct that none of these characterizations was set forth in supplying legal meaning to the covenant, that is irrelevant because these only could have proceeded in response to litigation. Thus, it is a strength, not a weakness, of plaintiffs' position that these characterizations preceded the legal dispute over the covenant. Accordingly, when all these characterizations have been taken into

D. "CONGENIALITY"

Similarly, this dissent's understanding and conclusion of modularity fully comports with the covenants' stated purpose, whereas the majority's rule of "predominance" accords no apparent regard to this purpose. The covenants here, as with many others across Michigan, are expressly intended to "provide for congenial occupancy of the Premises, and for the protection of the value of the Parcels therein . . . ." See *Bloomfield Estates*, 479 Mich at 214. "Congenial" is defined as "**1 :** having the same nature, disposition, or tastes . . . **2 a :** existing or associated together harmoniously **b :** . . . agreeably suited to one's nature, tastes, or outlook . . . ." *Merriam-Webster's Collegiate Dictionary* (11th ed). In expressing their desire for congeniality, the subdivision's residents thereby simply communicated their concern for tranquility and harmony in their neighborhood.[13] That is, they expressed their intention to live within a structurally homogenous neighborhood that was to be spared the presence of discordant or ill-matching homes, a neighborhood in

account, each pertaining to some aspect of erecting the home, the most reasonable conclusion can only be that, per common and ordinary usage, it is modular.

[13] The Goyingses argue that the covenant was intended to prevent "cheap" and "ugly" structures. This argument, however, overlooks that the covenant expressly precludes only the erection of modular homes, whether ugly or beautiful, perhaps because the parties did not want their *own* perceptions of beauty or ugliness to be supplanted by those of the judiciary. Possibly, the parties' premise in drafting the covenant may have been that any home that strayed from the restrictions would likely be substandard, unaesthetic, or incompatible, or simply in some manner negatively affect property values. Such speculation is of no matter, however, because the covenant does not forbid substandard, unaesthetic, or incompatible homes; it forbids modular homes. Thus, even operating under the presumption that the parties' intention was to prohibit substandard, unaesthetic, or incompatible homes, the parties decided that an appropriate mechanism by which to accomplish this was to institute a straightforward ban on modular homes.

which they could look out their window and be appeased by the structures that surrounded them. There is nothing in the public policy of this state that disfavors such a contractual purpose or that encourages our judiciary to look askance upon such an arrangement. There is nothing in the public policy of this state that ought to give limited regard to the efforts of free people seeking to anticipate and thereby to limit what they perceive as the irritants of daily life. And not to be overlooked despite its obviousness, *both* parties here willingly acceded to the commitments set forth by the covenants, presumably because each envisioned some benefit to themselves of residential "congeniality."

What is particularly disturbing about the majority's decision is its disregard for the virtues of "congeniality," both with regard to modular homes and to other forms of property restriction. It is hard to imagine a more straightforward covenant limitation than that in dispute in this case; at least, in this dissent's judgment, it could not be less in doubt that the home in question was erected and stands in violation of the plainest promise to the contrary. The majority both misreads this promise and ignores its purpose. It can easily be imagined that future covenant restrictions may increasingly be disregarded on the basis of the not-unreasonable suspicion that this Court has now found removal to be a disproportionate remedy for even the most egregious breach of covenant. Judicial decisions invariably have consequences. Indeed, concerning specifically modular-home covenants, the majority offers a road map for avoiding even the breach, never mind the remedy itself—erect or reconstruct a home that is sufficiently decked out with ancillary and disconnected stick-built elements that will place the home within its 49.9% safe harbor of "predominance." The meaning of any real-world sense of the "congeniality" of such a structure is left little more than empty contractual

baggage. In the course, one more minor realm of private decision-making is eroded, one more lesser sphere of decision-making by free persons seeking harmony and accord with their neighbors is displaced by the very different priorities of judges and lawyers.

Thus, despite their best efforts to "secure unto themselves the development of a uniform and desirable residential area," *Oosterhouse*, 343 Mich at 288, plaintiffs here suffer disappointment in their pursuit of "congeniality," diminution in the value of their covenants, and likely the lessening of property values. Quite certainly, plaintiffs will not be the last of the people of our state who will be similarly disappointed in what they once supposed to be the protective fortresses of their contracts.

IV. REMEDY

A finding of modularity, however, does not end the discussion concerning the home; we must determine the appropriate remedy for this violation. Because Michigan has long adhered to the policy of enforcing covenants, I agree with the Court of Appeals that the appropriate remedy in this case is the removal of the home.[14]

"[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to

[14] This may appear to many to be a disproportionate—or even a draconian—remedy. However, the parties were never precluded from amicably agreeing to an alternative remedy, if that had been viewed as mutually tenable. When they chose not to do so, the courts of Michigan are left to enforce the covenant. See *McQuade v Wilcox*, 215 Mich 302, 306; 183 NW 771 (1921) (noting that there are "[n]umerous cases involving [restrictions] and the right to their enforcement" in this Court's caselaw).

enforce the terms and conditions contained in such contracts . . . ." *Bloomfield Estates*, 479 Mich at 213. "If the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of the covenant affords sufficient ground for the court to interfere by injunction." *Oosterhouse*, 343 Mich at 289, quoting *Lord Manners v Johnson* (1875) LR 1 Ch Div 673, 680 (quotation marks omitted).[15] "The matter of damages to plaintiff is immaterial." *Smart Farm Co v Promak*, 257 Mich 684, 685; 241 NW 813 (1932). See also *Austin v Van Horn*, 245 Mich 344, 346; 222 NW 721 (1929); *Longton v Stedman*, 182 Mich 405, 414; 148 NW 738 (1914).

Thus, "we have never hesitated in proper cases to restrain by injunction the invasion of property rights . . . ." *Oosterhouse*, 343 Mich at 287. This is because "courts cannot disregard private contracts and covenants in order to advance a particular social good." *Terrien*, 467 Mich at 70. "[W]e recognize that refusal to enforce a contract is 'contrary to the real justice as between [the parties].' " *Bloomfield Estates*, 479 Mich at 213, quoting *Mitchell v Smith*, 1 Binn 110, 121 (Pa, 1804). Should a court fail to enforce a covenant, "today's exception [will] become[] tomorrow's precedent and the next day's settled usage. Thus the isolated

[15] See also *Doherty v Allman* (1878) LR 3 App Cas 709, 720 ("If parties, for valuable consideration, with their eyes open, contract that a particular thing shall not be done, all that a court of equity has to do is to say by way of injunction that which the parties have already said by way of covenant, that the thing shall not be done; and in such case the injunction does nothing more than give the sanction of the process of the court to that which already is the contract between the parties. It is not, then, a question of convenience or inconvenience, or of the amount of damage or injury—it is the specific performance, by the court, of that negative bargain which the parties have made, with their eyes open, between themselves.").

violation may plant the seed of a general practice which may subsequently lead to a finding of abandonment of the [covenant]." *Oosterhouse*, 343 Mich at 289; see also Olson, *The Litigation Explosion: What Happened When America Unleashed the Lawsuit* (New York: Truman Talley Books, 1991), p 218 ("If courts no longer thought it as important as they once did that people live up to their solemn promises . . . people would themselves come to attach less importance to choice and agreement as sources of rights.").

We enforce covenants because "[u]ndergirding [the] right to restrict uses of property is, of course, the central vehicle for that restriction: the freedom of contract, which is . . . deeply entrenched in the common law of Michigan." *Terrien*, 467 Mich at 71 n 19.

> The notion, that free men and women may reach agreements regarding their affairs without government interference and that courts will enforce those agreements, is ancient and irrefutable. It draws strength from common-law roots and can be seen in our fundamental charter, the United States Constitution, where government is forbidden from impairing the contracts of citizens, art I, § 10, cl 1. [*Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 52; 664 NW2d 776 (2003).]

" 'The principle of freedom of contract is rooted in the notion that it is in the public interest to recognize that individuals have broad powers to order their own affairs.' " 1 Restatement Property, 3d, Servitudes, § 3.1, comment *a*, p 347, quoting 2 Restatement Contracts, 2d, Introductory Note, pp 2-3.[16]

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[16] The importance of contract in our society cannot be understated. "The law of contract occupies a special place in American law . . . ." Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p 532. "[F]ree contract [is] a pillar holding up the palace of ordered liberty[.]" *Id*. The ability of each individual to enter into a free and voluntary agreement, regardless of his or her race, creed, religion,

Accordingly, given that the Goyingses violated the covenant in this case by erecting a modular home, we are left only to enforce the covenant and then to remedy the violation. Indeed, "in the absence of countervailing public policy, it is not the function of the courts to strike down private property agreements and to readjust those property rights in accordance with what seems reasonable . . . ." *Oosterhouse*, 343 Mich at 289-290.[17] Rather, we must act in accordance with the intentions of the parties as evidenced by their covenant, which proposition lies at the heart of the rule of law. Here, the parties intended to provide for "congenial" occupancy by imposing certain restrictions upon the construction of a home within a subdivision, a principal one of which was to forbid modular homes, and the Goyingses acted contrary to these intentions. Because it is the parties' land and property interests, it does not matter *why* they agreed to such a restriction, but simply that they did. "We may not understand why

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or gender, is inherent to this state's foundational adherence to "equal opportunity and justice to all." MCL 2.29. Indeed, liberal societies such as ours exist as a result of the "movement *from Status to Contract*," Maine, *Ancient Law* (London: John Murray, 1861), p 170, by which the dispositive influence of castes and classes came to be replaced over time by the free interaction of citizens. Societies came to realize that the ideal way to "organize[] social relations [is] through free voluntary agreement" by persons "pursuing their own ends . . . ." *A History of American Law*, p 532. Thus, " 'parties may contract as they wish, and courts will enforce their agreements without passing on their substance.' " 1 Restatement Property, 3d, Servitudes, § 3.1, comment *a*, p 347, quoting 2 Restatement Contracts, 2d, Introductory Note, p 2. However, when a court fails to reasonably adhere to a contract that is the result of a free and voluntary transaction between individuals, a foundational underpinning of our law and society is eroded.

[17] Of course, a judge may not define public policy on the basis of his or her predilections but rather must adhere to "policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes, and the common law." *Terrien*, 467 Mich at 66-67.

property owners want certain obligations to run with the land, but as it is *their* land, not ours, some very strong reasons should be advanced before [courts'] intentions are allowed to control." Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S Cal L Rev 1353, 1359 (1982).

Given the circumstances of the instant case, the only effective remedy is the removal or dismantling of the home.[18] This is not an instance in which a violation can be otherwise remedied by a "quick fix" such as repainting or reshingling the home to conform with exterior appearance requirements or reconfiguring a fence or porch to avoid encroachment upon boundary lines. Rather, as already discussed, the Goyingses' home, considered as a whole, is modular because its core is modular. That is, the home cannot be made nonmodular absent removal; a home cannot stand without its core. Accordingly, I agree with the Court of Appeals that no other remedy will more reasonably suffice and that the "only solution [is] to grant injunctive relief and order that the non-conforming home be removed." *Thiel*, unpub op at 6.

While this remedy might appear to some as disproportionate or unfair, removal is, in fact, entirely equitable. In requiring the removal of a building that

[18] While it not something done every day (most likely because covenants are not so blatantly breached every day), it is not without precedent that this Court has ordered the removal of an otherwise valuable building that violates a covenant or easement. See, e.g., *Nechman v Supplee*, 236 Mich 116, 119; 210 NW 323 (1926) (ordering the removal of a four-family flat in a subdivision that prohibited any building other than single-family residences); *Smith v Byrne*, 208 Mich 104, 108-109; 175 NW 138 (1919) (affirming an order requiring the removal of a rental garage on a parcel intended for a single private residence); *McIlhinny v Village of Trenton*, 148 Mich 380, 383; 111 NW 1083 (1907) (ordering the removal of an electric lighting plant that a village improperly constructed in the center of a public street).

violated covenants which established boundary lines and forbade more than one family residence on a parcel, this Court adopted the following reasoning of the Supreme Judicial Court of Massachusetts:

> "It is strongly urged that a mandatory injunction ought not to issue, for the reason that it would operate oppressively and inequitably, and impose on the defendant a loss disproportionate to the good it can accomplish, and that the plaintiffs ought to be relegated to financial compensation by way of damages. This remedy is a drastic one, and ought to be applied with caution, but in cases proper for its exercise, it ought not to be withheld merely for the reason that it will cause pecuniary loss. It has been found that the defendant, with full knowledge of the restrictions, 'deliberately attempted' to override them, and thus deprive the district of the character given it by the restrictions. He took his chances as to the effect of his conduct with eyes open to the results which might ensue. It has been the practice of courts to issue mandatory injunctions upon similar facts. (Citing cases.) Intrenchment behind considerable expenditures of money cannot shield premediated efforts to evade or circumvent legal obligations from the salutary remedies of equity." [*Nechman v Supplee*, 236 Mich 116, 124-125; 210 NW 323 (1926), quoting *Stewart v Finkelstone*, 206 Mass 28, 38; 92 NE 37 (1910).]

Here, the Goyingses were not only fully aware that their covenant prohibited the erection of modular homes, but they were also fully aware that their home in particular might run afoul of the covenant. Indeed, they contracted for a specifically described "modular" home and were then approached by plaintiffs, who immediately objected to the construction of the home on the basis of its modularity. Nonetheless, the Goyingses, as acknowledged even by the majority, "brushed off" plaintiffs' objections. See *Oliver v Williams*, 221 Mich 471, 475; 191 NW 34 (1922) ("Defendants knew, when they purchased their lots, of the

building restriction thereon and, while they accepted the same, they evidently did so with the mental reservation that they would not abide thereby if they could avoid the obligation."). But a party may not act in "bald defiance of [a] restriction" and thereafter complain that a result would somehow be inequitable. *Michiana Shores Estates, Inc v Robbins*, 290 Mich 384, 388; 287 NW 547 (1939).[19]

Moreover, while this Court has on another occasion recognized specific equitable exceptions to the enforcement of a covenant, these exceptions are absent in this case. In *Cooper*, 349 Mich at 530, quoting 26 CJS (1956), Deeds, § 171, we stated:

> As equitable exceptions to the general rule that the courts will enforce valid restrictions by injunction we find these: (a) Technical violations and absence of substantial injury; (b) Changed conditions; [and] (c) Limitations and laches.

However, in *Cooper*, we neither defined nor expounded upon what would constitute a "[t]echnical violation[]" or the "absence of substantial injury,"[20] the only one of these exceptions even conceivably pertinent in the

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[19] This is not, however, to say that the Goyingses acted out of malice or ill will. See *Oosterhouse*, 343 Mich at 285 ("The violation was apparently deliberate. But it was not malevolent, and it was conceived in no spirit of deliberate harm to his neighbors' rights."). By all accounts, the Goyingses sought to build their dream home at significant expense. Nonetheless, they did so by *knowingly* ignoring the limitations imposed upon them by their own promises and should, as a fair result, bear the consequences so as not to burden the substantial interests of their neighbors.

[20] The Court of Appeals helpfully identified a definition of the exception in *Webb v Smith (After Second Remand)*, 224 Mich App 203, 212; 568 NW2d 378 (1997): "a technical violation of a negative covenant [is] a 'slight deviation' or a violation that 'can in no wise, we think, add to or take from the objects and purposes of the general scheme of development . . . .' " (Quotation marks and citation omitted.)

present case,[21] and we declined to invoke the exception, concluding that the defendants' "conversion of a large portion of a residential subdivision to business in direct violation of a contrary covenant undoubtedly affects every home therein." *Cooper*, 349 Mich at 530.

But *Cooper* has never since been cited by this Court for its assertion of a technical-violation exception to the enforcement of a covenant. Indeed, it stands out as a distinct outlier in this Court's jurisprudence, appearing to be at odds with this Court's repeated emphasis, both before and after *Cooper*, that the mere occurrence of a breach may necessitate a judicial response, regardless of the extent of the harm.[22] See, e.g., *Terrien*, 467 Mich at 65; *Oosterhouse*, 343 Mich at 289; *Smart Farm Co*, 257 Mich at 685; *Austin*, 245 Mich at 346; *Longton*, 182 Mich at 414. That is, the notion that an undisputed violation may be excused or ignored by the judiciary because it comprises only a slight deviation from what is required by the covenant is inconsistent with the Court's myriad holdings that no deviation should be deemed immaterial.[23] Thus, I question whether the

[21] The Goyingses have not alleged that the subdivision in any way has undergone changed conditions since the adoption of the covenants, and the trial court concluded that neither waiver nor equitable estoppel prevented plaintiffs from bringing suit, a decision the Goyingses did not appeal and hardly could have successfully appealed in light of the promptness of plaintiffs' legal challenge.

[22] Obviously, the nature of the *relief* afforded may vary substantially depending upon the nature and magnitude of the violation, perhaps only rarely requiring the broad relief that I believe is required in the case.

[23] This Court has engaged in several discussions regarding "minor" or "trivial" violations. See, e.g., *Jeffery v Lathrup*, 363 Mich 15, 22; 108 NW2d 827 (1961); *Stark v Robar*, 339 Mich 145, 154; 63 NW2d 606 (1954) ("We need not cite any authority for the proposition that minor infractions of restrictions by other lot owners do not preclude this appellee from objecting to the major violation of a business structure on lots restricted for residential purposes."); *Knorr v Hazen*, 292 Mich 119,

technical-violation exception of *Cooper* remains good law, and was ever more than an outlier, in light of our contrary decisions in the same regard.

However, even to the extent that the technical-violation exception remains viable within our jurisprudence, the present violation was anything but technical. First, our caselaw continues to mandate that the "technicality" of the violation cannot hinge upon the lack of damages; thus, it is of no consequence that plaintiffs have not suffered easily measurable damages, especially those pertaining to lack of "congenial" occupancy. Second, a violation can hardly be regarded as technical when neighboring plaintiffs have promptly and steadfastly pursued litigation in an effort to protect what they deem to be an infringement upon the property rights they enjoy in the covenant,

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123; 290 NW 351 (1940); *Boston-Edison Protective Ass'n v Goodlove*, 248 Mich 625, 629-630; 227 NW 772 (1929) ("Plaintiffs are not estopped from preventing a most flagrant violation of the restrictions on account of their theretofore failure to stop a slight deviation from the strict letter of such restrictions."); *Nechman*, 236 Mich at 120; *Signaigo v Begun*, 234 Mich 246, 249; 207 NW 799 (1926); *Oliver*, 221 Mich at 476; 34 Am Jur POF3d 339, 370, § 16 ("Trivial violations of a restrictive covenant do not result in the loss of a right to enforce the covenant by injunction, and acquiescence in violations of a restrictive covenant which are immaterial will not preclude restraining violations which would so operate as to cause the property owner damage."). These discussions, however, are confined to considerations of the *waiver* of the right to enforce a covenant. In this context, a court's consideration of triviality seems fully prudent because in such instances the parties have already concluded that the initial violation was trivial. Indeed, when a defendant has previously overlooked a violation because he deemed it unworthy of enforcement, he should not be allowed to avoid his *own* violation on account of the previously ignored and trivial violation. By contrast, when a plaintiff has timely filed suit concerning a defendant's alleged violation of a covenant, that violation cannot be deemed technical or else the plaintiff presumably would not have filed the action. In such instances, this Court must adhere to the policy of enforcing covenants, which "has been expressly held to be the common law of this state." *Terrien*, 467 Mich at 71 n 19.

and this Court is not empowered to engage in its own assessment of the value of these rights in an effort "to advance a particular social good." *Terrien*, 467 Mich at 70. Third, the present violation is permanent and ongoing, pervading the entire use of the property in question; *to wit*, the parcel here was intended for single-family residential use of a stick-built home, and by erecting a modular home the Goyingses have substantially tainted for neighbors the residential use of their own property until the home is removed. Fourth, the violation is in no fashion a "slight deviation," as it directly undermines the covenants' express and fundamental command and consequently the parties' intentions of maintaining "congenial" occupancy within the subdivision. Accordingly, the violation "undoubtedly affects every home therein." *Cooper*, 349 Mich at 530. Rather than being "technical" in any comprehensible sense of that term, the Goyingses' disregard of the covenant's obligations is both blatant and substantial, cutting to the core of the covenant.

V. RESPONSE TO THE CONCURRENCE

The concurrence concludes "that the decision of whether to enforce a restrictive covenant by injunction is a matter left to the discretion of the trial court, sitting in equity" and that a trial court must "exercise its discretion in determining an equitable remedy." "But courts have no power to create equities contrary to law." *Hendricks v Toole*, 29 Mich 340, 343 (1874). Instead, there must be a *standard*—a legal standard—derived from the covenant itself and from the nature of the violation of that covenant that ultimately guides the determination of an appropriate remedy. *Oosterhouse*, 343 Mich at 289 ("Equity acts . . . because of the nature of the violation itself."). That is, in considering both the

violation and the remedy, there must be a standard for decision-making that is grounded in the covenant itself. Consideration of some vague formulation of "equity" does not allow the judiciary to look to its own conscience and to substitute that conscience for the decisions of the parties who, by contract, have established their own "law" to be applied in the event of a future dispute. While the judiciary does indeed have some necessary element of discretion to choose among remedies that afford relief for a contract breach, the ultimate standard, the lodestar, for exercising that discretion must be the covenant itself. Is this the standard by which the concurring justice would measure "equity"? If not, what would his standard be? Courts do not have a rootless or limitless commission to do "equity," but courts must do even "equity" within the confines of the law. Specifically with regard to the instant case, *both* the fact of the violation and the range of appropriate remedies for that violation are defined by the terms of the covenants—have the covenants been breached as a result of defendants' conduct, and if so, how can plaintiffs' affected interests be most reasonably and fully redressed? The weight and priority of these interests is determined in accordance with the covenants and not in accordance with the judge's own abstract understanding of "equity." Thus, the concurrence is in error when it asserts that this dissent "summarily" concludes that removal is the required remedy; rather, I reached this conclusion only after having considered the terms of the covenant and having discerned no alternative course that would fully redress the interests of plaintiffs. But the concurrence merely decries that abstract considerations of "equity" must somehow predominate over the terms of the contract, supplying no particular standard by which to measure what such "equity" would require and afford-

ing no particular guidance for the lower courts to whom it would remand for this determination.[24]

Rather than act in accordance with the covenant, the concurrence "imagine[s] that there is some vague equity" that should entirely control a court's decision. *Hendricks*, 29 Mich at 343. But the concurrence fails to apprehend that its position would

> accord the judiciary the power to examine the wisdom of private contracts in order to enforce only those contracts it deems prudent. However, it is not 'the function of the courts to strike down private property agreements and to readjust those property rights in accordance with what seems reasonable upon a detached judicial view.' Rather, absent some specific basis for finding them unlawful, courts cannot disregard private contracts and covenants in order to advance a particular social good. [*Terrien*, 467 Mich at 69-70, quoting *Oosterhouse*, 343 Mich at 289-290.]

For "the duty of the judiciary is to assert what the law 'is,' not what it 'ought' to be." *Terrien*, 467 Mich at 66. "If a deed restriction is unambiguous, we will enforce that deed restriction as written unless the restriction contravenes law or public policy, or has been waived by acquiescence to prior violations, because enforcement of such restrictions grants the people of Michigan the freedom 'freely to arrange their affairs' by the formation of contracts to determine the use of land." *Bloomfield Estates*, 479 Mich at 214 (citation omitted). Thus, equity is certainly relevant with regard to craft-

[24] Quite imprecisely, the concurring justice asserts that I possess an "evident distaste" for the judicial exercise of discretion. Better put, I possess an "evident distaste" for the type of *standardless* discretion that the concurring justice hails. And even better put still, I possess an "evident distaste" that in exercising this standardless discretion, freely made contractual judgments entered into within this state can be so thoroughly disregarded.

ing the remedy for a violation of a covenant and addressing circumstances such as waiver, laches, changed circumstances, and unclean hands. *Id*.; *Taylor Avenue Improvement Ass'n v Detroit Trust Co*, 283 Mich 304, 309; 278 NW 75 (1938); *Evergreen Village Civic Ass'n v Oakborn, Inc*, 327 Mich 161, 166; 41 NW2d 509 (1950) (opinion by SHARPE, J.). But when such circumstances do not exist, courts are left to enforce the covenant and fashion a remedy that resolves the violation, which in this case, as properly ascertained by the Court of Appeals, is removal of the home.

In the end, it is both ironic and telling that while the *concurrence* would substitute "equity" for the law, the *majority*, with whom the concurring justice joins, would hail as the virtue of its own test that, unlike this dissent, resolution of the present dispute would not be "left to a reviewing judge's whims." See note 9 of this opinion.

VI. CONCLUSION

"[W]hen parties have freely established their mutual rights and obligations through the formation of unambiguous contracts, the law requires this Court to enforce the terms and conditions contained in such contracts . . . ." *Bloomfield Estates*, 479 Mich at 213. When we fail to do so, a foundational institution of our rule of law is undermined. *Terrien*, 467 Mich at 70. On the basis of a review of common and ordinary understandings of what comprises a modular home—in particular the unanimous characterizations of professionals familiar with such homes, see Part III(C) of this opinion—it is clear that the Goyingses have erected a modular home in a subdivision in which such erection was expressly prohibited by covenant and thus have breached a promise made in that covenant. As a result, the "congenial" enjoyment of plaintiffs' property rights

in those covenants was substantially undermined. There being no contrary equitable considerations in the Goyingses' favor, I would affirm the Court of Appeals' determination that the home be removed. I thus respectfully dissent.

ZAHRA, J., concurred with MARKMAN, J.

PEOPLE v BRUCE
PEOPLE v NICHOLSON

Docket Nos. 156827 and 156828. Argued March 6, 2019 (Calendar No. 1). Decided July 25, 2019.

Terence M. Bruce and Stanley L. Nicholson were convicted following jury trials in the Jackson Circuit Court, Thomas D. Wilson, J., of common-law misconduct in office. Defendants were federal border patrol agents assigned to a Hometown Security Team (HST) task force that included Michigan State Police troopers, border patrol agents, and other officers operating in Jackson County. Defendants had been assigned to ensure perimeter security around a home during the execution of a search warrant and to help search the home and remove confiscated evidence. The task force kept a tabulation of items seized, but defendants took additional property not included on the tabulation. Defendant Nicholson took an antique thermometer and barometer device, insisting that it was junk, and he accidentally ruined the device when he took it home to clean it. Defendant Bruce took a wheeled stool with a leather seat home with him, but he returned it to the police department when asked about it. Defendants were charged with common-law misconduct in office as well as larceny in a building. Defendants moved for directed verdicts, arguing that they were not public officers for purposes of the misconduct-in-office offense. The court denied the motions, and the jury convicted defendants of misconduct in office but acquitted them of larceny in a building. Defendants appealed. In an unpublished per curiam opinion issued on October 5, 2017 (Docket Nos. 331232 and 331233), the Court of Appeals, SERVITTO, P.J., and MURRAY, J. (BORRELLO, J., dissenting), held that defendants were not public officers and vacated the convictions. The prosecution sought leave to appeal in the Supreme Court, and the Supreme Court granted the application. 501 Mich 1026 (2018).

In an opinion by Justice CAVANAGH, joined by Justices MARKMAN, ZAHRA, and BERNSTEIN, the Supreme Court *held*:

Misconduct in office is corrupt behavior by an officer in the exercise of the duties of his or her office or while acting under color of his or her office. To determine whether a position

constitutes a public office, a court considers five factors: (1) the position must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; and (5) it must have some permanency and continuity, and not be only temporary or occasional. Oath and bond requirements are also of assistance in determining whether a defendant is a public officer. Together, these factors are referred to as the *Coutu* factors.[1] In this case, the central problem was how to categorize defendants for purposes of applying the factors—as border patrol agents or as federal agent HST members enforcing Michigan law. The relevant office to analyze must be determined by which duties defendants were exercising and the color of office under which defendants were acting. Defendants in this case were functioning as federal agent HST members enforcing Michigan law, and application of the *Coutu* factors showed that defendants, as federal agent members of the HST enforcing Michigan law, were public officers for purposes of the common-law offense of misconduct in office. The first factor was satisfied under MCL 764.15d, which provides that federal law enforcement officers may enforce state law to the same extent as a state or local officer when they are authorized under federal law with arrest powers and to carry a firearm and when they are participating in a joint investigation with a state or local law enforcement agency or acting pursuant to the request of local law enforcement. Defendants operated under the authority of MCL 764.15d in assisting with the execution of the warrant; therefore, the Legislature created defendants' positions. The second factor was satisfied because police officers discharging their duties act for the state in its sovereign capacity, so defendants possessed power delegated by the Legislature that was exercised for the benefit of the public. The third factor was satisfied because under MCL 764.15d, authorized officers may enforce state law to the same extent as a state or local officer and are granted the privileges and immuni-

[1] *People v Coutu*, 459 Mich 348 (1999).

ties of a peace officer of the state. MCL 764.15d also described the officers' duties to be discharged; in this case, the duties of defendants were the obligations of the HST and other duties authorized officers may have under MCL 764.15d. The fourth factor was satisfied because defendants were empowered to act only insofar as they were participating in a joint investigation or acting at the request of state officers; they were under the general control of the HST. The permanence requirement of the fifth factor was satisfied because the statutory delegation of the state's police power to qualifying federal agents used by defendants has been codified since 1999, the HST is an ongoing invocation of the delegated authority, and defendants were on long-term assignments. The additional factor of whether a defendant has taken an oath was not dispositive; that factor is merely used to assist with the determination. However, because federal law enforcement officers take oaths to defend the federal Constitution, MCL 764.15d(1) contemplates an oath as well. Although the parties disagreed about whether all the factors had to be established as elements, or only considered as factors, the disagreement did not need to be resolved because all the factors supported the conclusion that the defendants in this case were public officers. Accordingly, as federal agent HST members enforcing Michigan law, defendants were public officers for purposes of the offense of misconduct in office.

Reversed and remanded to the Court of Appeals.

Chief Justice MCCORMACK, dissenting, would have exercised restraint in defining the common-law crime because bedrock principles of fairness demand that a defendant have fair notice of criminal liability, because changing the scope of criminal liability is a role best left to the Legislature, and because expanding the definition of "public officer" in this case causes future uncertainty instead of resolving it. There was no reason to expand this particular common-law crime to restrain conduct like the defendants' when other already-defined crimes exist and when defendants' conduct could have exposed them to civil liability, sanctions for violating federal ethics regulations, or adverse employment consequences. Accordingly, Chief Justice MCCORMACK would have held that the defendants in this case were not public officers for purposes of the common-law offense of misconduct in office. "Public office" is not defined as a mere grant of power; rather, it requires the give and take between authority and obligation—the officer holds the power of the state because the officer needs it to carry out his or her duties. In this case, defendants' duties derived from federal law. Under MCL 764.15d, federal agents receive, like

a gift from the state, all the rights and immunities of Michigan peace officers, but they are not obligated to do anything in return. And a grant of power without undertaking a corresponding duty is merely a privilege. Because defendants had the privilege of enforcing state law but lacked the duty to do so, defendants did not hold "public office." Accordingly, Chief Justice MCCORMACK would have affirmed.

Justice VIVIANO, dissenting, would have held that the prosecution did not meet its burden of establishing that defendants were public officers for purposes of the offense of misconduct in office because *Coutu* elements 1, 3, 4, and 5 were not established and because defendants were not required to take an oath as HST members, which Justice VIVIANO would hold is also requisite to a finding that the position is a public office. Each of the *Coutu* elements must be established before a court may conclude that a position constitutes a public office for purposes of a misconduct in office charge. The first *Coutu* element was not met because there is no statute providing for the creation of HSTs, much less authorizing the Michigan State Police to appoint anyone to such a body. While the majority cited MCL 764.15d, that statute does not create a position on any particular task force or outline the duties of task force members, how they are appointed, or their tenure in office. The third element was not met because while the "powers conferred" on federal law enforcement officers working on joint investigations or task forces were defined by the Legislature in MCL 764.15d, the "duties to be discharged" were not defined in MCL 764.15d. The majority's analysis simply conflates statutory authority to perform certain tasks with a statutory duty to do so. MCL 764.15d was intended to allow federal law enforcement officers to enforce Michigan law to the same extent as a state or local officer, but only in limited circumstances and for limited purposes; MCL 764.15d does not purport to create a new office or to prescribe the duties of any such office. The fourth element was not met because MCL 764.15d does not provide for the appointment of members to a joint investigation or task force, create a command structure, or describe how any such joint investigation or task force will be administered. The fifth element was not met because MCL 764.15d does not create a permanent position on any particular task force or outline the duties of a task force member or how a member is appointed. Additionally, a task force is not, by its nature, a permanent or continuing entity; instead, it is organized and implemented to solve a specific problem. Finally, Supreme Court precedent has indicated that an oath is a necessary prerequisite to a finding that a person is a public officer for purposes of the charge of misconduct in office.

Defendants were not required to take an oath, and MCL 764.15d, the statute that authorized them to enforce state law, makes no reference to an oath. Accordingly, Justice VIVIANO would have affirmed.

Justice CLEMENT, dissenting, would have held that defendants did not hold "public office" under the test articulated in *Coutu* because defendants' positions as federal agents and as members of the task force were not created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature. Accordingly, Justice CLEMENT would have affirmed.

CRIMINAL LAW — COMMON-LAW MISCONDUCT IN OFFICE — WORDS AND PHRASES — "PUBLIC OFFICE."

Misconduct in office is corrupt behavior by an officer in the exercise of the duties of his or her office or while acting under color of his or her office; to determine whether a position constitutes a public office, a court considers the factors outlined in *People v Coutu*, 459 Mich 348 (1999); the proper perspective of a defendant's office for purposes of applying the *Coutu* factors is determined by the duties the defendant exercised and the color of office under which he or she acted.

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *Laura Moody*, Chief Legal Counsel, and *Christopher M. Allen*, Assistant Attorney General, for the people.

Law Office of Rosemary Gordon Pánuco (by *Rosemary Gordon Pánuco*) for Terence M. Bruce and Stanley L. Nicholson.

CAVANAGH, J. In these consolidated cases we consider whether defendants, who were federal border patrol agents operating as part of a joint task force enforcing Michigan law, are public officers for purposes of the common-law offense of misconduct in office. The crux of this question is how to categorize their offices—solely as border patrol agents or as federal agent task force members enforcing Michigan law. We hold that the categorization depends on the duties exercised by

defendants and the color of office under which defendants acted. In these cases, because defendants exercised duties of enforcement of Michigan law and acted under authority granted to them by Michigan statute, they acted as public officers. Accordingly, we reverse the Court of Appeals and remand to that Court for consideration of defendants' remaining issues.

I. FACTS AND PROCEDURAL HISTORY

Defendants, Terence Bruce and Stanley Nicholson, were federal border patrol agents assigned to a Hometown Security Team (HST) task force operating in Jackson County in December 2014. The HST is a "criminal intervention team" assigned mostly to freeways and that focuses on drugs and firearms. At the time, the HST consisted of Michigan State Police troopers, border patrol agents, and other officers.

Defendants were "embedded" with the HST, meaning that they did not have other duty assignments; they worked with the HST every shift. They took orders from superiors in the HST, and defendant Nicholson testified that he considered himself to have "peace officer status," that he adopted the authority of the HST, and that he participated in the law enforcement duties the HST performed. If the HST executed a search warrant, defendants took part.

On the evening of December 23, 2014, an HST patrol unit consisting of a Michigan State Police trooper and a border patrol agent executed a traffic stop against Benjamin Scott. The trooper searched Scott's car and found marijuana trimmings and proof of his residency. The investigation then incorporated another task force, the Jackson Narcotics Enforcement Team (JNET). HST and JNET obtained a search warrant for

two residences Scott was renting and held a joint briefing to prepare to execute the warrant.

Defendants attended the briefing, which addressed team member assignments for the raid and contingencies such as where to retreat if shots were fired and which hospital to use if necessary. Defendants were assigned to ensure perimeter security during the initial entry and then to help search the homes and remove confiscated evidence. HST and JNET made entry and spent most of the evening and early morning disassembling and removing an elaborate marijuana-growing operation from the basements of the homes. The task forces seized grow lights, ballasts, netting, and marijuana plants. A careful tabulation was kept of every item taken that noted whether it was evidence of a crime or subject to forfeiture as proceeds of a crime. But defendants took additional property not included on the tabulation.

Defendant Nicholson took an antique thermometer and barometer device. He said that it was rusty and dirty, and he insisted that "it really was junk" when he removed it but that he intended to clean it up. According to defendant Nicholson, he took the device to his workshop where he tried to clean the lens with a rotary tool, but he accidentally burrowed through, making the device useless. After ruining the device, he discarded it and "gave it no other thought, it was trash." But it had not been trash to Scott. The device had been given to Scott by his grandfather, who had received it from his father. It was a family heirloom.

Defendant Bruce took a wheeled stool with a leather seat home with him and kept it until he was asked about it by the HST team leader. When asked, Bruce admitted that he took the stool. He then returned it to the Michigan State Police post in Jackson.

Defendants were charged with common-law misconduct in office as well as larceny in a building. Each moved for pretrial dismissal and midtrial directed verdicts, arguing that they were not public officers for purposes of the misconduct-in-office offense. The trial court denied the motions for pretrial dismissal and midtrial directed verdicts in both cases. Ultimately the jury convicted defendants of misconduct in office but acquitted them of larceny in a building.

Defendants appealed and challenged their convictions on multiple grounds, including that they were not public officers for purposes of the misconduct-in-office offense. The Court of Appeals agreed that defendants were not public officers and vacated the convictions. *People v Bruce*, unpublished per curiam opinion of the Court of Appeals, issued October 5, 2017 (Docket Nos. 331232 and 331233). The prosecution sought leave to appeal in this Court, and we granted the application to address "whether the defendant federal border patrol agents were 'public officers' for purposes of the common-law crime of misconduct in office when they assisted—as members of a law enforcement task force that included Michigan State Police and Michigan motor carrier officers—in the execution of a search warrant." *People v Bruce*, 501 Mich 1026, 1026 (2018).

II. STANDARD OF REVIEW

Whether defendants are public officers is a question of law that we review de novo. *People v Coutu*, 459 Mich 348, 353; 589 NW2d 458 (1999). Interpretation and application of statutes are also questions of law that we review de novo. *Id*.

III. ANALYSIS

Often, appellate consideration of the common-law offense of misconduct in office has been a vertical

inquiry into whether a defendant's status was more than that of an "employee," to the point of becoming a "public officer." Defendants argue that although they were executing a search warrant as HST team members, their status as border patrol agents makes this a horizontal problem that allows them to escape sideways from the common-law responsibilities at issue. We hold that the proper perspective of defendants' offices is determined by the duties they exercised and the color of office under which they acted. From that perspective, we see that defendants were public officers.

The idea that people who wield the power of the state are required to do so responsibly is not new. More than 20 years ago we observed that the common law describes the offense of misconduct in office as " 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' " *Coutu*, 459 Mich at 354, quoting Perkins & Boyce, Criminal Law (3d ed), p 543. Public officers had been held accountable under the offense long before,[1] and public officers in Michigan have continued to be held accountable under the offense since.[2]

In *Coutu*, 459 Mich 348, we considered the question whether a deputy sheriff is a public officer. There, we built on the foundation of *People v Freedland*, 308 Mich 449; 14 NW2d 62 (1944), in constructing our understanding of who qualifies as an officer. *Freedland* had considered many authorities, including

[1] See, e.g., *State v Winne*, 12 NJ 152, 163; 96 A2d 63 (1953), citing 1 Burdick, The Law of Crime (1946), § 272, p 387 (recognizing common-law criminal misconduct-in-office offenses); *People v Ward*, 85 Cal 585, 586; 24 P 785 (1890) (recognizing the common-law offense of misconduct in office); *State v Wedge*, 24 Minn 150, 151 (1877) (recognizing common-law criminal offenses of misbehavior and malfeasance in office).

[2] See, e.g., *People v Milton*, 257 Mich App 467; 668 NW2d 387 (2003); *People v Hardrick*, 258 Mich App 238, 244; 671 NW2d 548 (2003).

State v Hawkins, 79 Mont 506; 257 P 411, 418 (1927), which defined "public office of a civil nature" for purposes of Montana's constitutional prohibition on legislators holding multiple positions. The *Hawkins* court concluded that "five elements are indispensable" in any such office:

> (1) It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional. [*Id*.]

Freedland quoted these five factors, among other considerations. *Freedland*, 308 Mich at 457-458. *Coutu* noted these same factors and also added that oath and bond requirements are "of assistance" in determining whether a defendant is a public officer. *Coutu*, 459 Mich at 355. The parties in this matter agree that *Coutu* identifies the relevant factors.[3]

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[3] Although the parties agree as to the factors the test applies, they disagree as to the operation of the test. Defendants argue that each of the factors must necessarily be established, whereas the prosecution argues that the factors must only be considered. Justice VIVIANO agrees with defendants and would treat the factors as elements. Justice VIVIANO would also add an oath as an element. We do not need to resolve that disagreement in this case because all five factors support the conclusion that defendants are public officers and because defendants in fact took oaths.

The central problem of this case is how to categorize defendants for purposes of the *Coutu* analysis. Should we view defendants solely as border patrol agents or as federal agent HST members enforcing Michigan law? Again, defendants were charged with " 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' " *Id*. at 354, quoting Perkins & Boyce, p 543. The relevant office to analyze must be determined by which duties defen-

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It is noteworthy that we have never applied the factors in the way that defendants and Justice VIVIANO suggest. An "element" of a claim or crime is a "constituent part." See *Black's Law Dictionary* (9th ed). By definition, each "element" is necessary, and all "elements" together are sufficient. In *Freedland*, we quoted the factors from *Hawkins* and said that the "rule [was] accurately stated" there by the Montana Supreme Court. *Freedland*, 308 Mich at 457. But, as noted, *Hawkins* was one of many authorities we considered in *Freedland*. We also said "the correct rule is stated in Mechem on Public Offices and Officers" about a different rule, *Freedland*, 308 Mich at 455, and that *Scofield v Strain*, 142 Ohio St 290, 295; 51 NE2d 1012 (1943), stated "the rule expressed in the majority" of cases about yet a third rule, *Freedland*, 308 Mich at 457. We also observed in *Freedland* that in *People ex rel Throop v Langdon*, 40 Mich 673, 682 (1879), we had opined that an " 'officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond.' " *Freedland*, 308 Mich at 458. Rather than treating the factors from *Hawkins* as necessary individually and sufficient as a group, we resolved the question there by "[a]pplying the *rules* thus stated . . . ." *Id*. (emphasis added). They were factors in *Freedland*, not elements. Further, the question in *Freedland* was not even the definition of "public officer" for purposes of this common-law offense; rather, the question was whether the defendant was an "executive officer of the State of Michigan" for purposes of then Section 118 of the Penal Code. *Id*. at 452.

Then, in *Coutu*, we relied on *Freedland*'s discussion of *Hawkins* and *Langdon*. *Coutu*, 459 Mich at 354-357. We carried over the phrase "five indispensable elements," *id*. at 354, but that is not how the test was applied. If the five factors were "elements," each would have been necessary individually, and they would have been sufficient collectively. Accordingly, the oath consideration could not have had any effect. Again, we do not need to solve this puzzle in this case because all the factors are satisfied.

dants were exercising and the color of office under which defendants were acting.

In some ways the categorization problem here is similar to that in *People v Perkins*, 468 Mich 448; 662 NW2d 727 (2003). In *Perkins*, the defendant was a deputy sheriff who was prosecuted for acts arising from his sexual relationship with a 16-year-old girl. *Id*. at 450. The charged offenses included misconduct in office. *Id*. at 449. By then we had already decided that a deputy sheriff was a public officer for purposes of the offense. *Id*. at 457, citing *Coutu*, 459 Mich at 357-358. But in *Perkins* we held that because there was "no evidence correlating that conduct with defendant's public office," there was no "nexus between defendant's alleged conduct and defendant's status as a sheriff's deputy." *Id*. at 457-458. Said another way, although the defendant was a public officer in another context, he was not acting under the color of that office when he allegedly committed the offense.

Defendants have not argued that they were off duty from the HST or at Scott's home solely as border patrol agents. Nor have defendants argued that they were enforcing a federal statute or acting under their power as border patrol agents. There is no dispute that defendants were at Scott's home as federal agent HST members authorized to assist in the execution of the search warrant under MCL 764.15d. Under this section, under certain circumstances, federal law enforcement officers may "enforce state law to the same extent as a state or local officer," MCL 764.15d(1), and enjoy all the "privileges and immunities of a peace officer of this state," MCL 764.15d(2).[4] Defendants were functioning as federal agent HST members enforcing

[4] In full, MCL 764.15d states:

Michigan law, and that is the relevant perspective under *Coutu*. See *Bruce* (BORRELLO, J., dissenting), unpub op at 3.

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(1) A federal law enforcement officer may enforce state law to the same extent as a state or local officer only if all of the following conditions are met:

(a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.

(b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.

(c) One or more of the following apply:

(*i*) The officer possesses a state warrant for the arrest of the person for the commission of a felony.

(*ii*) The officer has received positive information from an authoritative source, in writing or by telegraph, telephone, teletype, radio, computer, or other means, that another federal law enforcement officer or a peace officer possesses a state warrant for the arrest of the person for the commission of a felony.

(*iii*) The officer is participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency.

(*iv*) The officer is acting pursuant to the request of a state or local law enforcement officer or agency.

(*v*) The officer is responding to an emergency.

(2) Except as otherwise provided in subsection (3), a federal law enforcement officer who meets the requirements of subsection (1) has the privileges and immunities of a peace officer of this state.

(3) This section does not impose liability upon or require indemnification by the state or a local unit of government for an act performed by a federal law enforcement officer under this section.

(4) As used in this section:

(a) "Emergency" means a sudden or unexpected circumstance that requires immediate action to protect the health, safety, welfare, or property of an individual from actual or threatened harm or from an unlawful act.

(b) "Local unit of government" means a county, city, village, or township.

Application of the *Coutu* factors shows that defendants, as federal agent members of the HST enforcing Michigan law, are public officers for purposes of the common-law offense of misconduct in office.[5] The first factor is satisfied by MCL 764.15d. As described earlier, the Legislature provided for positions, such as those defendants held with the HST, in which federal law enforcement officers "may enforce state law to the same extent as a state or local officer . . . ." MCL 764.15d(1). Federal law enforcement officers are vested with this authority if they are authorized under federal law with arrest powers and to carry a firearm, MCL 764.15d(1)(a) and (b), and when they are participating in a joint investigation with a state or local law enforcement agency or acting pursuant to the request of local law enforcement, MCL 764.15d(1)(c)(*iii*) and (*iv*). Defendants acknowledged at oral argument that they were operating under the authority of MCL 764.15d in assisting with the execution of the warrant. But for this statute, there would be no federal law enforcement officers who have authority to participate in these types of investigations. The Legislature created their positions, which authorized them to be in Scott's home.[6]

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[5] While we agree with our dissenting colleagues that we should exercise restraint in defining common-law crimes, we disagree that our decision is an expansion of the common law rather than a consistent and restrained application of our precedent.

[6] Justice VIVIANO points out that MCL 764.15d "does not create a position on any particular task force or outline the duties of task force members, how they are appointed, or their tenure in office." However, Justice VIVIANO does not cite authority for why these considerations define what it means to "create a position." Adopting these considerations, and then applying them as Justice VIVIANO would, would be contrary to *Coutu*. It is true that MCL 764.15d does not create a position "on any particular task force," but neither does MCL 51.70 create a position of deputy in any particular sheriff's department, and that did

Analysis of the second factor is similar to that of *Coutu*'s analysis of deputy sheriffs because defendants were empowered to "enforce state law to the same extent as a state or local officer . . . ." MCL 764.15d(1). The second factor is satisfied because police officers discharging their duties act for the state in its sovereign capacity, *Coutu*, 459 Mich at 355, citing *Tzatzken v Detroit*, 226 Mich 603, 608; 198 NW 214 (1924), so necessarily defendants, who were empowered to "enforce state law to the same extent as a state or local officer," MCL 764.15d(1), possessed power delegated by the Legislature that was exercised for the benefit of the public.

The third factor is also satisfied. Again, in *Coutu* we stated that " 'the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority[.]' " *Coutu*, 459 Mich at 354, quoting *Freedland*, 308 Mich at 458. Authorized officers "may enforce state law to the same extent as a state or local officer," MCL 764.15d(1), and they are granted the "privileges and

not trouble us in *Coutu*. MCL 51.70 does describe the mechanism for creation of a particular position of a deputy sheriff by stating that "[e]ach sheriff may appoint 1 or more deputy sheriffs . . . ." But MCL 764.15d provides a similar mechanism by stating that the statute may be invoked when "[t]he officer is participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency," MCL 764.15d(1)(c)(*iii*), or "[t]he officer is acting pursuant to the request of a state or local law enforcement officer or agency," MCL 764.15d(1)(c)(*iv*). The only tenure of office described by MCL 51.70 is appointment "at the sheriff's pleasure," which the sheriff "may revoke . . . at any time." Here, the relevant tenure is the length of participation in the relevant joint investigation, MCL 764.15d(1)(c)(*iii*), or at the pleasure of the requesting state or local law enforcement officer or agency, MCL 764.15d(1)(c)(*iv*). If MCL 764.15d does not create a position for purposes of this common-law offense, then neither does MCL 51.70. But we already held that it did in *Coutu*. We decline to revisit the method of application of this factor. More on duties below.

immunities of a peace officer of this state," MCL 764.15d(2). That defendants were vested with broad "powers" is obvious enough. MCL 764.15d also directly or impliedly describes their "duties." A "duty" is commonly understood to be "something that one is expected or required to do by moral or legal obligation." *Random House Webster's College Dictionary* (2001). In *Coutu*, we held that this factor was satisfied because "the Legislature defined in part the powers and duties of deputy sheriffs," citing MCL 51.75, MCL 51.76(2), and MCL 51.221. *Coutu*, 459 Mich at 355. To the extent that those statutes impose obligations, they impose them on the sheriff and the department, but not on any particular deputy.[7] Additionally, MCL 51.221 states that a deputy "*may* serve or execute civil or criminal process issued by a court of this state, and have and

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[7] MCL 51.75 states that "[*t*]*he sheriff* shall have the charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailer." (Emphasis added.) MCL 51.76(2) states:

> Each *sheriff's department* shall provide the following services within the county in which it is established and shall be the law enforcement agency primarily responsible for providing the following services on county primary roads and county local roads within that county, except for those portions of the county primary roads and county local roads within the boundaries of a city or village; and on those portions of any other highway or road within the boundaries of a county park within that county:
>
> (a) Patrolling and monitoring traffic violations.
>
> (b) Enforcing the criminal laws of this state, violations of which are observed by or brought to the attention of the sheriff's department while providing the patrolling and monitoring required by this subsection.
>
> (c) Investigating accidents involving motor vehicles.
>
> (d) Providing emergency assistance to persons on or near a highway or road patrolled and monitored as required by this subsection. [Emphasis added.]

exercise all the powers and duties of constables." (Emphasis added.) In *Coutu*, we held that a deputy's duties were the obligations of the sheriff, MCL 51.75, the obligations of the sheriff's department, MCL 51.76(2), and other duties a deputy *may* have, MCL 51.221. *Coutu*, 459 Mich at 355. We see little difference in this case, in which the duties of defendants were the obligations of the HST, MCL 764.15d(1)(c)(*iii*) and (*iv*), and other duties authorized officers may have, MCL 764.15d(1) ("A federal law enforcement officer may enforce state law to the same extent as a state or local officer . . . .").[8]

The fourth factor is also comparable to *Coutu*. There, we reasoned that although deputy sheriffs do not operate without a superior control other than the law, they are under the control of the sheriff, a "superior officer." *Coutu*, 459 Mich at 355. In this case, the situation is much the same. Defendants were operating under MCL 764.15d(1)(c)(*iii*) and (*iv*), so they were empowered to act only insofar as they were participat-

[8] Justice VIVIANO agrees that MCL 764.15d defines the powers conferred but argues that MCL 764.15d does not define the duties to be discharged. Our reading of Justice VIVIANO's dissent is that it considers duties not to be things that are "expected or required," but more like the sole statutory responsibilities of a sheriff. This is not necessarily an unreasonable way to think about *Coutu*'s third factor, but it is not how we have applied it before, and we decline to adopt this new approach. Moreover, the gravamen of defendants' misconduct was not in failing to perform a duty but in abusing the power they had unquestionably been granted by the state of Michigan. Neither any member of this Court nor defendants disagree that defendants possessed a delegation of a portion of the sovereign power of government that was to be exercised for the benefit of the public. Neither any member of this Court nor defendants disagree that defendants abused that power when they stole from Scott after entering his home without his permission under the color of their offices. It would strike us as odd to apply this offense in such a way as to punish a deputy sheriff serving on JNET or the HST for stealing from Scott, but not to punish defendants.

ing in a joint investigation or acting at the request of state officers. They were under the general control of the HST. Defendant Nicholson testified that border patrol agents embedded in the HST deferred to the knowledge and expertise of the Michigan State Police troopers, followed their lead, and took orders from them.[9]

The permanence requirement of the fifth factor is satisfied from multiple perspectives. First, the statutory delegation of the state's police power to qualifying federal agents used by defendants has been codified since 1999. 1999 PA 64. There is nothing "temporary or occasional" about the delegation. We think that almost 20 years of delegated authority easily crosses the threshold of "some permanency and continuity." Second, the HST is an ongoing invocation of the delegated authority. The record does not reveal precisely when the HST was established, but the team leader, a Michigan State Police sergeant, had led the team continuously from December 2012 until this trial in September 2015. Therefore, we know that the team was in operation for nearly three years. Third, defendants were on long-term assignments, being "embedded" with the HST. Defendants did not have any other duty assignments. They worked with the HST every shift. Accordingly, there was

[9] Justice VIVIANO argues that MCL 764.15d "does not provide for the appointment of members to a joint investigation or task force, create a command structure, or describe how any such joint investigation or task force will be administered." First, we note that MCL 764.15d does provide for the appointment of members to a joint investigation. See MCL 764.15d(1)(c)(*iii*). Second, we do not read *Coutu* as requiring a detailed statutory "command structure." Indeed, the relevant statutes merely provide that deputy sheriffs serve at the pleasure of the sheriff. See MCL 51.70. In this case, defendants are limited by their participation in the joint investigation and/or the request of the Michigan State Police. MCL 764.15d(1)(c)(*iii*) and (*iv*). Just as deputy sheriffs serve at the pleasure of a sheriff, defendants served at the pleasure of the HST. We decline to revisit *Coutu*'s analysis or adopt any new understanding of this factor.

permanency and continuity to defendants' assignment to the HST.[10]

Lastly, we note that whether a defendant has taken an oath is "of assistance" in this determination.[11] *Coutu*, 459 Mich at 355. The delegation of the state's

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[10] Justice VIVIANO argues that MCL 764.15d "does not create a permanent position on any particular task force or outline the duties of a task force member or how a member is appointed." Justice VIVIANO is correct that MCL 764.15d does not create a permanent position on any *particular* task force. But again, neither does MCL 51.70 create a *particular* deputy sheriff position in any one department. As we declined to alter the method of analysis we applied to previous factors, we decline to do so for this factor as well. Justice VIVIANO also argues that being embedded in a task force is a situation that cannot have "some permanency and continuity" as the fifth factor requires because a task force is not permanent by definition. We respectfully disagree. Just because a task force may be formed to work on a specific problem does not mean that it cannot be permanent. "Permanent" is defined, in pertinent part, as "**1.** existing perpetually; everlasting. **2.** intended to serve, function, etc., for a long, indefinite period[.]" *Random House Webster's College Dictionary* (2001). A quick Internet search reveals the existence of many permanent task forces, including a permanent greenhouse gas sequestration task force, see State of Hawaii, Office of Planning, *Greenhouse Gas Sequestration Task Force* <https://planning.hawaii.gov/carbon-farming-task-force/> (accessed June 18, 2019) [https://perma.cc/F992-GT5D], a permanent environmental justice task force, see State of California, California Environmental Protection Agency, *Environmental Justice Task Force* <https://calepa.ca.gov/enforcement/environmental-justice-compliance-and-enforcement-task-force/> (accessed June 18, 2019) [https://perma.cc/2M8F-92NH], and several permanent task forces to address election security, see Lawler, *FBI, DHS Task Forces To Address Election Security Are Now Permanent*, Engadget (April 26, 2019), available at <https://www.engadget.com/2019/04/26/christopher-wray-election-task-force-fbi> (accessed June 18, 2019), just to name a few. As noted, the HST had been in existence and under the same leadership for more than three years. Defendants were embedded within the HST. Neither the HST nor defendants' embedding within it was "temporary" or "occasional," but rather satisfied the requirement of "some permanency and continuity."

[11] Again, as we otherwise declined to alter the *Coutu* analysis, we decline to convert the oath consideration into an element.

police power used by these defendants, MCL 764.15d, is not available to everyone. Rather, the delegation may only be used by a "federal law enforcement officer." MCL 764.15d(1). Because federal law enforcement officers take oaths to defend the federal Constitution, MCL 764.15d(1) contemplates an oath as well. At any rate, this factor is not dispositive. Under *Coutu*, defendants are public officers.

The Court of Appeals majority concluded that the relevant perspective was that defendants were mere border patrol agents and then observed that the authority that allowed defendants to enforce Michigan law had no bearing on the authority that created the border patrol. *Bruce*, unpub op at 4. This same argument is offered by defendants, who assert that the position of federal border patrol agent was created by Congress, not the Michigan Constitution or Michigan Legislature. For further support, defendants point out that MCL 15.181(e) defines "public officer" in a way that does not allow for creation of such a public office by Congress. These arguments all err in that they focus on defendants' status as mere border patrol agents rather than on their status as federal agent HST members enforcing Michigan law.[12] If defendants had been operating only as federal border patrol agents, the body which created that position would be

[12] Additionally, MCL 15.181 is simply not applicable to the common-law offense of misconduct in office. MCL 15.181 provides a list of statutory definitions that is introduced by the phrase "[a]s used in this act[.]" This introduction indicates that the "Legislature has chosen to specifically limit the applicability of a statutory definition . . . ." *People v Feeley*, 499 Mich 429, 444; 885 NW2d 223 (2016). The term "public officer" has its own common-law meaning in the context of the offense of misconduct in office, and we use that meaning until it has been modified by the Legislature. *Perkins*, 468 Mich at 455. As discussed earlier, *Coutu* defines what it means to be a "public officer" for purposes of the common-law offense of misconduct in office, not MCL 15.181.

relevant. But it was *because* they were federal agent HST members and *because* they were enforcing Michigan law that they were in Scott's home. That makes their authority to enforce Michigan law—and their status as federal agent HST members—the relevant perspective.

Defendants also argue that they were not "law enforcement officer[s]" as defined by MCL 28.602(*l*).[13] Whether defendants were state law enforcement officers as defined by MCL 28.602(*l*) has no relevance as to whether they were federal law enforcement officers for purposes of MCL 764.15d.[14] Defendants conceded during oral argument that they were federal law enforcement officers and that they were acting under the authority of MCL 764.15d.

Finally, defendants argue that MCL 764.15d only governs when federal law enforcement officers can make an arrest for violation of a Michigan state law offense, rather than being a general grant of police powers. The plain language of MCL 764.15d reveals that its scope is significantly broader than defendants suggest. The statute gives federal law enforcement officers the power to "enforce state law to the same extent as a state or local officer," MCL 764.15d(1), and states that federal law enforcement officers enjoy all the "privileges and immunities of a peace officer of this state," MCL 764.15d(2), under certain circumstances. Moreover, we look to the language of the statute to ascertain its meaning; while statutory titles and head-

[13] In 2016, the Legislature rewrote MCL 28.602; "law enforcement officer" is now defined in MCL 28.602(f). See 2016 PA 289.

[14] Again, this statutory definition is simply inapplicable. The definitions provided in MCL 28.602 are for use "in this act," referring to the Michigan Commission on Law Enforcement Standards Act, MCL 28.601 *et seq*. See *Feeley*, 499 Mich at 444.

ings are "useful navigational aids," they "should never be allowed to override the plain words of a text." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), pp 221-222. See *People v Jaboro*, 76 Mich App 8, 11; 258 NW2d 60 (1977) (" 'The title cannot control the plain words of the statute.' "), quoting 2A Sutherland, Statutory Construction (4th ed), § 47.03, pp 72-73.[15] This same principle regarding statutory titles and headings can be applied to the chapter titles within the statute. Accordingly, while MCL 764.15d is codified within Chapter IV of the Code of Criminal Procedure, which is entitled "Arrest," we look to the language of the statute for its meaning rather than the title of the chapter. At any rate, the relevant analysis is whether defendants satisfied *Coutu* through their invocation of MCL 764.15d. As discussed earlier, they did.

IV. CONCLUSION

We conclude that defendants are public officers, as federal agent HST members enforcing Michigan law, for purposes of the offense of misconduct in office. Accordingly, we reverse the decision of the Court of Appeals and remand to that Court for consideration of defendants' remaining arguments.

MARKMAN, ZAHRA, and BERNSTEIN, JJ., concurred with CAVANAGH, J.

MCCORMACK, C.J. (*dissenting*). I respectfully dissent. I share Justice VIVIANO's concerns about the need for

[15] If the body of a statute is ambiguous, a court may look to the title to resolve the ambiguity, *Kalee v Dewey Prod Co*, 296 Mich 540, 545; 296 NW 826 (1941), but when the meaning of a statute is otherwise clear, the title may not be used to create ambiguity, *Jaboro*, 76 Mich App at 11.

restraint in defining common-law crime. Not just because bedrock principles of fairness demand that a defendant have fair notice of criminal liability, but because changing the scope of criminal liability is a role best left to the Legislature and, perhaps most importantly, because expanding the definition of "public officer" causes future uncertainty rather than resolving it.

I'm not concerned that these defendants suffered unfair surprise. An ordinary, law-abiding citizen in the defendants' position would have known that taking something that doesn't belong to him might be a crime. But I see no reason for us to expand this particular common-law crime to restrain conduct like the defendants' when other already-defined crimes (or noncriminal consequences) will do the job. For example, the defendants *were* charged with (but acquitted of) larceny in a building. And their conduct could have exposed them to civil liability, sanctions for violating federal ethics regulations,[1] or adverse employment consequences. Although it feels perfectly intuitive to extend the definition of a public officer under the specific facts of *this* case, that seemingly intuitive principle may have downstream consequences—an overinclusive, indefinite rule "broadcasts to the law-enforcement community a potent message: the limits of official coercion are not fixed; the suggestion box is always open. The result is that lawmaking devolves to law enforcement, and police and prosecutors are invited to play too large a role in deciding what to punish." Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va L Rev 189, 223

[1] See, e.g., US Customs and Border Protection Directive, *Standards of Conduct*, No. 51735-013A (March 13, 2012).

(1985). These concerns are only heightened when criminal liability stems from a common-law crime rather than a statute.

We can largely avoid these hazards by applying settled law to facts. And I would conclude that under our caselaw, the defendants were not public officers for purposes of the common-law offense of misconduct in office. To convict a defendant of common-law misconduct in office, the prosecution must establish that the defendant (1) is a public officer (2) who engaged in corrupt behavior (3) in the exercise of the duties of his office or while acting under color of his office. *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999). At common law, misconduct could entail malfeasance, misfeasance, or nonfeasance. *People v Perkins*, 468 Mich 448, 456; 662 NW2d 727 (2003). But nonfeasance has been codified as a misdemeanor. See MCL 750.478 ("When any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every willful neglect to perform such duty, where no special provision shall have been made for the punishment of such delinquency, constitutes a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00."). And MCL 750.505 provides a catchall provision for "any indictable offense at the common law, for the punishment of which *no provision is expressly made by any statute* of this state . . . ." (Emphasis added.) Thus, only theories of misfeasance and malfeasance remain as common-law crimes. Misconduct under these theories (in contrast to nonfeasance) is also the most susceptible to existing criminal and noncriminal consequences.

It is only the first element that causes disagreement —whether the defendant border patrol agents were

public officers. The question isn't whether they are public officers in the abstract or public officers under federal law, but whether they are public officers for this court-defined Michigan crime. And the parties agree that *Coutu*, 459 Mich at 354, states the relevant test for distinguishing between public officers and mere employees. The prosecution's theory is that the defendant border patrol agents hold "public office" because the Legislature, in effect, deputized certain federal law enforcement officers by authorizing them to enforce the laws of the state and vesting them with the privileges and immunities enjoyed by Michigan peace officers. MCL 764.15d. This theory is appealing—Michigan entrusted these border patrol agents with a sliver of the sovereign power of government, and they abused the public trust by using their privilege to commit misconduct.

But we have not defined "public office" as a mere grant of power. Rather, it requires the give and take between authority and obligation—the officer holds the power of the state *because* she needs it to carry out her duties. Under MCL 764.15d, federal agents receive, like a gift from the state, all the rights and immunities of Michigan peace officers, but they are not obligated to do anything in return. And a grant of power without undertaking a corresponding duty is merely a privilege. This distinguishes the position created by MCL 764.15d from the position of deputy sheriff in *Coutu*. There, the Legislature specifically authorized the sheriff to appoint deputies. MCL 51.70 ("Each sheriff may appoint 1 or more deputy sheriffs at the sheriff's pleasure, and may revoke those appointments at any time."). And it enacted *other* statutes specifically defining the duties of the sheriff or sheriff's department. E.g., MCL 51.75 and 51.76; MCL 51.221. Without a similar statute that "define[s], directly or impliedly,"

some set of "duties to be discharged" under MCL 764.15d, I conclude that the third element of the *Coutu* test is not met.

The parties dispute whether the test described in *Coutu* was an all-or-nothing set of elements or a flexible totality-of-the-circumstances standard. But I would end the analysis here under either standard. Even under the more flexible approach, I find that the lack of affirmative duty conveyed by law is fatal. And without a duty, several other elements fail in cascade.

In sum, the border patrol agents here had the privilege of enforcing state law but no duty to do so. Their duties derived from federal law. And their relationship with Michigan law enforcement was one of mutual agreement, not law. Thus, I cannot conclude that they held "public office" as *Coutu* used that term. And because I conclude that the lack of duty is fatal, I would affirm.

VIVIANO, J. (*dissenting*). Just last term, in a unanimous opinion, our Court reaffirmed our longstanding rule that " '[a] criminal statute ought to be so plain and unambiguous that "he who runs" may read, and understand whether his conduct is in violation of its provisions.' " *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018), quoting *People v Ellis*, 204 Mich 157, 161; 169 NW 930 (1918). Because the majority's rendering of the parameters of the common-law offense of misconduct in office does not live up to that standard, I respectfully dissent.

Defendants were charged under MCL 750.505, which pertains generally to common-law criminal offenses but does not purport to define any specific crime. Instead, the statute provides that "[a]ny person who shall commit any indictable offense at the common law,

for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony . . . ." MCL 750.505. Here, defendants were charged with the common-law offense of misconduct in office. "When the Legislature codifies a common-law crime without articulating its elements, we must look to the common law for the definition of the crime. We are bound by the common-law definition until the Legislature modifies it." *People v Perkins*, 468 Mich 448, 455; 662 NW2d 727 (2003) (citation omitted).

We have previously observed that "[a]t common law, misconduct in office constituted 'corrupt behavior by an officer in the exercise of the duties of his office or while acting under color of his office.' " *People v Coutu*, 459 Mich 348, 354; 589 NW2d 458 (1999), quoting Perkins & Boyce, Criminal Law (3d ed), p 543. The element of this offense at issue here is whether defendants are public officers. See *Perkins*, 468 Mich at 457 ("To be guilty of misconduct in office, one must first be a public officer.").

In *Coutu*, we held that five elements are indispensable to a determination of whether a position constituted a public office for purposes of a misconduct in office charge:

> "(1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature, and by it placed under the general control of a

> superior officer or body; (5) it must have some permanency and continuity, and not be only temporary or occasional." [*Coutu*, 459 Mich at 354, quoting *People v Freedland*, 308 Mich 449, 457-458; 14 NW2d 62 (1944).]

To these five, I believe a sixth should be added: the officer must be required to take an official oath. To understand why, and before determining whether these elements were satisfied in this case, it is necessary to briefly trace the origins of the *Coutu* elements.

A. HISTORY OF THE *COUTU* ELEMENTS

First a general observation: the *Coutu* elements were not originally designed to answer the question of whether a position constitutes a public office for purposes of a misconduct in office charge. Instead, they were derived from cases involving dual office prohibitions or more specific statutory misconduct crimes. The *Coutu* elements were first annunciated by the Montana Supreme Court in *State ex rel Barney v Hawkins*, 79 Mont 506; 257 P 411 (1927), which addressed whether the position of auditor of the board of railroad commissioners was a public office, such that a state representative would be barred by the state constitution from concurrently serving in both positions. The court began by observing that "[t]here are a great many judicial decisions defining the word 'office' or the words 'public office.' The subject is an old one and decisions extend far back." *Id*. at 515. After reviewing a number of those decisions, the court summarized them as follows:

> From the foregoing and many other authorities examined it appears that various elements are considered requisite to a public office. Some decisions hold that the taking of an official oath is necessary to constitute a position an office; others hold that the giving of an official bond is necessary;

> still others hold that the issuance of a commission or certificate of appointment is necessary; some decisions hold all three requisite. . . .
>
> Some decisions hold that, in an office, there must be tenure, duration, a definite term of service; others, that the character of the service does much to determine if a position is an office. . . .
>
> Practically all of the authorities, however, hold that to an officer are granted some of the sovereign powers of the government, to be exercised for the benefit of the public. They hold, also, quite generally that an officer's duties must be prescribed by law, and that he must be independent in the exercise of them and not subject to orders from a superior as to the nature or discharge of his duties, with the exception of some assistants, such as assistant attorneys general, secretaries, and the like, created by law, with salaries fixed by law. Some authorities hold deputies to be officers; others not. Those two rules, stated above, delegation of sovereign power and independent exercise of it, with the stated exception in the latter, appear to be general. [*Id*. at 517-519.]

After reviewing another batch of cases that it believed were in accord, the court quoted the following passage from *People ex rel Throop v Langdon*, 40 Mich 673, 682-685 (1879), an opinion written by our esteemed predecessor, Justice THOMAS COOLEY:

> "The officer is distinguished from the employee in the greater importance, dignity and independence of his position; in being required to take an official oath and, perhaps, to give an official bond; in the liability to be called to account as a public offender and for misfeasance or nonfeasance in office and, usually, though not necessarily, in the tenure of his position. In this case the facts are stipulated. We find among them no evidence that an office known as chief clerk in the office of the assessor has been created. A person has been appointed and has acted under the designation of chief clerk but no statute or ordinance has given him that title and, if he

> were now to be called and to style himself, in the discharge of his duties, head clerk or leading clerk or assistant to the assessor or assessor's amanuensis, it would, for aught we can discover, be equally well, for nothing whatever depends upon the name. * * * Nor do we find in the facts stipulated or in any law or ordinance the requirement of an official oath. It is said that the usual oath of office has, sometimes and perhaps always, been administered but why administered we do not understand. The fact of it being taken cannot prove that the clerk is an officer. * * * It was, we think, a needless ceremony. Nor do the duties usually performed by the chief clerk indicate an office, rather than an employment. Nothing but custom has defined them. * * * He is wholly subordinate to the assessor, having no independent functions. * * * The duties, such as they are, can be changed at the will of the superior, since no rule of law or well defined custom forbids it." [*Hawkins*, 79 Mont at 520-521.][1]

At the conclusion of its "exhaustive examination of the authorities," the *Hawkins* court held that

> five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature: (1) It must be created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) the powers conferred and the duties to be discharged must be defined, directly or impliedly, by the legislature or through legislative authority; (4) the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the legislature and by it placed under the general control of

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[1] In *Langdon*, the Court had little difficulty concluding that the so-called chief clerk in the city assessor's office was only an employee, not an officer for purposes of a quo warranto action.

> a superior officer or body; (5) it must have some permanency and continuity and not be only temporary or occasional. [*Id*. at 528-529.]

The court also held that, "[i]n addition, in this state, an officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority." *Id*. at 529. After reciting these elements, the court had little difficulty in determining that the position of auditor was not a civil office under the state because it "[did] not possess a delegation of a portion of the sovereign power of government"; instead, the auditor was "only an employee; holding a position of employment, terminable at the pleasure of the employing power . . . ." *Id*.

Our Court first made reference to the *Coutu* elements in *Freedland*, where we addressed the question of whether the defendant, " 'an accounts examiner of the Michigan State sales tax division,' " was an "executive officer" for purposes of a statute making it a crime for an executive, legislative, or judicial officer to accept a bribe. *Freedland*, 308 Mich at 452. The defendant argued that he was not a public officer for the following reasons:

> (a) He did not fill any position that was established or created by statute or other legislation;
>
> (b) There were no duties conferred upon his position by law;
>
> (c) He was hired to perform his work and did not fill an appointive position;
>
> (d) His position was completely lacking in the independence and dignity associated with a public officer;
>
> (e) His position was completely lacking in discretionary powers which usually are inherent in a public office;
>
> (f) He took no oath of office;

> (g) He had no fixed tenure of office.
>
> Defendant had no right to hire or discharge employees, nor the right to impose, or cancel, the taxes provided for by law. [*Id*. at 454.]

After citing numerous authorities, the Court observed that "[t]he rule is accurately stated in [*Hawkins*]" and then quoted the passage cited above containing the five indispensable elements. *Id*. at 457-458. Interestingly, the Court did not discuss the defendant's arguments or the elements individually in reaching its conclusion that the defendant was not a public officer under the statute. Instead, the Court simply observed that the "defendant neither had the dignity nor the discretion usually vested in one holding a public office." *Id*. at 458. Then, the Court analyzed the statute in context and determined that since the defendant was not a public officer, he should have been charged under a different section of the Michigan Penal Code, MCL 750.1 *et seq*. *Id*. at 458-460.

Finally, as noted above, two decades ago in *Coutu*, our Court adopted the five indispensable elements from *Hawkins* and used them for the first time to determine whether a person is a public officer for purposes of a common-law misconduct in office charge. It is to the *Coutu* Court's findings regarding those elements—and how its analysis differs from the majority's in this case—that I now turn.

B. THE *COUTU* ELEMENTS ARE NOT SATISFIED IN THIS CASE

A review of the *Coutu* Court's treatment of the five indispensable elements, and a comparison of the majority's treatment of them here, shows where the majority's analysis misses the mark.

1. TO CONSTITUTE A PUBLIC OFFICE, THE POSITION MUST BE CREATED BY THE CONSTITUTION OR BY THE LEGISLATURE OR CREATED BY A MUNICIPALITY OR OTHER BODY THROUGH AUTHORITY CONFERRED BY THE LEGISLATURE

It is undisputed that defendants' positions as agents of the United States Border Patrol were not created by Michigan's Constitution or by the laws of this state. However, at all times relevant to this case, defendants were assigned to a Hometown Security Team (HST), a task force comprised of members of the Michigan State Police (MSP), motor carrier officers, and federal Border Patrol agents. *People v Bruce*, unpublished per curiam opinion of the Court of Appeals, issued October 5, 2017 (Docket Nos. 331232 and 331233), p 2. No one contends that positions on the HST—or positions on joint state and federal law enforcement task forces more generally—are created by the Michigan Constitution or by the MSP through authority conferred by the Legislature. So, I agree with the majority to the extent it believes that the appropriate question as it relates to the first *Coutu* element is whether defendants' positions as HST members were "created by . . . the legislature."[2]

[2] The majority's reference to *Coutu*'s five indispensable elements as "factors" is misleading. They are not simply factors to be considered in some sort of balancing test, but instead "five indispensable elements" that must be established before a court may conclude that a position is a public office. See *Coutu*, 459 Mich at 354. See also *Hawkins*, 79 Mont at 528 ("[W]e hold that five elements are indispensable in any position of public employment, in order to make it a public office of a civil nature[.]"). In case there could be any doubt, perusal of a dictionary confirms that "indispensable" means either "absolutely necessary, essential, or requisite" or "incapable of being disregarded or neglected[.]" Dictionary.com <https://www.dictionary.com/browse/indispensable?s=ts> (accessed June 28, 2019) [https://perma.cc/4WWZ-8L63]. And "element" in ordinary usage means "a component or constituent of a whole or one of the parts into which a whole may be resolved by analysis[.]"

In *Coutu*, the analysis of this element was straightforward: the Court simply noted that "the Legislature provided for the creation of deputy sheriffs at MCL 51.70," which provides that "[e]ach sheriff may appoint 1 or more deputy sheriffs at the sheriff's pleasure, and may revoke those appointments at any time." *Coutu*, 459 Mich at 355. Here, however, there is no statute providing for the creation of HSTs, much less authorizing the MSP to appoint anyone to such a body.[3] Notwithstanding, the majority believes that "the Legislature provided for positions, such as those defen-

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Dictionary.com <https://www.dictionary.com/browse/element?s=t> (accessed June 28, 2019) [https://perma.cc/W9JX-BJY2]. Thus, each element is absolutely necessary to a finding of a public office. By adopting such a stringent test, our Court implicitly rejected the totality of the circumstances approach now favored by the majority. In addition to running headlong into our caselaw, the majority's approach provides significantly less clarity about the scope of this common-law offense and, as a result in my view, gives rise to the same constitutional concerns as a vague statutory offense. See *United States v Davis*, 588 US ___, ___; 139 S Ct 2319, 2323; 204 L Ed 2d 757 (2019) (explaining that vague laws violate due process and the separation of powers because "[t]hey hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct").

[3] Notably, the description of HSTs in the Michigan State Police *Services Guide* does not even refer to federal law enforcement officers:

> Each Hometown Security Team consists of one sergeant, four troopers, and one motor carrier officer. They concentrate on highway crime and enhanced traffic enforcement by augmenting local police services with visible patrols. Their goal is to saturate areas with enhanced police presence in an effort to reduce crime and improve public safety by reducing serious traffic accidents. Each Hometown Security Team also has the ability to rapidly assist local communities in times of crisis. [Michigan State Police, *Services Guide* (March 28, 2014), p 4, available at <https://www.michigan.gov/documents/msp/Services_Guide_455043_7.pdf> (accessed June 13, 2019) [https://perma.cc/AP8J-WJM2].]

dants held with the HST" pursuant to MCL 764.15d. That statute authorizes federal law enforcement officers to "enforce state law to the same extent as a state or local officer," MCL 764.15d(1), and grants them "the privileges and immunities of a peace officer of this state" under certain specified conditions, MCL 764.15d(2).[4] But it does not create a position on any particular task force or outline the duties of task force members, how they are appointed, or their tenure in office. Instead, the statute simply authorizes federal law enforcement officers to work in a different capacity (enforcing state, rather than federal, law) in limited circumstances (if the officer has arrest power and is authorized to carry a firearm in the performance of his or her duties under federal law) and for a limited purpose (as relevant here, to serve on a joint state and federal investigation or otherwise at the request of a state or local law enforcement agency).

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[4] MCL 764.15d(1) provides, in pertinent part, as follows:

> (1) A federal law enforcement officer may enforce state law to the same extent as a state or local officer only if all of the following conditions are met:
>
> (a) The officer is authorized under federal law to arrest a person, with or without a warrant, for a violation of a federal statute.
>
> (b) The officer is authorized by federal law to carry a firearm in the performance of his or her duties.
>
> (c) One or more of the following apply:
>
> * * *
>
> (*iii*) The officer is participating in a joint investigation conducted by a federal agency and a state or local law enforcement agency.
>
> (*iv*) The officer is acting pursuant to the request of a state or local law enforcement officer or agency.

The majority bases its finding that the first element is met on thin gruel—how thin will become apparent when MCL 764.15d is examined in relation to the third, fourth, and fifth *Coutu* elements. Suffice it to say that I do not believe this first element is satisfied by the statute.[5]

2. TO CONSTITUTE A PUBLIC OFFICE, THE POSITION MUST POSSESS A DELEGATION OF A PORTION OF THE SOVEREIGN POWER OF GOVERNMENT, TO BE EXERCISED FOR THE BENEFIT OF THE PUBLIC

As to the second element, I agree with the majority that, pursuant to MCL 764.15d(1), defendants in this case "possess a delegation of a portion of the sovereign power of government . . . ." There can be no serious debate that defendants, when acting pursuant to the limited authority granted by MCL 764.15d(1), "exercise sovereign power while engaged in the discretionary discharge of their duties." *Coutu*, 459 Mich at 355, citing *Tzatzken v Detroit*, 226 Mich 603, 608; 198 NW 214 (1924).

3. TO CONSTITUTE A PUBLIC OFFICE, THE POWERS CONFERRED, AND THE DUTIES TO BE DISCHARGED, MUST BE DEFINED, DIRECTLY OR IMPLIEDLY, BY THE LEGISLATURE OR THROUGH LEGISLATIVE AUTHORITY

Regarding the third element, I agree with the majority that "the powers conferred" on federal law enforcement officers working on joint investigations or task forces were defined by the Legislature in MCL 764.15d.

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[5] Ordinarily, this finding would be the end of the matter. But since the majority analyzes all the *Coutu* elements and believes that they all "support the conclusion that defendants are public officers," I will address them as well.

But it is equally clear that the "duties to be discharged" are nowhere to be found in the statute. This is a critical point.

In *Langdon*, we explained that "[a]n office is a special trust or charge created by competent authority. *If not merely honorary, certain duties will be connected with it*, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer." *Langdon*, 40 Mich at 682 (emphasis added). The Court first observed that "[n]othing but custom" had defined the duties usually performed by the chief clerk and that "custom ha[d] certainly not been very specific . . . ." *Id*. at 685. Next, the Court observed that "the duties, such as they are, can be changed at the will of the superior, since no rule of law or well defined custom forbids it." *Id*. Finally, the Court observed that it was unaware of any "case in which [chief clerk] is conferred as a title of office where the duties are undefined." *Id*. at 686.

This requirement of a duty is consistent across many jurisdictions. See *Hawkins*, 257 P at 414 (noting many authorities holding "that an officer's duties must be prescribed by law"). See also *Farley v Perry Bd of Ed*, 62 Okla 181; 162 P 797, 799 (1917) ("The duties of an officer are fixed by law," and "in the discharge of his duties he knows no guide but the established law . . . ."); *State v Begyn*, 34 NJ 35, 42; 167 A2d 161 (1961) ("The relevant duties actually assigned and undertaken are controlling in this type of situation and not the mere matter of designation of a title."); *State v Sellers*, 7 Rich 368, 371; 41 SCL 368 (1854) (" 'Every man is a public officer who hath any duty concerning the public; and he is not the less a public officer where his authority is confined to narrow limits; because it is

the duty of his office, and the nature of that duty, which makes him a public officer, and not the extent of his authority.' "); *State v Hess*, 279 SC 14, 20; 301 SE2d 547 (1983) ("The existence of a duty owed to the public is essential, for otherwise the offending behavior becomes merely the private misconduct of one who happens to be an official."); *Raduszewski v New Castle Co Superior Court*, 232 A2d 95, 96 (Del, 1967) (explaining that to be a public officer a person must, among other things, have "the authority *and duty* to exercise some part of the sovereign power of the State" and holding that an inspector in the motor vehicle department was not a public officer because, among other things, "the duties and authority of an inspector" were not prescribed by statute) (emphasis added); *Hawkins*, 79 Mont at 528 (noting that another Montana case, *State ex rel Quintin v Edwards*, 38 Mont 250; 99 P 940 (1909), "held that a policeman is a 'public officer,' in the sense that, by provision of municipal ordinances, as well as of statute, he has to perform certain prescribed, definite duties to the public").

The duty requirement also makes logical sense, since misconduct in office has been defined as "any unlawful behavior in relation to official duties by an officer intrusted in any way with the administration of law and justice, or, as otherwise defined, any act or omission in breach of a duty of public concern by one who has accepted public office." 1 Burdick, The Law of Crime (1946), § 272, p 388. And Burdick explains that this offense is "broad enough to include malfeasance, misfeasance, and nonfeasance." *Id*. It is hard to imagine how, absent a duty, one could be charged with nonfeasance, since nonfeasance is "omit[ting] to do any act which is required of [a public officer] by the duties of his office[.]" Perkins & Boyce, p 540.

In *Coutu*, the analysis of this element, too, was straightforward: the Court simply noted that "the Legislature defined in part the powers and duties of deputy sheriffs," citing MCL 51.75 ("The sheriff shall have the charge and custody of the jails of his county, and of the prisoners in the same; and shall keep them himself, or by his deputy or jailer."); MCL 51.76(2) (listing the services that must be provided by each county sheriff's department); and MCL 51.221 ("A sheriff, undersheriff, or deputy sheriff of a county of this state may serve or execute civil or criminal process issued by a court of this state, and have and exercise all the powers and duties of constables."). *Coutu*, 459 Mich at 355.

The majority in this case errs in its analysis because it fails to recognize that no like statutory provisions exist defining the duties of federal law enforcement officers serving on a state task force. Citing MCL 764.15d(1), the majority asserts that "the duties of defendants were the obligations of the HST . . . ." This assertion is perplexing, however, since the statute does not refer to the HST or any particular task force or require anyone to serve on or perform any particular tasks for such a task force. The majority's analysis simply conflates statutory authority to perform certain tasks with a statutory duty to do so.

Perhaps recognizing the weakness in its position, the majority selects a broad but inapplicable definition of "duty" as " 'something that one is expected or required to do by moral or legal obligation.' " However, a much more apt definition in this context is "an action or task required by a person's position or occupation; function[.]" Dictionary.com<https//www. dictionary. com/browse/duty?s=t> (accessed June 28, 2019) [https://perma.cc/6RRH-2DQA]. Here, unlike in *Coutu*,

the statute does not impose any duties on anyone; indeed, it does not require any particular person in any particular position to do any particular thing.

But the absence of a statutory duty is not surprising since it is apparent, based on the plain language of MCL 764.15d, that the statute was intended to allow federal law enforcement officers to enforce Michigan law to the same extent as a state or local officer, but only in limited circumstances and for limited purposes. The statute does not purport to create a new office or to prescribe the duties of any such office. Thus, for example, the statute does not obligate federal officers to enforce state law—nor could it, since the Legislature has no power to impose job duties or conditions of employment on federal law enforcement officers. Instead, any such duties were simply a matter of custom or informal agreement and, as in *Langdon*, "the[se] duties, such as they are, can be changed at the will of the superior, since no rule of law or well defined custom forbids it." *Langdon*, 40 Mich at 685. In sum, the third *Coutu* element has also not been established.

4. TO CONSTITUTE A PUBLIC OFFICE, THE DUTIES MUST BE PERFORMED INDEPENDENTLY AND WITHOUT CONTROL OF A SUPERIOR POWER OTHER THAN THE LAW, UNLESS THEY BE THOSE OF AN INFERIOR OR SUBORDINATE OFFICE, CREATED OR AUTHORIZED BY THE LEGISLATURE, AND BY IT PLACED UNDER THE GENERAL CONTROL OF A SUPERIOR OFFICER OR BODY

As to the fourth *Coutu* element, no one contends that defendants' duties (whatever those might be—see above) as federal law enforcement officers assigned to the HST are "performed independently and without control of a superior power other than the law . . . ." Indeed, like the deputy sheriffs at issue in

Coutu, it is clear that they are not. Therefore, the pertinent inquiry is, assuming that their positions were created or authorized by the Legislature, whether those positions were placed by the Legislature "under the general control of a superior officer or body."[6] In *Coutu*, we held that this element was satisfied "[b]ecause the Legislature ha[d] authorized the appointment of deputy sheriffs, an inferior or subordinate office to that of sheriff," pursuant to MCL 51.70. *Coutu*, 459 Mich at 355. The majority asserts that since defendants "were empowered to act only insofar as they were participating in a joint investigation or acting at the request of state officers" under MCL 764.15d(1)(c)(*iii*) and (*iv*), "[t]hey were under the general control of HST." However, the statute does not provide for the appointment of members to a joint investigation or task force, create a command structure, or describe how any such joint investigation or task force will be administered. And I could locate no law or regulation setting forth these details for HSTs in particular. Although defendants may have deferred to the MSP troopers when involved in state investigations, they did so as a matter of custom or informal agreement—there is no law or regulation requiring them to do so. Thus, the fourth *Coutu* element has not been established.

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[6] In *Hawkins*, the court derived the following rule from the many cases it reviewed: "[Those cases] hold . . . quite generally that an officer's duties must be prescribed by law and that he must be independent in the exercise of them and not subject to orders from a superior as to the nature or discharge of his duties, with the exception of some assistants, such as assistant attorneys general, secretaries, and the like, created by law, with salaries fixed by law." *Hawkins*, 79 Mont at 518-519.

5. TO CONSTITUTE A PUBLIC OFFICE, THE POSITION MUST HAVE SOME PERMANENCY AND CONTINUITY, AND NOT BE ONLY TEMPORARY OR OCCASIONAL

The fifth *Coutu* element requires us to analyze whether defendants' positions as members of the HST "have some permanency and continuity" and are not "only temporary or occasional." *Coutu*, 459 Mich at 354. See also Mechem, A Treatise on the Law of Public Offices and Officers (1890), § 8, p 6 ("[C]ertainly a position which is merely temporary and local cannot ordinarily be considered an office."). As our Court explained in *Underwood v McDuffee*, 15 Mich 361, 366-367 (1867):

> The term "*officer*" . . . can only be taken to refer to such offices as have some degree of permanence, and are not created by a temporary nomination for a single and transient purpose. A designation of a person to do some one act of duty, with no official tenure except as incident to that transitory function, can not make him a public officer, without involving a great absurdity. Every public office includes duties which are to be performed constantly, or as occasion arises, during some continuous tenure.

In *Coutu*, again, this element was easily satisfied since "deputy sheriffs are generally positions of permanent employment." *Coutu*, 459 Mich at 356. Here, the picture is more complicated. The majority bases its conclusion that defendants' positions are sufficiently permanent and continuous on (1) the fact that "the statutory delegation of the state's police power to qualifying federal agents . . . has been codified since 1999,"[7] (2) the HST itself has been in existence at least three years, and (3) defendants were on long-term

[7] Although MCL 764.15d was last amended in 1999, see 1999 PA 64, it was first enacted in 1987, see 1987 PA 256.

assignments and worked solely with the HST. I believe this analysis misses the mark.

As noted above, MCL 764.15d does not create a permanent position on any particular task force or outline the duties of a task force member or how a member is appointed. Instead, it simply authorizes federal law enforcement officers to enforce state law in limited circumstances and for a limited purpose. Indeed, most of the work authorized by the statute is carefully circumscribed and quite obviously "temporary or occasional." For example, to enforce Michigan law, a federal law enforcement officer must possess a state felony arrest warrant, see MCL 764.15d(1)(c)(*i*), or receive "positive information from an authoritative source" that another federal or state law enforcement officer is in possession of same, see MCL 764.15d(1)(c)(*ii*). Or, the federal officer may "respond[] to an emergency." See MCL 764.15d(1)(c)(*v*). The acts of executing an arrest warrant and responding to an emergency do not require any degree of permanence or continuity. Nor would "acting pursuant to *the request*" of state or local law enforcement on one occasion—or even more than one occasion—be sufficient to satisfy the permanence requirement. See MCL 764.15d(1)(c)(*iv*) (emphasis added). So, we are left with the question whether participation in a joint investigation or task force under MCL 764.15d(1)(c)(*iii*) is sufficient to satisfy the permanence requirement.

As a general matter, a task force is not, by its nature, a permanent or continuing entity. Instead, it is organized and implemented to solve a specific problem. See Dictionary.com <https://www.dictionary.com/browse/task-force> (accessed June 17, 2019) [https://perma.cc/K6K2-HUDU] (defining a "task force" as "a group or committee, usually of experts or specialists, formed for

analyzing, investigating, or solving a specific problem"). As noted, we have been provided with no law or regulation permanently establishing the HST or describing the tenure of its members. The description on the MSP's website contains no reference to federal officers serving as members of the HST or any indication of the likely duration of any member's service on the team.[8] Nor does the record support the majority's conclusion that a Border Patrol agent's membership on the HST had any particular tenure or degree of permanency; instead, it appears that membership on the team fluctuated with the needs of the United States Border Patrol and the MSP. Defendant Nicholson had only been a member of the HST for six weeks prior to the search at issue in this case, and before joining the HST, he had been a member of a different task force in Detroit for a period of time.

For the above reasons, defendants' transitory assignments to the HST do not reflect the degree of permanence and continuity that we would typically associate with a public office. Therefore, the fifth *Coutu* element has not been established.

C. I BELIEVE THE OATH IS A REQUIRED ELEMENT, AND THAT REQUIREMENT IS NOT SATISFIED HERE

Lastly, the majority states that "whether a defendant has taken an oath is 'of assistance' in this determination." While I concede that we appeared to say as much in *Freedland*, 308 Mich at 458, and did say as much in *Coutu*, 459 Mich at 355 ("Oath and bond requirements are also of assistance in determining whether a position is a public office."), this observation was dictum and appears to be a misunderstanding of the authorities those opinions relied upon.

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[8] See note 3 of this opinion.

In *Langdon*, this Court clearly believed the taking of an official oath to be a requisite element of its determination of whether the chief clerk in the city assessor's office was an employee or a public officer for purposes of a quo warranto action. Justice COOLEY stated the oath requirement as part of his general rule for determining whether a person was an officer:

> An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employee in the greater importance, dignity and independence of his position; *in being required to take an official oath*, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general. [*Langdon*, 40 Mich at 682-683 (emphasis added).]

Similarly, in *Hawkins*, the court initially observed that:

> From the foregoing and many other authorities examined, it appears that various elements are considered requisite to a public office. *Some decisions hold that the taking of an official oath is necessary to constitute a position an office*; others hold that the giving of an official bond is necessary; still others hold that the issuance of a commission or certificate of appointment is necessary; some decisions hold all three requisite. [*Hawkins*, 79 Mont at 517-518 (emphasis added).][9]

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[9] One such case it cited was *Lindsey v Attorney General*, 33 Miss 508, 519 (1857) ("[T]here must be some fixed term prescribed for his continuance in office; he must give bond, and take an oath, faithfully to discharge the duties of his office; a commission must issue, investing him with the authority to enter upon the office.").

Later, after quoting at length from *Langdon*, the court stated:

> We are not informed if he took an oath of office and, sharing the views of Judge Cooley, above quoted, we hold it is not decisive if he did. Taking an official oath cannot make a position an office; although an office cannot be held legally in this state without the taking of the oath; but we look for other tests. [*Id*. at 524.]

This passage is perhaps best understood as clarifying that the taking of an official oath, by itself, is insufficient to make a position a public office. In any event, it is clear that the *Hawkins* court believed that an oath was required. See *id*. at 529 (stating, immediately after reciting the five indispensable elements quoted in *Freedland* and *Coutu*, that "[i]n addition, in this state, an officer must take and file an official oath, hold a commission or other written authority and give an official bond, if the latter be required by proper authority").

In *Freedland*, without explanation, this Court pruned this latter statement from its quotation of the five indispensable elements. Next, we quoted only a portion of the general rule from *Langdon*, as follows: " 'The officer is distinguished from the employee in the greater importance, dignity and independence of his position; *in being required to take an official oath*, and perhaps to give an official bond.' " *Freedland*, 308 Mich at 458, quoting *Langdon*, 40 Mich at 682 (emphasis added). Then, we observed that "[t]hese factors, while not controlling, are of assistance in doubtful cases." *Freedland*, 308 Mich at 458. It is unclear why we made this observation or where it came from; in any event, we never addressed the defendant's specific arguments as to why he was not a public officer, including that "[h]e took no oath of office[.]" *Id*. at 454. So, the

statement was clearly obiter dictum. See, e.g., *People v Lown*, 488 Mich 242, 267 n 46; 794 NW2d 9 (2011) ("Obiter dicta, or 'dicta,' are not binding precedent. Rather, they are statements that are not essential to determination of the case at hand and, therefore, 'lack the force of an adjudication.' "), quoting *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006).

In *Coutu*, we repeated both the abbreviated quotation of the general rule from *Langdon*, see *Coutu*, 459 Mich at 354, citing *Freedland*, 308 Mich at 458, and *Freedland*'s dictum that "[o]ath and bond requirements are also of assistance in determining whether a position is a public office," *Coutu*, 459 Mich at 355. But, significantly, immediately after analyzing the five indispensable elements, we noted that "[f]inally, deputy sheriffs are required to take an oath before entering upon their duties of office." *Id*. at 356, citing MCL 51.73.[10]

I would disavow the dictum in *Freedland* and hold, consistently with *Langdon*, *Hawkins*, and Const 1963, art 11, § 1, that an oath is a necessary prerequisite to a finding that a person is a public officer for purposes of

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[10] MCL 51.73 provides that "every such under sheriff or deputy shall, before he enters upon the duties of his office, take the oath prescribed by the twelfth article of the constitution of this state." As the Compiler's Note makes clear, this section originally referred to the Constitution of 1835; the oath is now set forth in Const 1963, art 11, § 1, which provides as follows:

> All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation: I do solemnly swear (or affirm) that I will support the Constitution of the United States and the constitution of this state, and that I will faithfully discharge the duties of the office of ..... according to the best of my ability. No other oath, affirmation, or any religious test shall be required as a qualification for any office or public trust.

a misconduct in office charge. Here, defendants were not required to take an oath under the Michigan Constitution or any other oath pertaining to their duties as members of the task force before commencing their assignment. Indeed, the statute that authorizes them to enforce state law makes no reference to an oath. See MCL 764.15d.

The majority relies on the fact that defendants were required to take a promissory oath[11] to serve as Border Patrol agents for the United States government, but that oath promises faithful performance of the duties of a Border Patrol agent and makes no reference to the faithful performance of any duties relating to Michigan law or service on a task force.[12] Justice COOLEY's analysis of the oath requirement in *Langdon* is instructive here:

> Nor do we find in the facts stipulated or in any law or ordinance the requirement of an official oath. It is said that the usual oath of office has sometimes and perhaps always been administered, but why administered we do not understand. The fact of its being taken cannot prove

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[11] See *People v Cain*, 498 Mich 108, 159; 869 NW2d 829 (2015) (VIVIANO, J., dissenting) (explaining that a " 'promissory oath' . . . obliges the swearer to 'observe a specified course of conduct in the future' ") (citation omitted).

[12] Border Patrol agents are required to take the following oath of office:

> I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God. [United States Office of Personnel Management, *Appointment Affidavits*, Standard Form 61 (revised August 2002), available at <https://perma.cc/4PA4-76FQ>.]

It is undisputed that defendants took the requisite federal oath of office.

> that the clerk is an officer; at most, it could only evidence his belief that he was one, or perhaps his caution to observe all forms that possibly might turn out to be essential. It was, we think, a needless ceremony. [*Langdon*, 40 Mich at 685.]

Properly understood, Justice COOLEY was stating the seemingly unremarkable proposition that the oath requirement could not be satisfied by the taking of any old oath; instead, it could only be satisfied by the taking of an official oath required for the position by law or ordinance. See *People v Cain*, 498 Mich 108, 159; 869 NW2d 829 (2015) (VIVIANO, J., dissenting) ("A jury becomes a jury when its members take the *juror's oath*—not just any old oath.").

In this case, to the extent that defendants' positions are correctly described by the majority as "federal agent task force members enforcing Michigan law," defendants took no oath to faithfully perform any duties attendant to such a position and therefore, for this additional reason, may not be deemed public officers for purposes of a common-law misconduct in office charge for work done in that capacity.[13]

For these reasons, I do not believe that the prosecution has met its burden of establishing that defendants were public officers for purposes of a misconduct in office charge. In particular, *Coutu* elements 1, 3, 4, and 5 were not established; additionally, defendants were not required to take an oath as HST members, which I believe is also requisite to finding that the position is a public office. Therefore, I would affirm the Court of Appeals' judgment vacating defendants' convictions.

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[13] I take no position on whether defendants would be considered public officers for purposes of a common-law misconduct in office charge for work done in their capacity as Border Patrol agents, because that issue is not before us.

CLEMENT, J. (*dissenting*). Under the "public office" test articulated in *People v Coutu*, a position is not a "public office" if it was not "created by the Constitution or by the legislature or created by a municipality or other body through authority conferred by the legislature." 459 Mich 348, 354; 589 NW2d 458 (1999) (cleaned up). Defendants' positions as federal agents don't meet that criterion. Nor do their positions on the task force. Justice VIVIANO's dissent, *ante* at 588-591, reaches the same conclusions and thus further concludes, correctly in my view, that without that "indispensable" element, *Coutu*, 459 Mich at 354, the prosecutor cannot prove that defendants held public office. For that reason, I respectfully dissent.

PEOPLE v BECK

Docket No. 152934. Argued on application for leave to appeal January 23, 2019. Decided July 29, 2019.

Eric L. Beck was convicted as a fourth-offense habitual offender of being a felon in possession of a firearm (felon-in-possession) and carrying a firearm during the commission of a felony (felony-firearm), second offense, after a jury trial in the Saginaw Circuit Court. He was acquitted of open murder, carrying a firearm with unlawful intent, and two additional counts of felony-firearm attendant to those charges. The applicable guidelines minimum sentence range for the felon-in-possession conviction was 22 to 76 months in prison, but the court imposed a sentence of 240 to 400 months (20 to 33½ years), to run consecutively to the mandatory five-year term for second-offense felony-firearm. The court, James T. Borchard, J., explained that it had imposed this sentence in part on the basis of its finding by a preponderance of the evidence that defendant had committed the murder of which the jury acquitted him. Defendant appealed and challenged his convictions and sentences on multiple grounds, including that the trial court erred by increasing his sentence on the basis of conduct of which he had been acquitted. The Court of Appeals, BOONSTRA, P.J., and SAAD and HOEKSTRA, JJ., issued an unpublished per curiam opinion on November 17, 2015 (Docket No. 321806), remanding for further sentencing proceedings using the procedure set forth in *United States v Crosby*, 397 F3d 103 (CA 2, 2005), in light of *People v Steanhouse*, 313 Mich App 1 (2015), aff'd in part and rev'd in part 500 Mich 453 (2017). Defendant sought leave to appeal in the Supreme Court, which, after holding the application in abeyance for *Steanhouse*, ordered and heard oral argument on whether to grant the application or take other action. 501 Mich 1065 (2018).

In an opinion by Chief Justice MCCORMACK, joined by Justices VIVIANO, BERNSTEIN, and CAVANAGH, the Supreme Court, in lieu of granting leave to appeal, *held*:

Due process bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of

which he was acquitted and basing a sentence on that finding. Accordingly, defendant's sentence for felon-in-possession was vacated.

1. The Fourteenth Amendment of the United States Constitution incorporates the Sixth Amendment right to a jury trial in state prosecutions. It also provides the right to due process, which includes the presumption of innocence. The United States Supreme Court has issued a number of decisions potentially relevant to whether a sentencing judge may rely on acquitted conduct when sentencing a defendant without violating due process or the right to a jury trial. In *McMillan v Pennsylvania*, 477 US 79 (1986), the Court did not specifically address acquitted conduct, but it held that a state statute allowing sentencing courts to find by a preponderance of the evidence a fact the jury had not been asked to decide did not violate the Due Process Clause of the Fourteenth Amendment or the jury-trial guarantee of the Sixth Amendment. In *United States v Watts*, 519 US 148 (1997), which addressed a sentencing court's reliance on acquitted conduct in the context of the Double Jeopardy Clause of the Fifth Amendment rather than the Due Process Clause, the Court held, citing *McMillan*, that a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge as long as that conduct has been proved by a preponderance of the evidence. The United States Supreme Court's jurisprudence analyzing a defendant's due-process and Sixth Amendment rights changed significantly after *Jones v United States*, 526 US 227 (1999), and *Apprendi v United States*, 530 US 466 (2000), which held that other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. The Michigan Supreme Court addressed the use of acquitted conduct in *People v Ewing (After Remand)*, 435 Mich 443 (1990), a case that resulted in a fractured set of opinions in which it was not entirely clear what rule of law commanded a majority.

2. *McMillan* could not be considered dispositive of claims that the use of acquitted conduct does not violate due process because *McMillan* did not involve the use of acquitted conduct; intervening caselaw based on *Alleyne v United States*, 570 US 99 (2013), essentially overruled *McMillan*'s Sixth Amendment analysis; and the intertwining nature of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process rendered *McMillan*'s due-process analysis significantly compromised. *Watts* was also unhelpful in resolving whether the use of

acquitted conduct at sentencing violated due process because *Watts* addressed only a double-jeopardy challenge to the use of acquitted conduct.

3. Reliance on acquitted conduct at sentencing violates due process based on the guarantees of fundamental fairness and the presumption of innocence, as several state courts and many judges and commentators have concluded. When a jury has made no findings regarding a defendant's conduct, as in *McMillan*, no constitutional impediment prevents a sentencing court from punishing the defendant as if the defendant engaged in that conduct using a preponderance-of-the-evidence standard. But when a jury has specifically determined that the prosecution has not proved beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent. The use of the preponderance-of-the-evidence standard in evaluating conduct that is protected by the presumption of innocence violates due process. Because the sentencing court punished the defendant more severely on the basis of the judge's finding by a preponderance of the evidence that the defendant committed the murder of which the jury had acquitted him, it violated the defendant's due-process protections.

Sentence for felon-in-possession vacated; case remanded to the Saginaw Circuit Court for resentencing.

Justice VIVIANO, concurring, agreed with the majority that due process precludes consideration of acquitted conduct at sentencing under a preponderance-of-the-evidence standard, but he wrote separately to state his position that defendant's sentence also violated the Sixth Amendment because it would not have been reasonable but for the judge-found fact that defendant had committed the conduct for which he had been acquitted. Justice VIVIANO further stated that he had serious concerns regarding whether the consideration of acquitted conduct at sentencing could ever comply with the Sixth Amendment.

Justice CLEMENT, joined by Justices MARKMAN and ZAHRA, dissenting, stated that a trial court does not violate the presumption of innocence by considering conduct underlying an acquitted charge when sentencing a defendant for convicted offenses because, at sentencing, the standard of proof is lower, requiring only that the facts considered by the trial court are supported by a preponderance of the evidence. She stated that defendant was not sentenced as if he had been convicted of the crime of murder, but rather as if he had been convicted of felon-in-possession as a fourth-offense habitual offender, with the trial court further determining by a preponderance of the evidence that defendant

had caused a death while doing so. Justice CLEMENT noted that the majority's standard was unsupported by precedent, was contrary to *Ewing*, and might be difficult to apply in practice. She would have affirmed the Court of Appeals' holding that the trial court did not err by considering conduct underlying defendant's acquitted charge but reversed the Court of Appeals' decision to remand the case to the trial court for a *Crosby* hearing. Instead, she would have remanded the case to the Court of Appeals pursuant to *People v Steanhouse*, 500 Mich 453 (2017), to determine whether the trial court abused its discretion by violating the principle of proportionality.

CONSTITUTIONAL LAW — CRIMINAL LAW — SENTENCING — ACQUITTED CONDUCT.

Due process bars a sentencing court from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted and basing a sentence on that finding (US Const, Am XIV).

Dana Nessel, Attorney General, *Fadwa A. Hammoud*, Solicitor General, *John A. McColgan, Jr.*, Prosecuting Attorney, and *Joseph M. Albosta*, Chief Appellate Attorney, for the people.

Matthew E. Gronda and *Outside Legal Counsel, PLC* (by *Philip L. Ellison*) for defendant.

Amici Curiae:

Melissa A. Powell, *Kym L. Worthy*, *Jason W. Williams*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

Jacqueline J. McCann and *Adrienne N. Young* for the Criminal Defense Attorneys of Michigan.

MCCORMACK, C.J. In this case, we consider whether a sentencing judge can sentence a defendant for a crime of which the defendant was acquitted.

That the question seems odd foreshadows its answer. But to explain the question first: Once a jury acquits a defendant of a given crime, may the judge,

notwithstanding that acquittal, take the same alleged crime into consideration when sentencing the defendant for *another* crime of which the defendant was convicted? Such a possibility presents itself when a defendant is charged with multiple crimes. The jury speaks, convicting on some charges and acquitting on others. At sentencing for the former, a judge might seek to increase the defendant's sentence (under the facts of this case, severely increase, though we consider the question in principle) because the judge believes that the defendant really committed one or more of the crimes on which the jury acquitted.

Probably committed, that is: A judge in such circumstances might reason that although the jury acquitted on some charges, the jury acquitted because the state failed to prove guilt on those charges beyond a reasonable doubt. But the jury might have thought it was somewhat likely the defendant committed them. Or the judge, presiding over the trial, might reach that conclusion. And so during sentencing, when a judge may consider the defendant's *uncharged* bad acts under a lower standard—a mere preponderance of the evidence—the judge might impose a sentence reflecting both the crimes on which the jury convicted, and also those on which the jury acquitted but which the judge finds the defendant more likely than not did anyway. Is that permissible?

We hold that the answer is no. Once acquitted of a given crime, it violates due process to sentence the defendant as if he committed that very same crime.

Because the trial court in this case relied at least in part on acquitted conduct[1] when imposing sentence for

[1] A brief aside on vocabulary: The dissent criticizes the term "acquitted conduct" as misleading, but that term comes directly from United Supreme Court precedent. See, e.g., *Watts v United States*, 519 US 148,

the defendant's conviction of being a felon in possession of a firearm, we reverse the Court of Appeals, vacate that sentence, and remand the case to the Saginaw Circuit Court for resentencing.[2]

I. FACTS AND PROCEDURAL HISTORY

The defendant was jury-convicted as a fourth-offense habitual offender of being a felon in possession of a firearm (felon-in-possession) and carrying a firearm during the commission of a felony (felony-firearm), second offense, but acquitted of open murder, carrying a firearm with unlawful intent, and two additional counts of felony-firearm attendant to those charges. The applicable guidelines range for the felon-in-possession conviction was 22 to 76 months, but the court imposed a sentence of 240 to 400 months (20 to 33½ years), to run consecutively to the mandatory five-year term for second-offense felony-firearm. The court explained its reasons for the sentence imposed as, among other things, its finding by a preponderance of the evidence that the defendant committed the murder of which the jury acquitted him. The court stated (emphasis added):

> With respect to that charge the Court does find that there are compelling reasons to go over the guidelines. The Court believes that . . . to sentence within the guidelines would not be proportionate to the seriousness of the

153-154; 117 S Ct 633; 136 L Ed 2d 554 (1997); *Booker v United States*, 543 US 220, 240; 125 S Ct 738; 160 L Ed 2d 621 (2005).

[2] Defendant's request that the resentencing occur before a different judge is denied because we are not persuaded that the standards set forth in *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), require reassigning the case to a different judge. See *People v Hicks*, 485 Mich 1060 (2010) (applying the *Hill* standards). In all other respects, the defendant's application for leave to appeal is denied because we are not persuaded that the remaining questions presented should be reviewed by this Court.

defendant's conduct or the seriousness of his criminal history. And for that reason the Court is going to go over the guidelines in setting a sentence that is, in fact, proportionate to those things.

In addition to that, the maximum—when you reach the maximum on the guidelines in this case it's at 75 points, this is way over that at 125 points. That is another reason the Court may, and will go over the guidelines in this case.

This gentleman has a prior murder conviction on his record that he pled guilty to for which he served 13 years in prison. That was in 1991. He was discharged from parole in 2007. In 2010, only three years later, he pled no contest to a firearms, possession by a felon for which he received 252 days in jail. And then this charge, offense date was June 11, 2013 where, again, he is in possession of a firearm at a murder scene.

The testimony in this case by one of the witnesses who could not identify him was that a man approached the victim with a gun. She saw a muzzle flash and the victim fell to the ground and the perpetrator ran off.

The other witness, who was not alive at the time of the trial, and was barely alive at the time of the prelim, identified this gentleman as the person who approached the victim with the gun. Gave a positive identification. Indicated she saw the gun. Then her story wavered as far as whether she saw the shooting or whether she was in her kitchen at the time of the shooting. I think the inconsistency, and where she was at the time of the shooting, as well as her not being in court, affected the jury's verdict. *They could not find, beyond a reasonable doubt, that the defendant committed the homicide. But the Court certainly finds that there is a preponderance of the evidence that he did*.

And I am not substituting my opinion for their's [sic]. I am just bound by a different standard in this matter. And that is the reason for the Court's finding that, in fact, this gentleman, in my opinion, did kill the victim for no reason other than jealousy. But, at the very minimum, he was the only person seen at the scene with a weapon seconds prior.

> Two people hearing a shot, and another lady seeing a shoot[ing] by someone she couldn't identify. And, certainly, provided the weapon. *But in the Court's opinion, he didn't just provide it, he actually was the person who perpetrated the killing. And I do find by a preponderance of the evidence that that has been shown. And I do consider that in going over the guidelines in this matter*.
>
> So for the fact that the guidelines don't properly—are so far out of scoring of 125, where 75 is the highest—but, more importantly, the fact that there was a death. *And the Court finds by a preponderance of the evidence that this gentleman did shoot the victim*.

The defendant appealed and challenged his convictions and sentences on multiple grounds, including that the trial court erred by increasing his sentence on the basis of conduct of which he had been acquitted. The Court of Appeals issued an unpublished opinion remanding for further sentencing proceedings (a *Crosby* remand)[3] under *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015), aff'd in part and rev'd in part by *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017). *People v Beck*, unpublished per curiam opinion of the Court of Appeals, issued November 17, 2015 (Docket No. 321806). The defendant sought leave to appeal in this Court, which first held his application in abeyance for our decision in *Steanhouse*.[4] *People v*

[3] A *Crosby* remand is the remedy this Court adopted in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), for the Sixth Amendment violation that would occur when judicial fact-finding was used to score the mandatory sentencing guidelines. It involves a remand to the trial court for a determination of whether that court would have imposed a materially different sentence if its discretion had not been constrained by the guidelines. *Id*. at 399. This Court adopted the procedure from *United States v Crosby*, 397 F3d 103 (CA 2, 2005). *Lockridge*, 498 Mich at 395-398.

[4] Among other issues, the defendant challenged the reasonableness of his sentence, and this Court held in *Steanhouse* that

Beck, 884 NW2d 283 (Mich, 2016). After issuing our decision in *Steanhouse*, we ordered oral argument on the defendant's application and directed that it be heard at the same session as oral argument on the prosecution's application in *People v Dixon-Bey*, 501 Mich 1066 (2018). *People v Beck*, 501 Mich 1065, 1065-1066 (2018).[5]

II. LEGAL BACKGROUND

A. CONSTITUTIONAL AMENDMENTS

The defendant argues that the trial court's reliance on conduct of which he was acquitted to increase his

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> the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the "principle of proportionality" set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), "which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." [*Steanhouse*, 500 Mich at 459-460.]

[5] Our order asking for oral argument on the application directed the parties to brief the following issues:

> (1) the appropriate basis for distinguishing between permissible trial court consideration of acquitted conduct, see *People v Ewing (After Remand)*, 435 Mich 443, 451-452 [458 NW2d 880] (1990) (opinion by BRICKLEY, J.); *id*. at 473 (opinion by BOYLE, J.); see also *United States v Watts*, 519 US 148 [117 S Ct 633; 136 L Ed 2d 554] (1997), and an impermissible "independent finding of defendant's guilt" by a trial court on an acquitted charge, see *People v Grimmett*, 388 Mich 590, 608 [202 NW2d 778] (1972), overruled on other grounds by *People v White*, 390 Mich 245, 258 (1973); see also *People v Fortson*, 202 Mich App 13, 21 [507 NW2d 763] (1993); and (2) whether the trial court abused its discretion by departing from the guidelines range, where the jury acquitted the defendant of murder, but the court departed based on its finding by a preponderance of the evidence that the defendant had perpetrated the killing. [*Beck*, 501 Mich at 1065.]

As in *Dixon-Bey*, we also invited the Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan to file amicus curiae briefs.

sentence violates his constitutional rights under the Sixth and Fourteenth Amendments of the United States Constitution, as interpreted by the United States Supreme Court.[6] The Sixth Amendment of the United States Constitution provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation.

The Fourteenth Amendment of the United States Constitution provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. CASELAW INTERPRETING THOSE RIGHTS

1. UNITED STATES SUPREME COURT

As a general matter, the Fourteenth Amendment incorporates the Sixth Amendment right to a jury trial in state prosecutions. *Duncan v Louisiana*, 391 US 145, 149; 88 S Ct 1444; 20 L Ed 2d 491 (1968). And the Fourteenth Amendment right to due process includes "the presumption of innocence—that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *In re Winship*, 397 US 358, 363; 90 S Ct 1068; 25

[6] The defendant has not independently challenged the trial court's reliance on acquitted conduct under the Michigan Constitution, so we do not address that issue here.

L Ed 2d 368 (1970), quoting *Coffin v United States*, 156 US 432, 453; 15 S Ct 394; 39 L Ed 481 (1895).

The United States Supreme Court has issued a number of decisions potentially relevant to the issue presented here—whether a sentencing judge may rely on acquitted conduct when sentencing a defendant without violating due process or the right to a jury trial. In the first, *McMillan v Pennsylvania*, 477 US 79; 106 S Ct 2411; 91 L Ed 2d 67 (1986), the Court did not specifically address acquitted conduct. Rather, it considered whether a Pennsylvania statute that allowed sentencing courts to find by a preponderance of the evidence that the person "visibly possessed a firearm" during the commission of the offense, resulting in a five-year mandatory minimum sentence, was constitutional. *Id*. at 81. That is, the statute permitted the court to find by a preponderance a fact the jury had not been asked to decide. The Court held that the statute did not violate the Due Process Clause of the Fourteenth Amendment or the jury-trial guarantee of the Sixth Amendment. *Id*. at 91-93. It explained that it saw no reason to "constitutionaliz[e] burdens of proof at sentencing." *Id*. at 92.

Next came *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997). *Watts* did address a sentencing court's reliance on acquitted conduct, but in the context of a claim that the use of such conduct violated the Double Jeopardy Clause of the Fifth Amendment. Citing *McMillan*, the Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." *Id*. at 157. The Court did not address the Fourteenth Amendment right to due process.

Around 1999, the United States Supreme Court's jurisprudence analyzing a defendant's due-process and Sixth Amendment rights underwent a sea change. In *Jones v United States*, 526 US 227, 232; 119 S Ct 1215; 143 L Ed 2d 311 (1999), and then *Apprendi v United States*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), the Court established the following constitutional rule:[7] "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 US at 490. The Court further noted that its rule was grounded in the "Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment" and that "[t]he Fourteenth Amendment commands the same answer in this case involving a state statute." *Apprendi*, 530 US at 476. The "*Apprendi* revolution," as it has been called, has wrought significant changes in sentencing practices in state and federal courts. See generally *Booker v United States*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005) (relying on *Apprendi*'s rule to strike down the mandatory federal sentencing guidelines and make them advisory only); *Lockridge*, 498 Mich at 399 (doing the same to Michigan's mandatory sentencing guidelines).

2. MICHIGAN SUPREME COURT

This Court has also addressed the use of acquitted conduct, albeit in a case with a fractured set of opinions in which it is not entirely clear what rule of law commanded a majority. In *People v Ewing (After*

[7] *Jones* was decided on statutory-construction grounds, but the next term the *Apprendi* Court concluded that its rule was constitutionally mandated.

Remand), 435 Mich 443; 458 NW2d 880 (1990), there were three substantive opinions:[8] Justice BRICKLEY's lead opinion, Justice ARCHER's opinion concurring in part and dissenting in part, and Justice BOYLE's concurring opinion (joined by Justices RILEY and GRIFFIN) that dissented in result. Justice BOYLE's opinion blessed the practice of sentencing courts relying on acquitted conduct as long as it was proven by a preponderance of the evidence. *Id*. at 473 (opinion by BOYLE, J.). Justice BOYLE relied primarily on *McMillan* and *Dowling v United States*, 493 US 342, 349; 110 S Ct 668; 107 L Ed 2d 708 (1990), to support that conclusion. *Ewing (After Remand)*, 435 Mich at 472-473 & n 15.

Justice BRICKLEY's lead opinion is harder to parse. He agreed with Justice BOYLE that "the mere fact of a prior acquittal of charges whose underlying facts are properly made known to the trial judge is not, without more, sufficient reason to preclude the judge from taking those facts into account at sentencing." *Id*. at 451 (opinion by BRICKLEY, J.). Yet his opinion proceeds to say that a judge's right to rely on such conduct might be limited under some circumstances not before the Court. *Id*. at 453-455. Among these caveats is the statement that "we are not presented with the issue whether a defendant may be punished for a crime for which no conviction was obtained; this is clearly unconstitutional." *Id*. at 454. Finally, Justice BRICKLEY agreed with the majority of justices who concluded a remand to the trial court was required to "test the accuracy of these allegations regarding his conduct." *Id*. at 446. Thus, the binding rule of law from *Ewing*, if any, is murky at best.[9]

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[8] Justice CAVANAGH wrote a brief two-sentence concurring opinion that was silent on reasoning (joined by Justice LEVIN).

[9] Perhaps for this reason, this Court has never cited *Ewing* for any binding legal rule. Notwithstanding these questions, much of the dissent's argument relies on *Ewing* and treats it as binding precedent.

III. ANALYSIS

The question whether the Sixth and Fourteenth Amendments permit the use of acquitted conduct to increase a defendant's sentence presents issues of constitutional interpretation, which we review de novo. *Lockridge*, 498 Mich at 373. That means that we review the issues independently, with no required deference to the trial court. *Millar v Constr Code Auth*, 501 Mich 233, 237; 912 NW2d 521 (2018).

Federal courts that have addressed constitutional challenges to the use of acquitted conduct at sentencing have relied almost entirely on *McMillan* and *Watts* to reject both due-process and Sixth Amendment challenges. See, e.g., *United States v Horne*, 474 F3d 1004, 1006 (CA 7, 2007) (citing *McMillan* and *Watts* but not identifying the constitutional right at issue); *United States v Dorcely*, 372 US App DC 170, 175-177 (rejecting both due-process and Sixth Amendment arguments, citing *McMillan* and *Watts*); *United States v Faust*, 456 F3d 1342, 1347-1348 (CA 11, 2006) (finding no Sixth Amendment violation, discussing *Watts*); *United States v Boney*, 298 US App DC 149, 160-161; 977 F2d 624 (1992) (due process) (collecting cases). We see several problems with relying on those cases for

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For reasons we have explained, we disagree with the dissent's reading of *Ewing*. Moreover, it is worth noting that Justice BRICKLEY's lead opinion provided the fourth vote for the disposition in *Ewing*: a remand to the trial court for further development of the sentencing record; Justice BOYLE and the justices joining her opinion would have simply reinstated the trial court's sentence. Thus, even assuming that Justice BRICKLEY agreed with the dissent in some theoretical but undefined way about acquitted conduct, it is difficult to see how that agreement could equate to a binding legal rule given the difference in the votes as to the disposition of the case. "[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication[.]" *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985).

due-process purposes,[10] and we address each of these concerns in greater detail below.

A. *McMILLAN*

There are at least three problems with relying on *McMillan* as dispositive of claims that the use of acquitted conduct does not violate due process. First, *McMillan* did not involve the use of acquitted conduct. Second, its constitutional analysis rests on very shaky footing in light of intervening caselaw. Third, even if it is only *McMillan*'s Sixth Amendment analysis that has been abrogated, the intertwining nature of the Sixth Amendment right to a jury trial and the Fourteenth Amendment right to due process makes it all but impossible not to view its due-process analysis as significantly compromised.

First problem: *McMillan* did not involve a trial court's reliance on acquitted conduct, and so it never addressed this unique question.[11] Thus, its general

[10] We decline to reach the defendant's argument that the use of acquitted conduct violates the Sixth Amendment right to a jury trial under *Apprendi* and its progeny. To our knowledge, although some federal district courts have opined that the use of acquitted conduct is unconstitutional and declined to consider it at sentencing, no appellate court in the country has accepted that argument. See, e.g., *United States v White*, 551 F3d 381, 384-385 (CA 6, 2008) (finding no Sixth Amendment problem with relying on acquitted conduct when sentencing a defendant under the *advisory* guidelines system because "[b]y freeing a district court to impose a non-guidelines sentence, *Booker* pulled out the thread that holds White's Sixth Amendment claim together"). But there has been persistent criticism of that uniformity. See, e.g., *White*, 551 F3d at 387 (Merritt, J., dissenting) (arguing that the defendant's sentence, as increased on the basis of acquitted conduct, "represents an as-applied violation of White's Sixth Amendment rights" under *Apprendi*).

[11] To the extent *McMillan*'s analysis is grounded in the general principle from *Williams v New York*, 337 US 241, 69 S Ct 1079; 93 L Ed 1337 (1949), that "[s]entencing courts have traditionally heard evidence

holding that it does not violate due process or the Sixth Amendment for the trial court to find facts by a preponderance of the evidence when imposing sentence is not obviously applicable.[12] Acquitted conduct is, of course, different from uncharged conduct—acquitted conduct has been formally charged and specifically adjudicated by a jury. While it is true that *McMillan* declined to "constitutionaliz[e] burdens of proof at sentencing," *McMillan*, 477 US at 92, that disinclination was expressed in an answer to a different question than the one we answer now.

Acquitted conduct is already constitutionalized. Due process encompasses the requirement that the state prove the charges beyond a reasonable doubt, to be sure. But that's not all it guarantees.[13] See *Faust*, 456

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and found facts without any prescribed burden of proof at all," *McMillan*, 477 US at 91, it is noteworthy that *Williams* itself limited the breadth of its holding by asserting that "[w]hat we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due-process clause," *Williams*, 337 US at 252 n 18; see also *Townsend v Burke*, 334 US 736, 741; 68 S Ct 1252; 92 L Ed 1690 (1948) (holding that sentencing a defendant on the basis of untrue assumptions about his criminal record violated due process).

[12] *McMillan* itself has language recognizing that its rule may not apply outside the particular question it addressed. See *McMillan*, 477 US at 91 (stating that "we have little difficulty concluding that *in this case* the preponderance standard satisfies due process") (emphasis added); *id*. at 92 (stating that "[w]e see nothing *in Pennsylvania's scheme* that would warrant constitutionalizing burdens of proof at sentencing") (emphasis added). Other courts have also recognized that *McMillan* and related Supreme Court cases, "while generally endorsing rules that permit sentence enhancements to be based on conduct not proved to the same degree required to support a conviction, have not embraced the concept that those rules are free from constitutional constraints." *United States v Lombard*, 72 F3d 170, 176 (CA 1, 1995).

[13] See, e.g., *Faust*, 456 F3d at 1351 n 2 (Barkett, J., concurring specially) ("I address my disagreement with *McMillan* primarily in order to distinguish the due process claim rejected by the Supreme Court in that case from the very different and particular due process

F3d at 1352 (Barkett, J., concurring specially) (concluding that the use of acquitted conduct at sentencing violates "other aspects of 'the requirement of fundamental fairness' embodied in the constitutional right to due process of law"), quoting *Winship*, 397 US at 369 (Harlan, J., concurring). It also encompasses the presumption of innocence and the requirement of notice.

A defendant is entitled to a presumption of innocence as to all charged conduct until proven guilty beyond a reasonable doubt, and that presumption is supposed to do meaningful constitutional work as long as it applies. At least that's what we tell the accused[14] and the jury[15] about how it works. We can think of no reason that a jury's finding the defendant not guilty of a charge undoes that guarantee. In fact, the jury's view that the state did not meet its burden of proof should cut the other way.

Hypotheticals are helpful. Imagine a judge sending a defendant acquitted of *all* the charges against him to prison because the judge believed the evidence supported some punishment. Or a judge in a bench trial acquits a defendant of some charges but convicts of others and then punishes him as if he had been convicted of all the charges.

The difference between acquitted conduct and uncharged bad acts presented at sentencing is critical and constitutional. Acquitted conduct shows up at sentencing in the company of the due-process protection of the presumption of innocence; uncharged conduct does not, says *McMillan*.

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problem . . . that arises when a defendant is sentenced on the basis of charges of which he has actually been acquitted.").

[14] MCR 6.610(E)(3)(b)(*iv*); MCR 6.302(B)(3)(b) and (c).

[15] M Crim JI 1.9; M Crim JI 3.2.

Due process also requires adequate notice. A defendant sentenced for conduct the jury acquitted him of surely has a notice complaint. See, e.g., *United States v Canania*, 532 F3d 764, 777 (CA 8, 2008) (Bright, J., concurring) (stating that the use of acquitted conduct at sentencing violates the due-process right to notice because "[i]t is not unreasonable for a defendant to expect that conduct underlying a charge of which he's been acquitted to play no determinative role in his sentencing"); see also *Ewing*, 435 Mich at 454 (opinion by BRICKLEY, J.) (stating that before acquitted conduct may be used to enhance a sentence, a defendant "should be able to test the accuracy of those allegations" so that the judge "may hear argument from the parties and decide how to view [acquitted conduct] testimony in light of the acquittal"). Because *McMillan* concerned uncharged conduct and not acquitted conduct, it does not address these constitutional due-process questions. Nor could it have—uncharged and therefore unconsidered-by-a-jury conduct is apples to acquitted conduct's oranges.

Second problem: *McMillan*'s continued vitality is significantly in question after *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013). At minimum, its Sixth Amendment analysis has been overruled in everything but name.[16]

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[16] The *Alleyne* Court did us no favors in that regard given that arguably, but only arguably, five justices said that *Alleyne* overruled *McMillan*. *Alleyne*, 570 US at 119-120 (Sotomayor, J., concurring, joined by Ginsburg and Kagan, JJ.) (noting that "Five Members of the Court" in *Harris v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002), recognized that *McMillan*'s analysis was inconsistent with *Apprendi* and that *McMillan* survived *Harris* only because Justice Breyer could not "yet accept" *Apprendi*); see *id*. at 124 (Breyer, J., concurring in part and concurring in the judgment) (agreeing with overruling *Harris* because "the time has come to end this anomaly in *Apprendi*'s application" but not mentioning *McMillan*) (emphasis

Third problem: even if *McMillan*'s due-process analysis remains superficially viable, the complementary analysis of the Sixth Amendment jury-trial right and the Fourteenth Amendment due-process right necessarily calls it into question as a practical matter. See *Apprendi*, 530 US at 476 (stating that its rule is grounded in the notice and jury-trial rights of the Sixth Amendment as well as the Fourteenth Amendment); *Alleyne*, 570 US at 104 (opinion by Thomas, J.) (stating that it is the Sixth Amendment jury-trial right "in conjunction with the Due Process Clause" that requires that each element of a crime be proved to the jury beyond a reasonable doubt). The interwoven nature of the United States Supreme Court's analysis of the Sixth Amendment and due-process rights makes it impossible to conclude that its analysis of the former has been repudiated but its analysis of the latter remains entirely viable.

That said, while we believe *McMillan* rests on an extremely shaky foundation, we leave to the United States Supreme Court "the prerogative of overruling

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added); *id*. at 133 (Alito, J., dissenting) (characterizing the majority opinion as "cast[ing] aside" *McMillan* as well as *Harris*). But the evidence is mounting, and it suggests *McMillan*'s due-process analysis has become equally untenable. See *United States v Haymond*, 588 US ___; ___ S Ct ___; ___ L Ed 2d ___ (2019) (Docket No. 17-1672) (opinion by Gorsuch, J.); slip op at 9-10 (stating that *Alleyne* found "no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris*" and "expressly overruled those decisions").

Several courts post-*Alleyne* have specifically stated that *Alleyne* overruled *McMillan*, even though the majority opinion in *Alleyne* did not explicitly do so. See, e.g., *Robinson v Woods*, 901 F3d 710, 715 (CA 6, 2018) (stating that "*Alleyne* was a watershed opinion, overruling two prior precedents—*Harris* . . . and *McMillan*"); *United States v Cassius*, 777 F3d 1093, 1095 (CA 10, 2015) (stating that in *Alleyne* "the Supreme Court explicitly overruled *Harris* and *McMillan*"); *Commonwealth v Hanson*, 623 Pa 388, 414; 82 A3d 1023 (2013) (characterizing *Alleyne* as having "overruled" *Harris* and *McMillan*).

its own decisions." *Rodriguez de Quijas v Shearson/American Express, Inc*, 490 US 477, 484; 109 S Ct 1917; 104 L Ed 2d 526 (1989). Thus, it is because *McMillan* did not involve acquitted conduct that we conclude that it does not answer the question here.

B. *WATTS*

Watts is in many ways the most difficult to dispense with, and also the most difficult to parse. *Watts* directly addressed a sentencing court's use of acquitted conduct at sentencing. But though its language was not always specific about the constitutional right it examined,[17] in a later case the Court made clear that *Watts* addressed only a double-jeopardy challenge to the use of acquitted conduct. Five justices gave it side-eye treatment in *Booker* and explicitly limited it to the double-jeopardy context. *Booker*, 543 US at 240 n 4 (observing that *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause, and did not even have the benefit of full briefing or oral argument," so it was "unsurprising that we failed to consider fully the issues presented to us in

[17] The *Watts* Court at one point quoted *Dowling* for the proposition that " 'an acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof.' " *Watts*, 519 US at 156, quoting *Dowling*, 493 US at 349. *Dowling*, unlike *Watts*, was *both* a double-jeopardy *and* a due-process case. But it also involved a different question from the one presented here: the issue in *Dowling* was whether the trial court could admit other-acts evidence in a subsequent prosecution when that other-acts evidence involved conduct of which the defendant had previously been acquitted. It did not involve whether the trial court could punish the defendant more severely on the basis of that acquitted conduct. See also *People v Oliphant*, 399 Mich 472, 499-500; 250 NW2d 443 (1976) (similarly concluding, 14 years before *Dowling*, that the introduction of acquitted conduct as other-acts evidence did not violate double jeopardy, though not addressing due process).

these cases").[18] As we must, we take the Court at its word. We therefore find *Watts* unhelpful in resolving whether the use of acquitted conduct at sentencing violates due process.[19]

C. SO NOW WHAT?

Because we conclude that neither *McMillan* nor *Watts* requires us to reject the defendant's argument that the use of acquitted conduct to sentence a defendant more harshly violates due process,[20] we address this question on a clean slate.[21] A few state courts have

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[18] In a pre-*Booker* case, *Alabama v Shelton*, 535 US 654, 665; 122 S Ct 1764; 152 L Ed 2d 888 (2002), the United States Supreme Court cited *Watts* for the proposition (made in passing) that a sentencing court's reliance on acquitted conduct does not violate due process. We consider that dictum repudiated by *Booker*'s clear statement limiting *Watts* to the double-jeopardy context.

[19] We also find it significant that although *Watts* stated that the use of acquitted conduct at sentencing was not *constitutionally* barred by double-jeopardy principles, its analysis relied substantially on a statute that has no counterpart in Michigan law. In *Watts*, the Supreme Court quoted 18 USC 3661 as codifying the "longstanding principle that sentencing courts have broad discretion to consider various kinds of information." *Watts*, 519 US at 151. That statute provides:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

[20] The dissent claims that our holding directly contradicts existing precedent, but it primarily cites only federal circuit court cases that rely on *McMillan* and *Watts* to support its claim. But of course "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). And to the extent the dissent relies on *McMillan*, *Watts*, and our decision in *Ewing*, we have explained why we don't find these decisions persuasive or binding.

[21] While we disagree with the dissent's view that *Ewing* is binding on us, we agree with the dissent that our decision in *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972), overruled in part on other grounds by

concluded that reliance on acquitted conduct at sentencing violates due process, grounding that conclusion in the guarantees of fundamental fairness and the presumption of innocence. See *State v Cote*, 129 NH 358, 375; 530 A2d 775 (1987) (concluding that "the presumption of innocence is as much ensconced in our due process as the right to counsel," citing *Coffin*); *State v Marley*, 321 NC 415, 425; 364 SE2d 133 (1988) (also citing *Coffin* in support of its conclusion that "due process and fundamental fairness precluded the trial court from aggravating defendant's second degree murder sentence with the single element—premeditation and deliberation—which, in this case, distinguished first degree murder after the jury had acquitted defendant of first degree murder").

We agree. When a jury has made no findings (as with uncharged conduct, for example), no constitutional impediment prevents a sentencing court from punishing the defendant as if he engaged in that conduct using a preponderance-of-the-evidence standard.[22] But when a jury has specifically determined that the prosecution has not proven beyond a reasonable doubt that a defendant engaged in certain conduct, the defendant continues to be presumed innocent.[23] "To allow the trial court to use at sentencing an

People v White, 390 Mich 245; 212 NW2d 222 (1973), is not controlling here for the reasons the dissent gives.

[22] Unless, of course, those findings mandate an increase in the mandatory minimum or statutory maximum sentence. See *Apprendi*, 530 US 466; *Alleyne*, 570 US 99.

[23] We respectfully disagree with the dissent's view that this is an overbroad reading of the presumption of innocence. The fact that the prosecution has overcome this presumption as to one charge does not allow a court to ignore that it has *not* done so as to others. See generally *Estelle v Williams*, 425 US 501, 503; 96 S Ct 1691; 48 L Ed 2d 126 (1976) (stating that "[t]o implement the presumption, courts must be alert to

essential element of a greater offense as an aggravating factor, when the presumption of innocence was not, at trial, overcome as to this element, is fundamentally inconsistent with the presumption of innocence itself." *Marley*, 321 NC at 425.

Unlike the uncharged conduct in *McMillan*, conduct that is protected by the presumption of innocence may not be evaluated using the preponderance-of-the-evidence standard without violating due process. While we recognize that our holding today represents a minority position, one final consideration informs our conclusion: the volume and fervor of judges and commentators who have criticized the practice of using acquitted conduct as inconsistent with fundamental fairness and common sense. Regarding jurists, see, e.g., *Faust*, 456 F3d at 1349 (Barkett, J., concurring specially) ("I strongly believe . . . that sentence enhancements based on acquitted conduct are unconstitutional under the Sixth Amendment, as well as the Due Process Clause of the Fifth Amendment"); *id*. at 1351-1352 & n 2; *Canania*, 532 F3d at 778 (Bright, J., concurring) ("I wonder what the man on the street might say about this practice of allowing a prosecutor and judge to say that a jury verdict of 'not guilty' for practical purposes may not mean a thing"); *United States v Mercado*, 474 F3d 654, 662 (CA 9, 2007) (Fletcher, J., dissenting) ("Such a sentence has little relation to the actual conviction, and is based on an accusation that failed to receive confirmation from the

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factors that may undermine the fairness of the fact-finding process" and "carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt"). Little would seem to more "undermine the fairness of the fact-finding process" than having the fact-finder render a not-guilty verdict yet allow the judge to impose a sentence based on his own conclusion that the defendant *did* commit the acquitted offense.

defendant's equals and neighbors"); *United States v White*, 551 F3d 381, 392 (CA 6, 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *United States v Brown*, 892 F3d 385, 408 (CA DC, 2018) (Millett, J., concurring) ("[A]llowing courts at sentencing 'to materially increase the length of imprisonment' based on conduct for which the jury acquitted the defendant guts the role of the jury in preserving individual liberty and preventing oppression by the government.") (citation omitted); *id*. at 415 (Kavanaugh, J., dissenting in part) ("[T]here are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness . . . .").

Regarding commentators, for just a sampling, see Johnson, *The Puzzling Persistence of Acquitted Conduct in Federal Sentencing, and What Can be Done About It*, 49 Suffolk Univ L Rev 1, 25 (2016) (quoting other sources for the proposition that "[t]he use of acquitted conduct has been characterized as, among other things, 'Kafka-esque, repugnant, uniquely malevolent, and pernicious[,]' 'mak[ing] no sense as a matter of law or logic,' and . . . a 'perver[sion] of our system of justice,' as well as 'bizarre' and 'reminiscent of *Alice in Wonderland*' "); Ngov, *Judicial Nullification of Juries: The Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235, 261 (2009) ("[T]he jury is essentially ignored when it disagrees with the prosecution. This outcome is nonsensical and in contravention of the thrust of recent Supreme Court jurisprudence."); Beutler, *A Look at the Use of Acquitted Conduct at Sentencing*, 88 J Crim L & Criminology 809, 809 (1998) (observing that "[t]he use of acquitted conduct in sentencing raises due process and double jeopardy concerns that deserved far more careful

analysis than they received" in *Watts* and noting "the fundamental differences between uncharged and acquitted conduct which trigger these constitutional concerns").

This ends here. Unlike many of those judges and commentators, we do not believe existing United States Supreme Court jurisprudence prevents us from holding that reliance on acquitted conduct at sentencing is barred by the Fourteenth Amendment. We hold that it is.

Because the sentencing court punished the defendant more severely on the basis of the judge's finding by a preponderance of the evidence that the defendant committed the murder of which the jury had acquitted him,[24] it violated the defendant's due-process protections.

IV. CONCLUSION

We hold that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted. Because the judge did exactly that in this case, we

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[24] The dissent spends most of its pages denying that this is what the trial court did, asserting that the court merely sentenced him as if he had caused a death while committing felon-in-possession as a fourth-offense habitual offender. But the judge's comments at sentencing are clear, as the dissent itself later concedes. Thus, to the extent the distinction the dissent wants to draw between sentencing a defendant more harshly based on the conclusion that the defendant committed an offense of which he was acquitted and sentencing a defendant "while considering conduct that supported the acquitted charge" is a meaningful one (and we are not convinced it is), this case plainly involves the former.

Finally, the dissent essentially says that trial courts are free to sentence defendants for all acquitted charges as long as the sentence imposed is statutorily permitted in connection with the convicted charge. Or, put differently, the court can't impose the statutory sentence for the acquitted charge if it's not a permissible sentence for the

vacate the defendant's sentence for felon-in-possession and remand that case to the Saginaw Circuit Court for resentencing consistent with this opinion.

VIVIANO, BERNSTEIN, and CAVANAGH, JJ., concurred with MCCORMACK, C.J.

VIVIANO, J. (*concurring*). In every criminal trial, jurors are instructed, "What you decide about any fact in this case is final."[1] But if a judge may increase a defendant's sentence beyond what the jury verdict alone authorizes—here, based on the judge's finding that the defendant committed a crime of which the jury just acquitted him—a more accurate instruction would read: "What you decide about any fact in this case is interesting, but the court is always free to disregard it." Though I concur fully in the majority opinion, including its holding that due process precludes consideration of acquitted conduct at sentencing under a preponderance-of-the-evidence standard, I write separately to explain (1) why I believe that, because defendant's sentence would not survive reasonableness review without the judge-found fact of homicide, his sentence also violates the Sixth Amendment, and (2) why I believe more generally that the consideration of acquitted conduct at sentencing raises serious concerns under the Sixth Amendment.

The Sixth Amendment enshrines the right to trial by jury: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

convicted charge. But that constraint is already established by the sentencing statutes. The dissent's constitutional rule therefore would apply to exactly zero cases.

[1] M Crim JI 2.4(3). A similar instruction is given in every civil trial. See M Civ JI 2.03 ("Your decision as to any fact in this case is final.").

crime shall have been committed . . . ."[2] As the majority recognizes, the United States Supreme Court has not addressed whether the use of acquitted conduct at sentencing is permissible under the Sixth Amendment. *United States v Watts*[3] was a Fifth Amendment decision. However, although the Supreme Court has not directly answered this question, I believe that its Sixth Amendment jurisprudence provides helpful guidance.

I. THE JURY MUST AUTHORIZE ALL FACTS NECESSARY TO PREVENT A SENTENCE FROM BEING SUBSTANTIVELY UNREASONABLE

In *Blakely v Washington*,[4] the Supreme Court stated, "When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." In other words, as Justice Antonin Scalia explained in his dissent in *Oregon v Ice*, "[W]e have hitherto considered 'the central sphere of [the Supreme Court's] concern' to be facts necessary to the increase of the defendant's sentence beyond what the jury verdict alone justifies. 'If the jury's verdict alone does not authorize the sentence, if, instead, the judge must find an additional fact to impose the longer term, the Sixth Amendment requirement is not satisfied.' "[5] This

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[2] US Const, Am VI. See also Const 1963, art 1, § 20 ("In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury . . . .").

[3] *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997).

[4] *Blakely v Washington*, 542 US 296, 304; 124 S Ct 2531; 159 L Ed 2d 403 (2004), quoting 1 Bishop, Criminal Procedure (2d ed), § 87, p 55.

[5] *Oregon v Ice*, 555 US 160, 178; 129 S Ct 711; 172 L Ed 2d 517 (2009) (Scalia, J., dissenting), quoting *Cunningham v California*, 549 US 270, 290; 127 S Ct 856; 166 L Ed 2d 856 (2007). See also *Alleyne v United States*, 570 US 99, 103; 133 S Ct 2151; 186 L Ed 2d 314 (2013) ("Any fact

makes sense. "A judge's authority to issue a sentence derives from, and is limited by, the jury's factual findings of criminal conduct."[6]

Even under *United States v Booker*'s[7] advisory guidelines, there can be instances where the jury's verdict alone does not authorize the punishment because the punishment would not be reasonable except for the judge's finding of fact. In his concurrence in *Rita v United States*, Justice Scalia offered two hypothetical situations that would pose such Sixth Amendment concerns:

> First, consider two brothers with similar backgrounds and criminal histories who are convicted by a jury of respectively robbing two banks of an equal amount of money. Next assume that the district judge finds that one brother, fueled by racial animus, had targeted the first bank because it was owned and operated by minorities, whereas the other brother had selected the second bank simply because its location enabled a quick getaway. Further assume that the district judge imposes the statutory maximum upon both brothers, basing those sentences primarily upon his perception that bank robbery should be punished much more severely than the Guidelines base level advises, but explicitly noting that the racially biased decisionmaking of the first brother further justified his sentence. Now imagine that the appellate court reverses as excessive only the sentence of the nonracist brother. Given the dual holdings of the appellate court, the racist has a valid Sixth Amendment claim that his sentence was

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that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt.").

[6] *United States v Haymond*, 588 US ___, ___; 139 S Ct 2369, 2376; 204 L Ed 2d 897 (2019) (opinion of Gorsuch, J.). See also *Blakely*, 542 US at 308 ("[T]he Sixth Amendment by its terms is . . . a reservation of jury power.").

[7] *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005).

> reasonable (and hence lawful) only because of the judicial finding of his motive in selecting his victim.
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> Second, consider the common case in which the district court imposes a sentence *within* an advisory Guidelines range that has been substantially enhanced by certain judge-found facts. For example, the base offense level for robbery under the Guidelines is 20, which, if the defendant has a criminal history of I, corresponds to an advisory range of 33–41 months. If, however, a judge finds that a firearm was discharged, that a victim incurred serious bodily injury, and that more than $5 million was stolen, then the base level jumps by 18, producing an advisory range of 235–293 months. When a judge finds all of those facts to be true and then imposes a within-Guidelines sentence of 293 months, those judge-found facts, or some combination of them, are not merely facts that the judge finds relevant in exercising his discretion; they are the legally essential predicate for his imposition of the 293-month sentence. His failure to find them would render the 293-month sentence unlawful. That is evident because, were the district judge explicitly to find *none* of those facts true and nevertheless to impose a 293-month sentence (simply because he thinks robbery merits seven times the sentence that the Guidelines provide) the sentence would surely be reversed as unreasonably excessive.[8]

These hypotheticals illustrate that "for every given crime there is some maximum sentence that will be upheld as reasonable based only on the facts found by the jury or admitted by the defendant. *Every* sentence higher than that is legally authorized only by some judge-found fact, in violation of the Sixth Amendment."[9] This is because, as stated above, "The Sixth Amendment requires that '[a]ny fact (other than a prior conviction) which is necessary to support a sen-

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[8] *Rita v United States*, 551 US 338, 371-373; 127 S Ct 2456; 168 L Ed 2d 203 (2007) (Scalia, J., concurring) (citations omitted).

[9] *Id*. at 372.

tence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.' "[10] As Justice Scalia explained in his dissenting statement in *Joseph Jones v United States*:

> The Sixth Amendment, together with the Fifth Amendment's Due Process Clause, "requires that each element of a crime" be either admitted by the defendant, or "proved to the jury beyond a reasonable doubt." Any fact that increases the penalty to which a defendant is exposed constitutes an element of a crime, and "must be found by a jury, not a judge." We have held that a substantively unreasonable penalty is illegal and must be set aside. It unavoidably follows that any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge.[11]

While the Supreme Court has not yet expressly adopted (or rejected) Justice Scalia's Sixth Amendment analysis,[12] it appears that the Supreme Court has been

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[10] *Id*. at 370, quoting *Booker*, 543 US at 244.

[11] *Joseph Jones v United States*, 574 US 948, 948-949 (2014) (Scalia, J., dissenting) (citations omitted). Justice Scalia contended that the Court should "put an end to the unbroken string of cases disregarding the Sixth Amendment—or to eliminate the Sixth Amendment difficulty by acknowledging that all sentences below the statutory maximum are substantively reasonable." *Id*. at 950. While I do not necessarily disagree with Justice Scalia's criticism of *Alleyne*, *Alleyne*, 570 US at 124 (Roberts, C.J., joined by Scalia, J., dissenting), and of substantive reasonableness review, *Rita*, 551 US at 370 (Scalia, J., concurring in part), *Alleyne* and substantive reasonableness review are the law of the land. See *People v Lockridge*, 498 Mich 358, 388; 870 NW2d 502 (2015) (stating that "the rule from *Alleyne* applies" to Michigan's indeterminate sentencing scheme); *id*. at 392 (stating that departure sentences "will be reviewed . . . for reasonableness").

[12] Though, as Justice Scalia noted, the federal circuit courts have rejected this analysis. *Joseph Jones*, 574 US at 949 (Scalia,

moving toward a more robust interpretation of the Sixth Amendment. In *McMillan v Pennsylvania*,[13] the Supreme Court summarily dismissed the defendant's Sixth Amendment challenges to judge-found facts affecting his sentence. However, after *McMillan*, the Supreme Court has found multiple penal schemes in violation of the Sixth Amendment.[14] As the majority notes, *McMillan* is now all but overruled.[15]

As the above discussion makes clear, "any fact necessary to prevent a sentence from being substantively unreasonable—thereby exposing the defendant

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J., dissenting) ("Nonetheless, the Courts of Appeals have uniformly taken our continuing silence to suggest that the Constitution *does* permit otherwise unreasonable sentences supported by judicial factfinding, so long as they are within the statutory range."), citing *United States v Benkahla*, 530 F3d 300, 312 (CA 4, 2008); *United States v Hernandez*, 633 F3d 370, 374 (CA 5, 2011); *United States v Ashqar*, 582 F3d 819, 824-825 (CA 7, 2009); *United States v Treadwell*, 593 F3d 990, 1017-1018 (CA 9, 2010); *United States v Redcorn*, 528 F3d 727, 745-746 (CA 10, 2008). This Court has not addressed this argument, which was not presented in either *Lockridge*, 498 Mich 358, or *People v Steanhouse*, 500 Mich 453; 902 NW2d 327 (2017).

[13] *McMillan v Pennsylvania*, 477 US 79, 93; 106 S Ct 2411; 91 L Ed 2d 67 (1986).

[14] *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *Blakely*, 542 US 296 (holding that the "exceptional" sentence that resulted from the judge-found fact violated the Sixth Amendment); *Alleyne*, 570 US at 112 ("[A] fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."); *Haymond*, 588 US at ___; 139 S Ct at 2382 (opinion of Gorsuch, J.) (holding that the mandatory minimum imposed after the defendant violated the conditions of his supervised release violated the Sixth Amendment).

[15] See *ante* at 623-624 n 16; *Haymond*, 588 US at ___; 139 S Ct at 2378 (opinion of Gorsuch, J.) (stating that *Alleyne* found "no basis in the original understanding of the Fifth and Sixth Amendments for *McMillan* and *Harris* [*v United States*, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002),]" and "expressly overruled those decisions").

to the longer sentence—is an element that must be either admitted by the defendant or found by the jury. It *may not* be found by a judge."[16] As Justice Scalia seemed to recognize, the consideration of acquitted conduct at sentencing is particularly at odds with this rule.[17] Take, for example, the instant case: defendant was charged with open murder, carrying a firearm with unlawful intent, felon in possession of a firearm (felon-in-possession), and three counts of felony-firearm. Defendant was convicted, as a fourth-offense habitual offender, of felon-in-possession and second-offense felony-firearm, and acquitted of the other charges. But the judge found, by a preponderance of the evidence, that defendant "was the person who perpetrated the killing," and the judge imposed a prison sentence of 240 to 400 months, a sentence far in excess of the guidelines minimum sentence range of 22 to 76 months. Such a significant departure would clearly not be reasonable based only on the jury's verdict that defendant was guilty of felon-in-possession and felony-firearm.[18] Thus, the fact that defendant killed the victim was a "legally essential predicate for his imposition of the . . . sentence."[19] Because the finding that

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[16] *Joseph Jones*, 574 US at 949 (Scalia, J., dissenting).

[17] *Id*. (lamenting the Court's unwillingness to address the anomaly in its caselaw and noting that the case at hand was "a particularly appealing case" in which to do so "because not only did no jury convict these defendants of the offense the sentencing judge thought them guilty of, but a jury *acquitted* them of that offense").

[18] *Steanhouse*, 500 Mich at 459-460 ("[T]he proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' ").

[19] *Rita*, 551 US at 372 (Scalia, J., concurring).

defendant committed homicide exposed him to a longer sentence, the Sixth Amendment requires that it be found by a jury or admitted by the defendant. Here, it was only found by a judge. Therefore, I would hold that the sentence at issue violates the Sixth Amendment.

II. CONSIDERATION OF ACQUITTED CONDUCT MORE GENERALLY

While the above analysis would be sufficient to resolve this case, I have serious concerns regarding whether acquitted conduct may ever be considered at sentencing without violating the Sixth Amendment. These concerns are based on the history of the jury and the Supreme Court's Sixth Amendment jurisprudence.

A. THE HISTORICAL IMPORTANCE OF THE JURY

"[T]he scope of the constitutional jury right must be informed by the historical role of the jury at common law."[20] As the Supreme Court explained in *Apprendi v New Jersey*:[21]

> We do not suggest that trial practices cannot change in the course of centuries and still remain true to the principles that emerged from the Framers' fears "that the jury right could be lost not only by gross denial, but by erosion." But practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt.

Practice must adhere to these principles "[b]ecause the Constitution's guarantees cannot mean less today than they did the day they were adopted . . . ."[22] Thus, while

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[20] *Ice*, 555 US at 170.

[21] *Apprendi*, 530 US at 483-484.

[22] *Haymond*, 588 US at ___; 139 S Ct at 2376 (opinion of Gorsuch, J.).

some trial practices may have changed since the founding, a historical inquiry provides important evidence as to what "intelligible content"[23] we should give to the Sixth Amendment right to a jury.

As an initial matter, the importance of the jury cannot be overstated. Blackstone referred to the jury as the "sacred bulwark of the nation,"[24] and he described the trial by jury as

> a trial that hath been used time out of mind in this nation, and seems to have been co-eval with the first civil government thereof. Some authors have endeavoured to trace the original of juries up as high as the Britons themselves, the first inhabitants of our island; but certain it is, that they were in use among the earliest Saxon colonies . . . . [Its] establishment however and use, in this island, of what date soever it be, . . . was always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it.[25]

At the time of the founding, Alexander Hamilton noted, "The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury: Or if there is any difference between them it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free govern-

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[23] *Blakely*, 542 US at 305 (noting "the need to give intelligible content to the right of jury trial"); *Apprendi*, 530 US at 499 (Scalia, J., concurring) ("And the guarantee that '[i]n all criminal prosecutions, the accused shall enjoy the right to . . . trial, by an impartial jury,' has no intelligible content unless it means that all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury.").

[24] *People v Cain*, 498 Mich 108, 129; 869 NW2d 829 (2015) (VIVIANO, J., dissenting), quoting 4 Blackstone, Commentaries on the Laws of England, p *350.

[25] 3 Blackstone, Commentaries on the Laws of England, pp **349-350.

ment."[26] More recently, the Supreme Court has referred to the right to trial by jury " 'as the great bulwark of [our] civil and political liberties,' " intended " '[t]o guard against a spirit of oppression and tyranny on the part of rulers . . . .' "[27]

The role of juries in sentencing has evolved over time, such that modern sentencing is very different than it was at the time of the founding. Unlike modern juries, colonial juries played a role in sentencing. This was because several crimes were capital offenses, and thus, a guilty verdict necessarily dictated the punishment.[28] Consequently, practically, a judge often had no discretion in sentencing:

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[26] The Federalist No. 83 (Hamilton) (Hamilton ed, 1864), p 614. Or as Thomas Jefferson asserted, "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Washington, *The Writings of Thomas Jefferson* (New York: Derby & Jackson, 1859), p 71.

[27] *Apprendi*, 530 US at 466, quoting 2 Story, Commentaries on the Constitution of the United States (4th ed), pp 540-541. See also *Haymond*, 588 US at ___; 139 S Ct at 2375 (opinion of Gorsuch, J.) ("Together with the right to vote, those who wrote our Constitution considered the right to trial by jury 'the heart and lungs, the mainspring and the center wheel' of our liberties, without which 'the body must die; the watch must run down; the government must become arbitrary.' ") (citation omitted); *Sullivan v Louisiana*, 508 US 275, 281; 113 S Ct 2078; 124 L Ed 2d 182 (1993) (describing trial by jury as a " 'basic protectio[n]' whose precise effects are unmeasurable, but without which a criminal trial cannot reliably serve its function"), quoting *Rose v Clark*, 478 US 570, 577; 106 S Ct 3101; 92 L Ed 2d 460 (1986) (alteration in original); Amar, *The Bill of Rights: Creation and Reconstruction* (New Haven: Yale University Press, 1998), p 96 ("If we seek a paradigmatic image underlying the original Bill of Rights, we cannot go far wrong in picking the jury.").

[28] Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 Ohio St L J 935, 939 (2010) ("While scholars disagree about the details, it is reasonable to conclude that the colonial jury was a de facto and, to a degree, a de jure sentencer. It was a de facto sentencer because of the nature of the criminal law, on the one hand, and the process by which it was selected, on the other. Many crimes were

> [W]ith respect to the criminal law of felonious conduct, "the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence (unless he thought in the circumstances that the sentence was so inappropriate that he should invoke the pardon process to commute it)." As Blackstone, among many others, has made clear, "[t]he judgment, though pronounced or awarded by the judges, is not their determination or sentence, but the determination and sentence of the law."[29]

However, on the rare occasions when a penalty was not set by law, judges had discretion to take into account a wide variety of factors in sentencing.[30]

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capital offenses. The result was necessarily binary and easy to understand—guilt and death or not guilty and freedom. Scalable punishments, punishments involving a term of years, were not common until the end of the eighteenth century with the growth of penitentiaries."); Spooner, *An Essay on the Trial by Jury* (Boston: Bela Marsh, 1852), p 97 ("[T]he principle of Magna Carta, that a man should be *sentenced* only by his peers, was in force, and acted upon as law, in England, so lately as 1725, (five hundred years after Magna Carta,) . . . ."). See also *Williams v New York*, 337 US 241, 247-248; 69 S Ct 1079; 93 L Ed 1337 (1949) ("Undoubtedly the New York statutes emphasize a prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender. This whole country has traveled far from the period in which the death sentence was an automatic and commonplace result of convictions—even for offenses today deemed trivial.") (citation omitted).

[29] *Apprendi*, 530 US at 479-480 (citation omitted).

[30] *Williams*, 337 US at 246 ("[B]oth before and since the American colonies became a nation, courts . . . practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law."); *Apprendi*, 530 US at 481 ("We have often noted that judges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case.") (emphasis omitted).

Though I am aware of no source or scholarship specifically addressing whether judges could consider acquitted conduct at sentencing, it is true that the Supreme Court "has repeatedly sought to guard the historic role of the jury . . . ."[31] But disregarding an acquittal at sentencing "trivializes 'legal guilt' or legal innocence."[32] Unlike uncharged conduct, which the jury has only not "authorize[d]," consideration of acquitted conduct entails consideration of "facts of which the jury expressly disapproved."[33] In a related context, Justice Neil Gorsuch explained the impact of similar Sixth Amendment violations: "Nor did the absence of a jury's finding beyond a reasonable doubt only infringe the rights of the accused; it also divested the ' "people at large" '—the men and women who make up a jury of a defendant's peers—of their constitutional authority to set the metes and bounds of judicially administered criminal punishments."[34] And the "people at large" perceive the slight. As one frustrated juror wrote:

> It seems to me a tragedy that one is asked to serve on a jury, serves, but then finds their work may not be given the credit it deserves. We, the jury, all took our charge seriously. We virtually gave up our private lives to devote

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[31] *Haymond*, 588 US at ___; 139 S Ct at 2384 (opinion of Gorsuch, J.).

[32] *United States v Pimental*, 367 F Supp 2d 143, 152 (D Mass, 2005); *United States v Ibanga*, 454 F Supp 2d 532, 541 (E D Va, 2006), sentence vacated and case remanded, 271 F Appx 298 (CA 4, 2008) ("A sentence that repudiates the jury's verdict undermines the juror's role as both a pupil and participant in civic affairs. The juror as pupil learns that the law does not value the results of his or her participation in the judicial process and may reject it at will. The disparity in the sentencing ranges with and without the inclusion of acquitted conduct effectively '[drives] a wedge between the community's sense of appropriate punishment and the criminal sanction inflicted.' ") (citation omitted).

[33] *Pimental*, 367 F Supp 2d at 152.

[34] *Haymond*, 588 US at ___; 139 S Ct at 2378-2379 (opinion of Gorsuch, J.).

> our time to the cause of justice, and it is a very noble cause as you know, sir. We looked across the table at one another in respect and in sympathy. We listened, we thought, we argued, we got mad and left the room, we broke, we rested that charge until tomorrow, we went on. Eventually, through every hour-long tape of a single drug sale, hundreds of pages of transcripts, ballistics evidence, and photos, we delivered to you our verdicts.
>
> What does it say to our contribution as jurors when we see our verdicts, in my personal view, not given their proper weight. It appears to me that these defendants are being sentenced not on the charges for which they have been found guilty but on the charges for which the District Attorney's office would have liked them to have been found guilty. Had they shown us hard evidence, that might have been the outcome, but that was not the case. That is how you instructed your jury in this case to perform and for good reason.[35]

How can the jury continue to be " 'the great bulwark of [our] civil and political liberties' "[36] when an acquittal means only that a defendant will not formally be sentenced for the crime but may, in reality, spend far longer in prison because a judge finds by a preponderance of the evidence that the defendant, in fact, committed the crime of which he or she was acquitted by the jury?[37] Consideration of acquitted conduct at sentencing diminishes the historical role of the jury.

B. JURY NULLIFICATION

Another historical consideration also supports this conclusion. Juries have historically protected defen-

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[35] *United States v Canania*, 532 F3d 764, 778 n 4 (CA 8, 2008) (Bright, J., concurring) (quotation marks omitted).

[36] *Apprendi*, 530 US at 477 (citation omitted).

[37] It is worth noting that, although the federal circuits have yet to agree, see note 12 of this opinion, several judges and commentators have expressed their vigorous opposition to the consideration of acquitted

dants from prosecutorial overreach. "The Framers envisioned the Sixth Amendment as a protection for

conduct at sentencing on Sixth Amendment grounds. See, e.g., *Pimental*, 367 F Supp 2d at 152-153 (opinion of Gertner, J.) ("[W]hen a court considers acquitted conduct it is expressly considering facts that the jury verdict not only failed to authorize; it considers facts of which the jury expressly disapproved. . . . To tout the importance of the jury in deciding facts, even traditional sentencing facts, and then to ignore the fruits of its efforts makes no sense—as a matter of law or logic."); *Ibanga*, 454 F Supp 2d at 536 (opinion of Kelley, J.) ("Sentencing a defendant to time in prison for a crime that the jury found he did not commit is a Kafka-esque result."); *United States v Faust*, 456 F3d 1342, 1350 (CA 11, 2006) (Barkett, J., concurring) ("Even though [the defendant]'s maximum possible sentence was not increased by the sentencing judge's independent findings—three separate findings of actual, criminal conduct—they certainly do change the quantity and quality of the stigma he faces. . . . [E]ven more importantly, "to consider acquitted conduct trivializes 'legal guilt' or 'legal innocence' . . . ."); *United States v White*, 551 F3d 381, 392 (CA 6, 2008) (Merritt, J., dissenting) ("[T]he use of acquitted conduct at sentencing defies the Constitution, our common law heritage, the Sentencing Reform Act, and common sense."); *Canania*, 532 F3d at 777 (Bright, J., concurring) ("[T]he unfairness perpetuated by the use of 'acquitted conduct' at sentencing in federal district courts is uniquely malevolent."); *United States v Bell*, 420 US App DC 387, 389; 808 F3d 926 (2015) (Kavanaugh, J., concurring) ("Allowing judges to rely on acquitted or uncharged conduct to impose higher sentences than they otherwise would impose seems a dubious infringement of the rights to due process and to a jury trial. If you have a right to have a jury find beyond a reasonable doubt the facts that make you guilty, and if you otherwise would receive, for example, a five-year sentence, why don't you have a right to have a jury find beyond a reasonable doubt the facts that increase that five-year sentence to, say, a 20-year sentence?"); *United States v Bagcho*, 440 US App DC 487, 497; 923 F3d 1131 (2019) (Millett, J., concurring) ("It stands our criminal justice system on its head to hold that even a single extra day of imprisonment can be imposed for a crime that the jury says the defendant did not commit."); Outlaw, *Giving an Acquittal Its Due: Why a Quartet of Sixth Amendment Cases Means the End of United States v. Watts and Acquitted Conduct Sentencing*, 5 U Denv Crim L Rev 189, 190 (2015); Yalinçak, *Critical Analysis of Acquitted Conduct Sentencing in the U.S.: "Kafka-Esque," "Repugnant," "Uniquely Malevolent" and "Pernicious"?*, 54 Santa Clara L Rev 675, 721 (2014); Ngov, *Judicial Nullification of Juries: Use of Acquitted Conduct at Sentencing*, 76 Tenn L Rev 235 (2009).

defendants from the power of the Government."[38] As Chief Justice John Roberts stated: "The question here is about the power of judges, not juries. . . . [T]he historical understanding of the jury right [is] as a defense *from* judges, not a defense *of* judges. See *Apprendi*, [530 US at 498 (Scalia, J., concurring)] ('Judges, it is sometimes necessary to remind ourselves, are part of the State')."[39]

Key to their role as "[p]opulist [p]rotectors,"[40] juries found both the facts and the law.[41] Chief Justice John

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[38] *Alleyne*, 570 US at 124 (Roberts, C.J., dissenting); see also *Blakely*, 542 US at 308 ("[T]he Sixth Amendment by its terms is not a limitation on judicial power, but a reservation of jury power. It limits judicial power only to the extent that the claimed judicial power infringes on the province of the jury.").

[39] *Alleyne*, 570 US at 129-130 (Roberts, C.J., dissenting).

[40] *The Bill of Rights: Creation and Reconstruction*, p 83.

[41] Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1193 (1991) ("[I]t was widely believed in late eighteenth-century America that the jury, when rendering a general verdict, could take upon itself the right to decide both law and fact."); Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 Hofstra L Rev 377, 446-448 (1996) ("In contrast to the traditional English jury, American juries were often granted the authority to resolve issues of law as well as issues of fact. This authority was recognized in constitutions, statutes, and judicial decisions following the Revolution. Furthermore, it was emphasized in a variety of celebrated eighteenth century cases involving political crimes during English rule of the colonies."); Warshawsky, *Opposing Jury Nullification: Law, Policy, and Prosecutorial Strategy*, 85 Geo L J 191, 198 (1996) ("Although criminal juries in England . . . possessed the raw power to ignore the law as given by the judge, they never acquired the legal right to do so. In America, by contrast, the right of the jury independently to decide questions of law was widely recognized until well into the nineteenth century."); Kemmitt, *Function Over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U Mich J L Reform 93, 95 (2006) ("The version of the jury adopted by the Founders largely mirrored the English archetype, but included a few structural modifications. While the division of labor between judge and jury remained the same, the American version added the general verdict

Jay, in *Georgia v Brailsford*,[42] summarized the jury's power:

> It may not be amiss, here, gentlemen, to remind you of the good old rule, that on questions of fact, it is the province of the jury, on questions of law, it is the province of the court, to decide. But it must be observed, that by the same law, which recognizes this reasonable distribution of jurisdiction, you have, nevertheless, a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.

An important way in which a jury might decide the law was by jury nullification. Jury nullification is "[a] jury's knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue that is larger than the case itself or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness."[43] Juries used jury nullification to ameliorate the effects of what they perceived to be unjust laws:

> The potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary conse-

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and endowed jurors with law-finding powers. . . . The adoption of a hybrid jury—one concerned with both fact-finding and sentencing—reflected the Founders' vision that the jury should serve as a bulwark against government oppression and a check against an unresponsive central government.").

[42] *Georgia v Brailsford*, 3 US (3 Dall) 1, 4; 1 L Ed 483 (1794).

[43] *Black's Law Dictionary* (11th ed); see also *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992) ("Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence.").

Jury nullification is sometimes also referred to as jury mitigation. See *Function Over Form*, 40 U Mich J L Reform at 100 ("Jurors were unashamed of using their powers of mitigation and frequently returned partial verdicts with a less serious charge . . . .").

> quences. This power to thwart Parliament and Crown took the form not only of flat-out acquittals in the face of guilt but of what today we would call verdicts of guilty to lesser included offenses, manifestations of what Blackstone described as "pious perjury" on the jurors' part.[44]

The power of jury nullification was held in high esteem at the time of the founding—Benjamin Franklin, John Adams, and Thomas Jefferson all spoke of jury nullification with approbation.[45] The Founders took steps to further insulate American juries and ensure that they could practice jury nullification:

> [W]hen creating their own legal institutions, the colonists endorsed the roles played by the English jury—namely, mitigator of unduly harsh sentences and populist check on a potentially unresponsive central government—but cast aside its inelegant form. In so doing, the colonists helped to insulate the process of jury-based mitigation from criticism. In England, the blatant manipulation of facts by criminal juries led critics to target the jury's function as mitigator. But in the United States, such tensions were

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[44] *Nathaniel Jones v United States*, 526 US 227, 245; 119 S Ct 1215; 143 L Ed 2d 311 (1999). See also *Apprendi*, 530 US at 480 n 5 ("[J]uries devised extralegal ways of avoiding a guilty verdict, at least of the more severe form of the offense alleged, if the punishment associated with the offense seemed to them disproportionate to the seriousness of the conduct of the particular defendant.").

[45] Parmenter, *Nullifying the Jury: "The Judicial Oligarchy" Declares War on Jury Nullification*, 46 Washburn L J 379, 428 n 56 (2007) ("John Adams argued, 'It is not only [the juror's] right, but his duty . . . to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court.' Benjamin Franklin's Pennsylvania Gazette commented that if jury nullification is not the law, 'it is better than law, it ought to be law, and will always be law wherever justice prevails.' Thomas Jefferson remarked, 'Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making [of] them.' ") (citations omitted; alterations in original).

> minimized through reliance on the general verdict and by granting the jury the power to determine the law.[46]

Understandably, there has been considerable debate about whether jury nullification is desirable.[47] Indeed, courts have consistently held that defendants are not entitled to a jury instruction regarding nullification.[48] This Court stated in *People v Bailey*,[49] "The jury 'has the *power* to acquit on bad grounds, because the government is not allowed to appeal from an acquittal by a jury. But jury nullification [like the jury's ability to convict a defendant of a lesser crime than the evidence proves] is just a power, not also a right . . . .' "[50] Yet, though it is only a power, it is a well-established power that this Court has consistently recognized—"Juries are not held to any rules of logic nor are they required

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[46] *Function Over Form*, 40 U Mich J L Reform at 103; see also Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U Penn L Rev 33, 36 (2003) ("This power to mitigate or nullify the law in an individual case is no accident. It is part of the constitutional design—and has remained part of that design since the Nation's founding.").

[47] Compare McKnight, *Jury Nullification as a Tool to Balance the Demands of Law and Justice*, 2013 BYU L Rev 1103, 1110 (2013), and *Opposing Jury Nullification*, 85 Geo L J 191.

[48] See, e.g., *Sparf v United States*, 156 US 51, 99; 15 S Ct 273; 39 L Ed 343 (1895); *United States v Krzyske*, 836 F2d 1013, 1021 (CA 6, 1988) ("The right of a jury, as a buffer between the accused and the state, to reach a verdict despite what may seem clear law must be kept distinct from the court's duty to uphold the law and to apply it impartially. . . . To have given an instruction on nullification would have undermined the impartial determination of justice based on law."); *Demers*, 195 Mich App at 208.

[49] *People v Bailey*, 451 Mich 657; 549 NW2d 325 (1996), amended on denial of reh'g 453 Mich 1204 (1996).

[50] *Id*. at 671 n 10, quoting *United States v Kerley*, 838 F2d 932, 938 (CA 7, 1988) (alterations in original). See also *People v Ward*, 381 Mich 624, 628; 166 NW2d 451 (1969) ("A jury may have the power but it has no right to disregard the court's instructions.").

to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency."[51] Regardless of whether jury nullification is good policy, or whether there is a right to jury nullification, the fact remains that juries at the time of the founding and at present have the power to exercise jury nullification.

But this power is rendered nearly meaningless if consideration of acquitted conduct is permissible. If a jury finds a defendant guilty of a lesser offense and acquits him or her of a greater offense, such jury nullification loses nearly all practical effect if the judge can consider the acquitted conduct at sentencing. As Judge Gilbert Merritt explained:

> Allowing the use of acquitted conduct at sentencing also eviscerates the jury's longstanding power of mitigation, a close relative of the power of jury nullification. . . . A jury cannot mitigate the harshness of a sentence it deems excessive if a sentencing judge may use acquitted conduct to sentence the defendant as though he had been convicted of the more severe offense.[52]

Instead of acquitting a defendant of certain offenses and convicting of others, a jury would have to exercise

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[51] *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); *Hamilton v People*, 29 Mich 173, 189-190 (1874) ("It is true that juries in criminal cases cannot properly find a conviction against their consciences. It is also true that they cannot be questioned or held responsible upon their verdict, nor called on to explain its reasons. Whether those reasons are based on a doubt or disbelief of evidence, or on a rejection of the exposition of law given by the court, they are equally beyond review."). See also *United States v Dougherty*, 154 US App DC 76, 473 F2d 1113 (1972) ("The pages of history shine on instances of the jury's exercise of its prerogative to disregard uncontradicted evidence and instructions of the judge.").

[52] *White*, 551 F3d at 394 (Merritt, J., dissenting).

jury nullification by the more extreme path of acquitting the defendant on all counts. Consideration of acquitted conduct at sentencing appears to conflict with the Founders' views on jury nullification, given that it would severely limit that check on the government's power.

C. DISTINGUISHING OFFENSE ELEMENTS FROM SENTENCING FACTORS

I also believe that the consideration of acquitted conduct at sentencing leads to anomalous results.[53] Specifically, it involves relabeling a particular fact from an element of a crime at the trial stage, which the jury must find beyond a reasonable doubt, to a mere "sentencing factor" at the sentencing stage, which the judge can find by a preponderance of the evidence. In *McMillan v Pennsylvania*,[54] the Supreme Court distinguished for the first time between an element of an offense and "a sentencing factor that comes into play only after the defendant has been found guilty . . . beyond a reasonable doubt." "Much turns on the determination that a fact is an element of an offense rather than a sentencing consideration, given that elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."[55] And, as we have noted, "The failure to have the jury find an element establishing 'a distinct and

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[53] *Faust*, 456 F3d at 1351 (Barkett, J., concurring) ("The majority believes that, in a single proceeding, Faust's possession of ecstacy [sic] may be both an element of a crime and a sentencing fact provable by a mere preponderance of the evidence. This anomaly is hardly justified . . . .").

[54] *McMillan*, 477 US at 86.

[55] *Nathaniel Jones*, 526 US at 232. See also *Apprendi*, 530 US at 500 ("[I]n order for a jury trial of a crime to be proper, all elements of the

aggravated crime,' not the resulting sentence, is the constitutional deficiency[.]"[56]

The United States Supreme Court has provided guidance on several occasions regarding how to distinguish between a sentencing factor and an element. The Supreme Court has looked to a variety of factors, including tradition, statutory structure, common practice, the risk of unfairness if a fact were to be decided by a jury, legislative history, and the effect the fact would have on the sentence. For example, in *Nathaniel Jones v United States*,[57] the question was whether serious bodily injury was an element defining an aggravated form of the underlying crime or a sentencing factor. The Court considered the structure of the statute as well as other provisions, reasoning that Congress likely did not intend for "serious bodily injury" to be an element in certain offenses but only a sentencing factor in the offense in the case at hand.[58] The Court also looked to similar state statutes, which used "serious bodily injury" as an element of an offense rather than as a sentencing factor.[59] Thus, the Court held that serious bodily injury was an element.[60] Similarly, in *Castillo v United States*,[61] the Court turned to the statutory structure, tradition, the risk of unfairness if decided by a jury, legislative history, and the

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crime must be proved to the jury (and . . . proved beyond a reasonable doubt). Thus, it is critical to know which facts are elements.") (citations omitted).

[56] *Lockridge*, 498 Mich at 384 (citations omitted).

[57] *Nathaniel Jones*, 526 US 227.

[58] *Id*. at 236.

[59] *Id*. at 236-237.

[60] *Id*. at 239, 251-252.

[61] *Castillo v United States*, 530 US 120; 120 S Ct 290; 147 L Ed 2d 94 (2000).

effects that the factual finding would have on the sentence. Notably, as for tradition, *Castillo* noted that "[t]raditional sentencing factors often involve either characteristics of the offender, such as recidivism, or special features of the manner in which a basic crime was carried out (*e.g.*, that the defendant abused a position of trust or brandished a gun)."[62]

The Court further refined the definition of an element in *Apprendi v New Jersey*[63] and *Alleyne v United States*.[64] In *Apprendi*, the Supreme Court noted the link between an element of the crime and punishment: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[65] In *Alleyne*, the

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[62] *Id*. at 126. See also *Almendarez-Torres v United States*, 523 US 224, 228; 118 S Ct 1219; 140 L Ed 2d 350 (1998) ("We therefore look to the statute before us and ask what Congress intended. Did it intend the factor that the statute mentions, the prior aggravated felony conviction, to help define a separate crime? Or did it intend the presence of an earlier conviction as a sentencing factor, a factor that a sentencing court might use to increase punishment? In answering this question, we look to the statute's language, structure, subject matter, context, and history —factors that typically help courts determine a statute's objectives and thereby illuminate its text.").

[63] *Apprendi*, 530 US 466.

[64] *Alleyne*, 570 US 99.

[65] *Apprendi*, 530 US at 490. See also *Nathaniel Jones*, 526 US at 252 (Stevens, J. concurring) ("[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."); *id*. at 253 (Scalia, J., concurring) ("I set forth as my considered view, that it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed."); *Apprendi*, 530 US at 503 (Thomas, J., concurring) (determining that the value of stolen property "was an element [of larceny] because punishment varied with value"); *Blakely*, 542 US at 304 ("When a judge inflicts punishment that the jury's verdict

Supreme Court extended *Apprendi*'s holding to judge-found facts that increased the mandatory minimum, not just the maximum as *Apprendi* had held—"a fact increasing either end of the range produces a new penalty and constitutes an ingredient of the offense."[66] But *Alleyne* noted that it did not restrict fact-finding necessary to exercising discretion in setting a sentence within legal limits; it only required that facts that increase the penalty be submitted to a jury—"Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt."[67]

At the trial stage, each charged crime consists of its requisite elements. These elements must be found by a jury beyond a reasonable doubt.[68] But, when acquitted conduct is considered, the rug is pulled out from under a defendant at the sentencing stage. The defendant then discovers that the elements that the jury found were *not* established beyond a reasonable doubt are still going to be considered against him or her; they are suddenly no longer elements but now reappear as sentencing factors.[69]

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alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' Bishop, *supra*, § 87, at 55, and the judge exceeds his proper authority.").

[66] *Alleyne*, 570 US at 112. See also *Apprendi*, 530 US at 501 (Thomas, J., concurring) ("This authority establishes that a 'crime' includes every fact that is by law a basis for imposing or increasing punishment . . . .").

[67] *Alleyne*, 570 US at 103.

[68] *Nathaniel Jones*, 526 US at 232.

[69] I note that the Supreme Court has rejected attempts to evade the Sixth Amendment by merely changing a label. *Haymond*, 588 US at __; 139 S Ct at 2379 (opinion of Gorsuch, J.) ("Our precedents, *Apprendi*, *Blakely*, and *Alleyne* included, have repeatedly rejected efforts to dodge the demands of the Fifth and Sixth Amendments by the simple expedient of relabeling a criminal prosecution a 'sentencing enhancement.' ").

In other words, if the prosecutor fails to establish a fact as an element at trial, the prosecutor gets a second bite at the apple: if the prosecutor can establish the fact by a preponderance of the evidence, then the fact can still dramatically affect the defendant's sentence. Take, for example, the instant case—though defendant was acquitted of open murder, the judge found by a preponderance of the evidence at sentencing that defendant had killed the victim, i.e., had committed the homicide. And on that basis, the trial court sentenced him to 240 to 400 months in prison, i.e., a minimum sentence more than three times greater than the upper limit of his guidelines minimum sentence range of 76 months.

But treating a finding that defendant killed the victim as a sentencing factor is counterintuitive. Applying the analysis from *Nathaniel Jones* and *Castillo*, it cannot seriously be contended that killing the victim, i.e., causing the victim's death, would be a mere sentencing factor. Unsurprisingly, tradition[70] and common practice[71] indicate that causing the death of the

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[70] Blackstone defined manslaughter as "the unlawful killing of another without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act," and murder as " 'when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and under the king's peace, with malice aforethought, either express or implied.' " 4 Blackstone, Commentaries on the Laws of England, pp **191, 195 (citation omitted).

[71] Many states have adopted the Model Penal Code in whole or in part. Under the Model Penal Code, criminal homicide—which can constitute murder, manslaughter, and negligent homicide depending on a defendant's *mens rea*—occurs when a person "causes the death of another human being," i.e., kills another human being. Model Penal Code, § 210.1 (2018); *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "kill," in relevant part, as to "cause the death of"). Also, our Legislature and Supreme Court have deemed killing an element of any

victim is an element of a crime. And as is evidenced by the fact that the jury was already tasked with deciding whether defendant had committed open murder, it does not risk unfairness to have a jury decide whether the defendant killed the victim. All these considerations support the rather uncontroversial notion that killing the victim is an element of a crime rather than a mere sentencing factor. The important distinction that the United States Supreme Court has identified between offense elements and sentencing factors is much ado about nothing if a prosecutor can convert an offense element (requiring proof beyond a reasonable doubt) to a sentencing factor (requiring proof by a preponderance of the evidence), resulting in a sentence similar to the one the defendant would have received if he or she had been convicted of the greater crime.[72] This, too, counsels against consideration of acquitted conduct at sentencing.

D. DIFFERENT BURDENS OF PROOF DO NOT RENDER CONSIDERATION OF ACQUITTED CONDUCT COMPATIBLE WITH AN ACQUITTAL

Proponents of the use of acquitted conduct argue that a judicial finding of guilt is not necessarily incompatible with a jury acquittal because different burdens of proof are involved in each determination. In other words, the proponents argue that acquittals are not

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of the forms of murder or manslaughter for which defendant could have been convicted. MCL 750.316 (defining first-degree murder); *People v Mendoza*, 468 Mich 527, 534; 664 NW2d 685 (2003) (defining second-degree murder under MCL 750.317 as including, in relevant part, "(1) death, (2) caused by defendant's act"); *id*. at 535 (defining voluntary manslaughter, in relevant part, as " '[t]he act of killing' ") (citation omitted); *id*. at 536 (defining involuntary manslaughter to include "killing").

[72] This is contrary to the statement that "[m]uch turns on the determination that a fact is an element of an offense rather than a sentencing consideration . . . ." *Nathaniel Jones*, 526 US at 232.

proclamations of innocence but only findings that there was not proof of guilt beyond a reasonable doubt.[73] I find this argument unpersuasive. First, while an acquittal might mean that a jury was convinced by a preponderance of the evidence but not beyond a reasonable doubt, that is not certain; it is also possible that a jury acquitted believing that the evidence did not meet even the lower preponderance-of-the-evidence standard.[74] The prosecutor should not receive the benefit of this ambiguity. Second, the logic that there might be evidence beyond a preponderance but not beyond a reasonable doubt skirts the issue. As Judge Patricia Millett explained:

> The problem with relying on that distinction in this setting is that the whole reason the Constitution imposes that strict beyond-a-reasonable-doubt standard is that it would be constitutionally intolerable, amounting "to a lack of fundamental fairness," for an individual to be convicted and then "imprisoned for years on the strength of the same evidence as would suffice in a civil case." *In re Winship*, [397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368

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[73] See, e.g., *post* at 661 ("To the extent that the majority's position implies that a sentencing court's consideration of conduct underlying an acquitted charge directly contradicts a jury's acquittal decision, there is no logical anomaly in the trial court making a factual finding that may have been rejected by the jury at trial. An acquittal means only that the jury held a reasonable doubt as to the defendant's guilt of that crime, not that the underlying conduct did not occur."); *Watts*, 519 US at 156-157.

[74] Doerr, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 Colum Hum Rts L Rev 235, 261-262 (2009) ("Allowing a judge to enhance a defendant's sentence because the jury 'has not said that the defendant is innocent, either' eviscerates the policy and purpose of the Sixth Amendment jury-trial guarantee, especially because an acquittal is the only action a jury can take to absolve a defendant of guilt. . . . The proper solution to this problem is not to ignore the fact that a jury's verdict of acquittal is ambiguous and punish the defendant by interpreting that verdict as 'maybe innocent.' ").

> (1970)]. In other words, proof beyond a reasonable doubt is what we demand from the government as an indispensable precondition to *depriving an individual of liberty for the alleged conduct*. Constructing a regime in which the judge deprives the defendant of liberty on the basis of the very same factual allegations that the jury specifically found did not meet our constitutional standard for a deprivation of liberty puts the guilt and sentencing halves of a criminal case at war with each other.[75]

For this reason, finding elements of a crime only by a preponderance of the evidence is unconstitutional, even if there is a possibility that it is logically consistent with an acquittal.

Moreover, it is important to keep in mind the practical reality of sentencing. According to the Supreme Court, "The dispositive question . . . 'is one not of form, but of effect.' "[76] The reality is that when judges find by a preponderance of the evidence that a defendant committed the conduct for which he was acquitted, that defendant can, and often does, serve a longer prison sentence because of it.[77] But this seems counterintuitive—"In effect, juries rule on 'legal guilt, guilt determined by the highest standard of proof we know, beyond a reasonable doubt. And when a jury acquit[s] a defendant based on that standard, one would have expected no additional criminal punish-

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[75] *Bell*, 420 US App DC at 391 (Millett, J., concurring).

[76] *Ring v Arizona*, 536 US 584, 602; 122 S Ct 2428; 153 L Ed 2d 556 (2002), quoting *Apprendi*, 530 US at 494.

[77] *Bell*, 420 US App DC at 392 (Millett, J., concurring) ("The other explanation commonly proffered is that, as long as the final sentence does not exceed the statutorily authorized maximum length of incarceration for the offense of conviction, the defendant is only being sentenced for the crime he committed. That blinks reality when, as here, the sentence imposed so far exceeds the Guidelines range warranted for the crime of conviction itself that the sentence would likely be substantively unreasonable unless the acquitted conduct is punished too.").

ment would follow.' "[78] In addition to a longer sentence, the defendant will also face additional stigma.[79] Regardless of whether an acquittal and consideration of acquitted conduct are logically inconsistent, the practical reality of sentencing calls into question the constitutionality of relying on acquitted conduct.

III. CONCLUSION

Although I agree with the majority that due process precludes consideration of acquitted conduct at sentencing under a preponderance-of-the-evidence standard, I believe it important to point out that defendant's sentence also violates the Sixth Amendment because it would not be reasonable but for the judge-found fact that defendant committed the conduct for which he was acquitted. Finally, for the above reasons, I have serious concerns regarding whether the consideration of acquitted conduct can ever comply with the Sixth Amendment.

CLEMENT, J. (*dissenting*). The majority concludes that the trial court violated defendant's due-process rights during sentencing when it found by a preponderance of the evidence that defendant had caused a death—despite defendant's acquittal of the charge of open murder—and, relying on this finding, imposed a sentence above the recommended guidelines range. I

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[78] *Pimental*, 367 F Supp 2d at 150 (alteration in original).

[79] *Faust*, 456 F3d at 1350-1351 (Barkett, J., concurring) ("[T]he reasonable doubt standard is warranted when imputations of criminal conduct are at stake not only 'because of the possibility that [an individual] may lose his liberty upon conviction,' but also 'because of the *certainty* that he would be stigmatized . . . .' Even though Faust's maximum possible sentence was not increased by the sentencing judge's independent findings—three separate findings of actual, criminal conduct—they certainly do change the quantity and quality of the stigma he faces.") (citations omitted; alterations in original).

dissent because I believe that the sentencing court properly considered all "circumstance[s] which aid[ed] the sentencing court's construction of a more complete and accurate picture of . . . defendant's background, history, or behavior . . . ." *People v Ewing (After Remand)*, 435 Mich 443, 472; 458 NW2d 880 (1990) (opinion by BOYLE, J.).

In Michigan, sentencing is "a matter for the exercise of judicial discretion [which] requires an individualized factual basis" of the defendant's personal, criminal, and mental history, as well as the circumstances of the crime. *People v Lee*, 391 Mich 618, 639; 218 NW2d 655 (1974). See also MCL 771.14 (requiring preparation of a presentence investigation report that "inquire[s] into the antecedents, character, and circumstances of the [defendant]" to aid the trial court in its sentencing determination). This individualized consideration guides the sentencing court in imposing a sentence within the range of punishments set by the Legislature that is proportionate to the manner in which the particular offense was committed and to the background of the defendant. See *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990) ("[T]he Legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society."). Today, the majority restricts a sentencing court's access to information, a restriction that is not mandated by federal or state law and that is antithetical to this state's tradition of providing the broadest range of information to consider at sentencing. See *Lee*, 391 Mich at 639. In so doing, the majority endorses an overbroad reading of the presumption of innocence and rejects this Court's decision in *Ewing* without adequate justification.

The majority declares that the presumption of innocence prevents a trial court from considering at sentencing conduct underlying a charge for which the defendant was acquitted. This declaration expands the presumption of innocence beyond its function. The presumption of innocence is rooted in constitutional due process, and it requires that the government prove beyond a reasonable doubt every element of a criminal offense. *McMillan v Pennsylvania*, 477 US 79, 85; 106 S Ct 2411; 91 L Ed 2d 67 (1986). The presumption of innocence mandates only that a defendant cannot be *convicted and sentenced* for a crime unless the elements of that crime were proved beyond a reasonable doubt. Once the prosecutor overcomes the presumption of innocence by obtaining a conviction, the presumption does not prevent the trial court from considering the defendant's relevant conduct when imposing a sentence, even if that same conduct supported an acquitted charge. The presumption *does* limit the trial court's sentencing discretion to the statutory penalties set by the Legislature for the convicted offenses, preventing the trial court from sentencing the defendant as if he had been convicted for the crime of which he was acquitted. Specifically, the trial court may not impose an additional concurrent or consecutive sentence for the acquitted charge and may not leave the confines of the continuum of sentences available for the convicted offenses. Accordingly, the trial court does not violate the presumption of innocence by considering conduct underlying an acquitted charge when sentencing the defendant for convicted offenses because the defendant is not being sentenced as if he had been *convicted* of the acquitted crime; it is merely a valid consideration of the manner in which the defendant committed the offenses for which he was convicted. See *Milbourn*, 435 Mich at 651.

To the extent that the majority's position implies that a sentencing court's consideration of conduct underlying an acquitted charge directly contradicts a jury's acquittal decision, there is no logical anomaly in the trial court making a factual finding that may have been rejected by the jury at trial. An acquittal means only that the jury held a reasonable doubt as to the defendant's guilt of that crime,[1] not that the underlying conduct did not occur.[2] At sentencing, the standard of proof is lower, requiring only that the facts considered by the trial court are supported by a preponderance of the evidence. Because of this lower standard of proof, the trial court can properly make a finding at sentencing that may have been rejected by the jury at trial.

Here, the trial court was statutorily empowered to sentence defendant to any term of years up to life imprisonment for defendant's conviction of being a

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[1] As stated in *Ewing (After Remand)*, 435 Mich at 452 (opinion by BRICKLEY, J.):

> Any number of reasons not related to the defendant's factual guilt or innocence may be hypothesized to explain a jury's decision to acquit. For example, a jury may acquit a factually guilty defendant because the prosecution was, for one reason or another, unable to present its best evidence, as would be the case where a strong witness died or disappeared before trial, yet sufficient evidence remained to persuade the prosecutor to proceed to trial. To take another example, it is also true, unfortunately, that a jury may acquit a factually guilty defendant because of confusion with regard to the judge's instructions.

[2] I have chosen to avoid referring to such conduct as "acquitted conduct" within this opinion because I believe that label is misleading. A jury may acquit the defendant of a criminal charge, but—absent the use of a special verdict form—the jury does not acquit the defendant of the underlying conduct. Accordingly—and although I acknowledge that the United States Supreme Court has used the term "acquitted conduct" as well—I believe that it is more precise to use the phrase "conduct underlying an acquitted charge."

felon in possession of a firearm (felon-in-possession). Although felon-in-possession is generally punishable by up to five years' imprisonment, MCL 750.224f(5), defendant's status as a fourth-offense habitual offender, MCL 769.12(1)(b), raised his maximum potential sentence to life imprisonment. The guidelines minimum sentence range for defendant's felon-in-possession conviction was calculated to be 22 to 76 months' imprisonment. But at sentencing, the trial court found by a preponderance of the evidence that defendant had, while committing felon-in-possession, caused the death of Hoshea Pruitt. On the basis of this finding regarding the manner in which defendant committed felon-in-possession, the trial court sentenced defendant to 240 to 400 months' imprisonment. This sentence was within the range of permissible sentences for felon-in-possession authorized by the Legislature in MCL 750.224f(5) and MCL 769.12(1)(b). Contrary to the majority's position, defendant was not sentenced as if he had been convicted of the crime of murder, but rather as if he had been convicted of felon-in-possession as a fourth-offense habitual offender with the trial court further determining by a preponderance of the evidence that defendant had caused a death while doing so. There is no doubt that a sentencing court may generally consider facts relevant to how the defendant committed the offense, and there is no basis in the law to distinguish this particular factual finding from all other information relevant to the manner in which defendant committed felon-in-possession.

I suspect that, in this case, the majority feels like defendant is being sentenced for an offense he was acquitted of committing because the offense for which defendant was convicted has the same maximum penalty as the offense for which defendant was acquitted.

The fact that MCL 769.12(1)(b) increases defendant's available maximum punishment for felon-in-possession to life imprisonment—the same maximum punishment available for murder—may make it seem like defendant is being sentenced for an offense for which he was acquitted.[3] But this is not an accurate observation. Consider instead a situation wherein a defendant is acquitted of murder, but convicted of second-degree home invasion. In this scenario, the recommended minimum sentence range for the particular defendant is 22 to 36 months' imprisonment. The trial court is not bound to follow this advisory range, *People v Lockridge*, 498 Mich 358, 391-392; 870 NW2d 502 (2015), but it is restricted by the statutory penalty for the convicted offense of second-degree home invasion. Second-degree home invasion may be punished by up to 15 years' imprisonment, MCL 750.110a(6), although MCL 769.34(2)(b) prohibits the trial court from imposing a minimum sentence that exceeds two-thirds of the statutory maximum sentence—as applied here, 10 years' imprisonment. In considering what sentence to impose in this 15-year continuum, the trial court is not prohibited from making factual findings regarding the manner in which defendant committed home invasion, even if those facts may have supported the acquitted charge of murder. As long as a preponderance of the evidence supports its conclusions, the trial court could find that the defendant killed a person in the course of committing home invasion and rely on this information to impose the highest sentence possible—10 to 15 years' imprisonment, as established by MCL 750.110a(6) and

[3] To the extent that some may find this troubling, the solution lies with the Legislature to narrow statutory penalties for crimes or to alter the substantial increase of statutory penalties in repeat-offender statutes like MCL 769.12.

MCL 769.34(2)(b). The presumption of innocence does not prohibit this. The presumption of innocence only prevents the trial court from sentencing the defendant as if he had been convicted of murder, which carries a maximum penalty of life imprisonment.[4] As long as the trial court imposes a sentence within the 15-year statutory maximum of second-degree home invasion whose minimum does not violate MCL 769.34(2)(b), it is inaccurate to say that the defendant was sentenced as if he had committed murder.

In sum, I disagree with the majority that the presumption of innocence prevents the trial court from considering at sentencing conduct that supported charges for which the defendant was acquitted.[5] There is a precise difference between sentencing a defendant as if he had been convicted of a crime for which he was acquitted and sentencing a defendant for a convicted offense while considering conduct that supported the

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[4] Specifically, first-degree murder "shall be punished by imprisonment in the state prison for life without eligibility for parole," MCL 750.316(1), and second-degree murder "shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same," MCL 750.317.

[5] I would also have held that the consideration of such conduct does not violate a defendant's Sixth Amendment rights, a conclusion that is consistent with the decision of every federal circuit court. See, e.g., *United States v Gobbi*, 471 F3d 302, 314 (CA 1, 2006), abrogated in part on other grounds as stated in *United States v Nagell*, 911 F3d 23, 31 n 8 (CA 1, 2018); *United States v Vaughn*, 430 F3d 518, 525-527 (CA 2, 2005); *United States v Hayward*, 177 F Appx 214, 215 (CA 3, 2006); *United States v Ashworth*, 139 F Appx 525, 527 (CA 4, 2005); *United States v Farias*, 469 F3d 393, 399-400 (CA 5, 2006); *United States v White*, 551 F3d 381, 383-384 (CA 6, 2008); *United States v Price*, 418 F3d 771, 787-788 (CA 7, 2005); *United States v High Elk*, 442 F3d 622, 626 (CA 8, 2006); *United States v Mercado*, 474 F3d 654, 655-656 (CA 9, 2007); *United States v Magallanez*, 408 F3d 672, 684-685 (CA 10, 2005); *United States v Duncan*, 400 F3d 1297, 1304-1305 (CA 11, 2005); *United States v Dorcely*, 372 US App DC 170; 454 F3d 366, 371 (2006).

acquitted charge, as this Court acknowledged nearly 30 years ago in *Ewing*. In concluding otherwise, the majority inaccurately dismisses *Ewing*'s holding as "murky at best,"[6] concluding that although Justice BOYLE's opinion provided three votes supporting the practice of considering acquitted conduct at sentencing, Justice BRICKLEY's lead opinion did not similarly bless the practice.[7]

I disagree. In *Ewing*, when sentencing the defendant for first-degree criminal sexual conduct, the trial court found that the defendant " 'ha[d] carried on a course of conduct involving attacks on young women over a periods [sic] of five years.' " *Ewing (After Remand)*, 435 Mich at 466 (opinion by BOYLE, J.). In so doing, the trial court relied on information that supported pending charges, prior convictions, and uncharged offenses against the

[6] The majority also criticizes *Ewing* on the basis that this Court has never cited it for a binding legal rule. While this is correct, I would note that the Court of Appeals *has* repeatedly done so in its published decisions. See, e.g., *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007) ("A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence."); *People v Granderson*, 212 Mich App 673, 679; 538 NW2d 471 (1995) ("A majority of the justices of our Supreme Court . . . subscribe to the view that a prior acquittal, without more, is not sufficient reason to preclude the court from taking into account the facts underlying that acquittal at sentencing."); *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994) ("A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals."); *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991), overruled on other grounds *People v Randolph*, 466 Mich 532, 586 (2002) ("A sentencing judge may also consider the facts underlying uncharged offenses, pending charges, and acquittals."). And this Court has never released an opinion or order undermining this Court's decision in *Ewing*.

[7] Justices LEVIN and CAVANAGH would not have reached the merits of the decision; Justice ARCHER would have concluded that conduct underlying acquitted charges could not be considered.

defendant that had been presented in the presentencing information report and during a *Golochowicz*[8] hearing. *Id*. at 465-467. Justice BRICKLEY, along with three other justices, agreed to remand the case to the trial court with the following instruction:

> On remand, the sentencing judge should indicate with greater specificity which facts he relied on in imposing sentence. If the judge determines that he relied on allegations against the defendant which did not result in a conviction, then the defendant must be afforded an opportunity to challenge the accuracy of those allegations. If the judge then determines that the accuracy of those facts has not been determined by a preponderance of the evidence, the defendant should be resentenced. Finally, if a resentencing is ordered, *the judge will be entitled to rely on testimony containing facts underlying an acquittal which was obtained after the original sentencing in this case, subject to the defendant's right to dispute the accuracy of that testimony.* [*Id*. at 446 (opinion by BRICKLEY, J.) (emphasis added).][9]

The order expressly permits the trial court to rely on the defendant's conduct underlying charges for which, by the time of the resentencing, the defendant had been acquitted. Moreover, Justice BRICKLEY "agree[d] with Justice BOYLE and a number of federal decisions

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[8] *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982).

[9] The majority relies on the fact that Justice BRICKLEY provided the fourth vote for the disposition of a remand to support its conclusion that Justice BRICKLEY's approach to the consideration of acquitted conduct at sentencing was not consistent with the approach of Justices BOYLE, RILEY, and GRIFFIN (the dissenting justices who would have instead reinstated the trial court's sentence). This difference in disposition does not undermine the fact that Justices BOYLE, RILEY, GRIFFIN, and BRICKLEY agreed that consideration of conduct underlying an acquitted charge is appropriate. The divergence between the dispositions concerned whether the defendant in that particular case had already received sufficient opportunity to refute the information on which the trial court based its sentence, an issue with which we are not presently faced.

that the mere fact of a prior acquittal of charges whose underlying facts are properly made known to the trial judge is not, without more, sufficient reason to preclude the judge from taking those facts into account at sentencing." *Id*. at 451.

Yet, the majority asserts that Justice BRICKLEY's opinion is "hard[] to parse." The majority specifically cites Justice BRICKLEY's statement that this Court was "not presented with the issue whether a defendant may be punished for a crime for which no conviction was obtained; this is clearly unconstitutional," *id*. at 454, for support of its argument. But the context of that statement demonstrates that Justice BRICKLEY was not reneging on his earlier assertions supporting the consideration of conduct underlying acquitted charges at sentencing. In that portion of the opinion, Justice BRICKLEY sought to establish that the opinion did not hold "that the sentencing judge may rely on the mere *fact* that the defendant was once acquitted of, and therefore had necessarily been bound over on, criminal charges." *Id*. at 453. He emphasized that the trial court in the case at hand made factual findings based on testimony from the *Golochowicz* hearing and trial rather than the fact of the charges themselves. *Id*. at 453-454. He then stated that the Court was "not presented with the issue whether a defendant may be punished for a crime for which no conviction was obtained"—referring to this concept of punishment based on the fact of pending or acquitted charges only—and immediately thereafter concluded that sentencing courts "may, in the exercise of the broad discretion conferred upon them in our sentencing scheme, consider relevant and reliable facts about offenders when selecting appropriate punishment within the legislatively established range for offenses whose commission has been proven beyond a reasonable doubt." *Id*. at 454.

Justice BRICKLEY endorsed the same distinction that I have made here: a defendant cannot be punished as if the jury had found the defendant guilty of the acquitted charge, but the trial court can consider the defendant's conduct underlying such a charge when sentencing the defendant for convicted offenses.[10] Further, given that Justice BRICKLEY's opinion clearly set forth how the trial court was to consider the defendant's conduct supporting the acquitted charges,[11] it is baf-

[10] Insofar as the majority states that I "want[] to draw [a distinction] between sentencing a defendant more harshly based on the conclusion that the defendant committed an offense of which he was acquitted and sentencing a defendant 'while considering conduct that supported the acquitted charge,' " I do not. I, in fact, agree with the majority that the trial court in this case found by a preponderance of the evidence that defendant had committed murder. My choice of phrase—"as if [defendant] . . . had caused a death" rather than "as if defendant had committed murder"—is used to emphasize that the trial court did not *convict* defendant of the criminal charge of murder. The jury found defendant guilty of felon-in-possession, and the trial court was empowered to consider conduct related to this conviction at sentencing when considering the continuum of available sentences that it could impose. The trial court's finding that defendant committed murder was not a finding that defendant was guilty of murder beyond a reasonable doubt but instead a finding regarding the manner in which defendant committed felon-in-possession.

[11] In the same section of the opinion, Justice BRICKLEY set forth the proper procedure for the trial court's consideration of conduct supporting the defendant's acquitted charges at sentencing:

> As noted above, . . . on remand the defendant should be able to test the accuracy of th[e] allegations [for which the defendant was acquitted]. . . . The defendant should not, however, be able to preclude the judge from basing his sentence on this testimony. Since the judge on remand will be aware that a prior jury declined to find the defendant guilty beyond a reasonable doubt in th[at] case . . . , he may hear argument from the parties and decide how to view this testimony in light of the acquittal. Moreover, because of the double jeopardy bar, the defendant will be unlikely to feel pressure not to effectively challenge the accuracy of the allegations underlying what will be, in the event of resentencing, a prior acquittal. [*Ewing (After Remand)*, 435 Mich at 454 (opinion by BRICKLEY, J.).]

fling to me how the majority can conclude that the rule of law from *Ewing* is "murky at best." Justice BRICKLEY and Justice BOYLE, joined by Justices RILEY and GRIFFIN, clearly supported the consideration of conduct underlying acquitted charges at sentencing, establishing a rule of law that this Court is bound to follow.[12] See *People v Feezel*, 486 Mich 184, 212; 783 NW2d 67 (2010) ("[T]his Court should respect precedent and not overrule or modify it unless there is substantial justification for doing so.").

Finally, I would also note that the majority has adopted a standard that may be problematic in application: "that due process bars sentencing courts from finding by a preponderance of the evidence that a defendant engaged in conduct of which he was acquitted." Left unexplained are the parameters of what constitutes acquitted conduct. Is acquitted conduct

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[12] Justice BRICKLEY's opinion also provides the key to an issue raised by the parties on appeal but left unaddressed by the majority: how to harmonize the ruling in *Ewing* with this Court's prior ruling in *People v Grimmett*, 388 Mich 590; 202 NW2d 278 (1972), overruled in part on other grounds by *People v White*, 390 Mich 245 (1973). In *Grimmett*, the defendant and two others robbed a Detroit grocery store; the robbery resulted in the death of the grocery store's owner and the wounding of a customer. *Id*. at 594. The defendant was found guilty of assault with intent to murder as to the customer. *Id*. at 596. At sentencing, the trial court found that the defendant " 'is certainly the same person who murdered the other grocer' "—referring to the murder charges filed, but not yet tried, against the grocery store's owner, *id*. at 608—and sentenced the defendant to life imprisonment pursuant to that finding. *Id*. at 596. This Court held that the trial court had "acted improperly in assuming defendant was guilty of the murder charge when he sentenced defendant on the assault charge" and remanded the case to the trial court for resentencing. *Id*. at 608. *Grimmett* is not inconsistent with *Ewing*, and this Court need not overrule it. *Grimmett* forbids the *assumption* of guilt based on the fact that the defendant was charged with a crime. The trial court's factual findings must instead be supported by a preponderance of the evidence—the mere fact of a charge, whether pending or acquitted, does not meet that evidentiary standard.

defined only as the exact conclusion that the defendant committed the acquitted charge? This would certainly apply to the present case, in which the trial court expressly found that defendant had committed murder despite his having been acquitted of the crime of murder. But does acquitted conduct extend beyond this ultimate conclusion to all facts that supported a charge for which a defendant was acquitted? Could the trial court here have safely found that defendant possessed a weapon and initiated a confrontation that caused Pruitt's death as long as it stopped short of the ultimate conclusion that defendant murdered Pruitt? What if it is unclear why the jury acquitted the defendant of the particular crime? For example, when a defendant is acquitted of a charge of felon-in-possession, it is possible that the jury could not find beyond a reasonable doubt that the defendant possessed a weapon or that he was a felon or both. If there is no indication as to which element the jury found lacking, is the sentencing court prohibited from considering the facts underlying either element?

The majority's holding may be difficult to apply, and it directly contradicts existing precedent.[13] The pre-

[13] Federal circuit courts have repeatedly held that the consideration of conduct underlying an acquitted charge does not violate constitutional authority, relying on the United States Supreme Court cases *McMillan* and *United States v Watts*, 519 US 148; 117 S Ct 633; 136 L Ed 2d 554 (1997), to support their conclusions. See, e.g., *United States v Swartz*, 758 F Appx 108, 111-112 (CA 2, 2018); *White*, 551 F3d 381, 384-385; *United States v Horne*, 474 F3d 1004, 1006 (CA 7, 2007); *United States v Jamerson*, 674 F Appx 696, 699 (CA 9, 2017); *United States v Maddox*, 803 F3d 1215, 1220-1222 (CA 11, 2015); *United States v Settles*, 382 US App DC 7, 10; 530 F3d 920 (2008).

In *McMillan*, 477 US at 85-86, the Court held that the Due Process Clause's requirement of proof beyond a reasonable doubt extends only to elements identified by the state legislature as an element of the offense and not to sentencing factors. Though the majority is correct that

sumption of innocence does not prohibit the trial court from considering conduct underlying acquitted charges when sentencing a defendant for convicted offenses as

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McMillan did not involve conduct underlying an acquitted charge, its conclusion that the finding of sentencing factors by a preponderance of the evidence does not violate due process is certainly relevant to the issue at hand.

Also relevant is the Court's holding in *Watts*, 519 US at 157, that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." The majority relies on the Court's statements regarding *Watts* in *United States v Booker*, 543 US 220, 240 n 4; 125 S Ct 738; 160 L Ed 2d 621 (2005), to declare *Watts* unhelpful to the issue at hand. In *Booker*, in which the Court was presented with a Sixth Amendment issue, the Court reasoned that *Watts* was not applicable *to the Sixth Amendment issue* because *Watts* "presented a very narrow question regarding the interaction of the Guidelines with the Double Jeopardy Clause . . . ." *Id*. But *Booker* did not overrule *Watts* and did not indicate that *Watts* was irrelevant to a due-process challenge. (The *Watts* decision not only rejected the defendants' double-jeopardy challenge to the use of facts underlying acquitted charges at sentencing, but also recognized the Court's earlier holdings "that application of the preponderance standard at sentencing generally satisfies due process" in order to conclude that a sentencing court may consider conduct underlying acquitted charges. *Watts*, 519 US at 156-157.) And, post-*Booker*, federal circuit courts have cited *Watts* in holding that due process does not prevent the sentencing court from considering conduct underlying acquitted charges. See, e.g., *Swartz*, 758 F Appx at 111-112; *Settles*, 382 US App DC at 10.

Even if the majority is correct in its additional criticism of *McMillan* and *Watts*, these cases have not been overruled, and this Court is bound to follow them (although a plurality opinion of the United States Supreme Court has recently stated that *McMillan* was overruled by *Alleyne v United States*, 570 US 99; 133 S Ct 2151; 186 L Ed 2d 314 (2013), see *United States v Haymond*, 588 US ___, ___; 139 S Ct 2369, 2378; 204 L Ed 2d 897 (2019) (opinion by Gorsuch, J.), *Alleyne* affected what is considered an element of a crime and what is considered a sentencing factor; it did not undermine *McMillan*'s conclusion that sentencing factors may be proven by a preponderance of the evidence). Further, even if *McMillan* and *Watts* could be effectively distinguished from the case at hand without contradicting United States Supreme Court precedent, the majority's conclusion still directly contradicts this Court's decision in *Ewing*.

long as the conduct is relevant and supported by a preponderance of the evidence. The contrary conclusion is belied by the majority's failure to cite any supporting precedent for its conclusion. Accordingly, I dissent from this Court's reversal of the judgment of the Court of Appeals. I would have affirmed the holding of the Court of Appeals that the trial court did not err by considering conduct underlying defendant's acquitted charge but reversed insofar as the Court of Appeals remanded this case for a *Crosby*[14] hearing. Pursuant to this Court's decision in *People v Steanhouse*, 500 Mich 453, 460-461; 902 NW2d 327 (2017), I would have instead remanded this case to the Court of Appeals so that it could determine whether the trial court abused its discretion by violating the principle of proportionality.

MARKMAN and ZAHRA, JJ., concurred with CLEMENT, J.

[14] *United States v Crosby*, 397 F3d 103 (CA 2, 2005).

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition June 5, 2019:

PEOPLE v ABBOTT, No. 157762; Court of Appeals No. 336332. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals to address whether Offense Variable 12 (OV 12), MCL 777.42, was properly scored. In making this determination, the Court of Appeals shall consider whether the defendant committed three or more felonious criminal acts within 24 hours of the sentencing offense and whether the predicate offenses for the defendant's conviction of conducting a criminal enterprise constitute "the sentencing offense" or can be considered as contemporaneous felonious criminal acts for the purpose of scoring OV 12. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

ALGHALI v HANOVER INSURANCE COMPANY, No. 158633; Court of Appeals No. 343359. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v MARK CARTER, No. 158770; Court of Appeals No. 345504. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's application for a delayed appeal as having been filed within the deadline set forth in MCR 7.205(G) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(E)(2).

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 5, 2019:

In re ROBERT E. WHITTON REVOCABLE TRUST, No. 158408; Court of Appeals No. 337828. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Oakland Probate Court had jurisdiction to entertain the request for declaratory relief in light of *McLeod v McLeod*, 365 Mich 25 (1961). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Probate and Estate Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of this issue may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 5, 2019:

PEOPLE v WILLIE ANDERSON, No. 156906; Court of Appeals No. 331466.

PEOPLE v SOURANDER, No. 157664; Court of Appeals No. 332091.

PEOPLE v ZERBE, Nos. 158292 and 158293; Court of Appeals Nos. 343779 and 343780.

OWENS v MANTHA MANAGEMENT GROUP, INC, No. 158454; Court of Appeals No. 338392.

PEOPLE v SPEARS, No. 158828; Court of Appeals No. 344921.

PIKE v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 158929; Court of Appeals No. 336455.

HOOKER v MOORE, No. 158983; reported below: 326 Mich App 552.

PEOPLE v FRANK, No. 159061; Court of Appeals No. 336243.

Summary Disposition June 6, 2019:

In re MGR, MINOR, Nos. 157821 and 157822; reported below: 323 Mich App 279. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the February 27, 2018 judgment of the Court of Appeals, which held that petitioners' appeal was moot because of an order of filiation in a related paternity case, *Brown v Ross* (Docket No. 157997). We also vacate the Oakland Circuit Court's determination that the putative father was a "do something" father under Section 39(2) of the Michigan Adoption Code, MCL 710.21 *et seq.*, and we remand this case to the Family Division of the Oakland Circuit Court for further proceedings.

The Court of Appeals erred in holding that petitioners' appeal of the September 14, 2017 order was moot because of the subsequently entered order of filiation in the related paternity case, *Brown v Ross* (Docket No. 157997). MGR was born on June 5, 2016. On June 9, 2016, petitioners filed the petition for adoption. Respondent-father filed the paternity action on July 15, 2016. "All proceedings under [the Michigan Adoption Code] shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition." MCL 710.25(1). "Although proceedings under the Adoption Code should, in general, take precedence over proceedings under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case

basis." *In re MKK*, 286 Mich App 546, 555 (2009), citing MCL 710.25(2). Respondent-father did not request that the trial court stay the adoption proceedings in favor of the paternity proceedings pursuant to MCL 710.25(2), and the facts did not justify a stay in any event.

Instead, over petitioners' objection that there was no good cause, the trial court, sua sponte, entered an order on April 17, 2017, staying the adoption proceedings until the paternity action was resolved. The Court of Appeals, in orders entered on May 31, 2017, and July 25, 2017, directed the trial court to commence and conclude the Section 39 hearing, see MCL 710.39. Respondent-father did not seek further appellate review of either order. The trial court held the Section 39 hearing on August 7 and 8, 2017, but did not issue a decision. On August 29, 2017, the Court of Appeals ordered the trial court to issue a decision with respect to the Section 39 hearing. Respondent-father did not seek further appellate review of the Court of Appeals order. The trial court issued its Section 39 opinion on September 14, 2017. Respondent-father never requested the court to stay the adoption proceedings under MCL 710.25(2) for good cause relating to his separate paternity proceeding, and the facts did not justify a stay in any event. The trial court entered an order of filiation on October 4, 2017—*after* it had issued its Section 39 determination and *after* petitioners had appealed that decision to the Court of Appeals.

The birth mother, on the other hand, twice asked the trial court to stay the paternity action. On June 7, 2017, the birth mother moved for stay, and the circuit court denied it on June 14, 2017. Following petitioners' appeal of the trial court's Section 39 determination, the birth mother again moved to stay the paternity action pending that appeal. On October 4, 2017, the trial court denied the motion and entered the order of filiation the same day.

The trial court's denial of the birth mother's motions was an abuse of discretion given the unique circumstances of this case. The trial court had the authority to stay the paternity action in favor of the adoption proceedings: absent good cause, adoption proceedings should be given priority. MCL 710.21a and MCL 710.25(2). And a trial court has the inherent authority to control the progress of a case. See MCR 1.105; MCR 2.401; see also MCR 3.217(A) ("Procedure in actions under the Paternity Act, MCL 722.711 *et seq.*, is governed by the rules applicable to other civil actions except as otherwise provided by this rule and the act.").

Because petitioners had a right to appeal the Section 39 determination and because good cause to delay those proceedings had not been alleged, the trial court should have stayed the paternity proceedings pursuant to MCR 7.209(E)(2)(b) so that the appellate court could review that decision.[1] The order of filiation was therefore erroneously entered

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[1] We agree with Justice VIVIANO that "*In re MKK* represents an admirable effort by the Court of Appeals to balance the competing rights, interests and responsibilities of the parties when determining whether to proceed with proceedings under the Adoption Code or a case filed under the Paternity Act." And we also agree that the Legislature's

on October 4, 2017, and is vacated in our June 6, 2019 order in *Brown v Ross* (Docket No. 157997). Accordingly, the order of filiation did not moot appellate review of the trial court's September 14, 2017 Section 39 decision.

Further, we conclude that the trial court abused its discretion in determining that the putative father was a "do something" father under Section 39(2) of the Michigan Adoption Code, MCL 710.39(2). To qualify as a "do something" father, a putative father must demonstrate that he has either (1) established a custodial relationship with the child or (2) provided "substantial and regular support or care in accordance with [his] ability to provide support or care for the mother during her pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him[.]" MCL 710.39(2). Respondent-father failed to satisfy either condition. After the birth mother discovered she was pregnant in October 2015, she and respondent-father lived for a matter of weeks with respondent-father's grandmother. In November 2015, the pair rented an apartment together, paying their $700 security deposit with funds from the birth mother's sister. The birth mother lived in the apartment from November 2015 until February 2016. Until the month before the birth mother moved out of the apartment—in her fourth month of pregnancy—the parties shared household responsibilities and expenses for rent, food, and utilities. Respondent-father provided financial assistance one time in the amount of $200 to partially repay his share of the security deposit. Respondent-father was employed full-time until the time of the child's birth, when he voluntarily terminated his employment. Respondent-father took the birth mother to Planned Parenthood once for a pregnancy test, but did not otherwise pay for or participate in her prenatal, delivery, or postnatal medical care.

After the child was born on June 5, 2016, respondent-father received notice of the hearing to determine his rights as a putative father on July 27, 2016, making the relevant statutory 90-day time period April 28, 2016 to July 27, 2016. MCL 710.39(2). Respondent-father testified that he set up a crowdfunding webpage in October or November 2016 to pay for his legal fees and expenses, outside of the statutory 90-day window. But he never paid any of the money raised to the child or the child's caretakers. Respondent-father also claimed he purchased several items for the child, including diapers and clothing, using money from odd jobs or Christmas gifts, but he never attempted to get those items to the child through either the adoption agency or the birth mother. The facts did not establish that respondent-father provided substantial and regular support or care either to the birth mother during her pregnancy or to the birth mother or the child after the child's birth during the relevant 90-day period. Respondent-father's support was insubstantial and irregular.

Further, this is not a case in which respondent-father lacked the ability to support the birth mother or the child; the record shows that

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input on this question would be helpful. But we respectfully disagree that this order creates any per se rule; our decision today is based in the very specific facts of this case alone.

respondent-father was employed throughout the birth mother's pregnancy and had the means to provide financial support. The trial court abused its discretion when it ruled that respondent-father was entitled to the protections of MCL 710.39(2) because the record does not support a finding that he provided substantial and regular support or care for the birth mother during her pregnancy or the birth mother or child during the 90 days before he received service of the notice of the hearing, despite having the ability to do so. We therefore vacate the trial court's September 14, 2017 order, and we remand this case to the Family Division of the Oakland Circuit Court to conduct an analysis under Section 39(1) of the Michigan Adoption Code, MCL 710.39(1).

In light of our resolution of these issues, we decline to reach petitioners' remaining issue. We do not retain jurisdiction.

MARKMAN, J. (*concurring*). I concur in the majority's decision to reverse the judgment of the Court of Appeals, which held that petitioners' appeal in this adoption case is moot because of an order of filiation in a related paternity case, *Brown v Ross* (Docket No. 157997), vacate the trial court's determination that the putative father was a "do something" father under MCL 710.39(2), and remand to the trial court to conduct an analysis under MCL 710.39(1). That is, I agree with the majority that the trial court in the paternity case abused its discretion by denying the birth mother's motions to stay the paternity case for the adoption case and that, as a result, the order of filiation was erroneously entered before the adoption case was completed. Accordingly, the majority correctly vacates the trial court's order of filiation in the paternity case and holds that petitioners' appeal in this adoption case is not moot. I also agree with the majority that the trial court abused its discretion in determining that the putative father was a "do something" father under MCL 710.39(2), for the reasons explained by the majority.

However, I write separately because I disagree with the majority's statement that " '[a]lthough proceedings under the Adoption Code should, in general, take precedence over proceedings under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis.' *In re MKK*, 286 Mich App 546, 555 (2009), citing MCL 710.25(2)." Because I believe, for the reasons explained below, that proceedings under the Adoption Code must take priority over proceedings filed under the Paternity Act and there is no "good cause" exception to that requirement, I believe that *In re MKK* was wrongly decided and thus would not rely on it as the majority does. That is, I would not, as does the majority, focus on whether respondent-father requested the trial court to stay the adoption case for the paternity case and whether the facts warranted such a stay. Instead, I would simply hold, in accordance with the Legislature, that an adoption case must take priority over a paternity case and thus that the trial court abused its discretion by not staying the paternity case for the adoption case. The majority states, "We agree with Justice Viviano that '*In re MKK* represents an admirable effort by the Court of Appeals to balance the competing rights, interests, and responsibilities of the parties when determining whether to proceed with proceedings under the Adoption Code or a case

filed under the Paternity Act.' " However "admirable" this effort may or may not be, it would have been far more "admirable," in my judgment, had the Court of Appeals, and now this Court, simply abided by the mandate of the Legislature that adoption cases be given the "highest priority." It is not for this, or any other, Court to "balance the competing rights, interests, and responsibilities" of the parties where that has already been done by the Legislature.

MCL 710.25(1) provides, "All proceedings under [the Adoption Code] shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition."[1] Pursuant to this provision, an adoption case should never be stayed for a paternity case because an adoption case must be given the "highest priority." MCL 710.25(2) states that "[a]n adjournment or continuance of a proceeding under [the Adoption Code] shall not be granted without a showing of good cause." I believe that *In re MKK*, and now this Court, erroneously interpret this provision to signify that, upon a showing of "good cause," an adoption case *can* be stayed for a paternity case. Instead, I believe the more reasonable interpretation of these provisions is that while an adoption case can, upon a showing of good cause, be adjourned or postponed, an adoption case must nonetheless take priority over a paternity case. In other words, MCL 710.25(2) is not an exception to the requirement in MCL 710.25(1) that an adoption case must be given the "highest priority." There is no instance in which another case should be accorded higher priority than an adoption case, and *In re MKK* read language into MCL 710.25(2) that is simply not there. Stating, as MCL 710.25(2) does, that an adoption case cannot be adjourned without a showing of good cause is not the equivalent of stating, as *In re MKK* does, that upon a showing of good cause, a paternity case may be given higher priority than an adoption case. MCL 710.25(1) provides that an adoption case shall be given the "highest priority," and there are no exceptions to that requirement. While MCL 710.25(2) does allow an adoption case to be adjourned, upon a showing of good cause, it does not allow another case to take priority over that case. Rather, read in context, I believe MCL 710.25(2) allows an adoption case to be adjourned where, for example, a witness, party, or attorney is unavailable, but it still does not allow a paternity action to be accorded priority. Holding to the contrary allows the express direction of MCL 710.25(1) to be rendered null and void by MCL 710.25(2), despite that: (a) there is no "good cause" exception contained in MCL 710.25(1), (b) there is no exception of any sort in MCL 710.25(1) to the express dictate set forth in that provision, (c) there is no reference within either provision to the disputed aspect of the other provision, and (d) stating, as MCL 710.25(2) does, that an adjournment of an adoption case shall not be granted without a showing of "good cause" would be a remarkably

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[1] In addition, MCL 710.21a(b) provides that "[i]f conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount."

oblique way of overcoming the explicit dictate of MCL 710.25(1) to consider adoption cases to have the "highest priority."[2]

Furthermore, I believe that this interpretation of § 25 of the Adoption Code is more generally consistent with the Adoption Code as a whole. As discussed, the Legislature clearly expressed its intention in the Adoption Code that adoption cases, not paternity cases, proceed first, and it created no exception to this rule, in particular for paternity cases. MCL 710.25(1). Instead, the Adoption Code provides detailed procedures for addressing the rights of putative fathers contesting an adoption. To begin with, the Adoption Code provides that the court shall determine the identity of the father by way of an affidavit from the mother, not by performing a DNA test as is done under the Paternity Act. MCL 710.36(6).[3] Next, under the Adoption Code, the rights of putative fathers are determined not by performing a DNA test as they are under the Paternity Act, but, instead, by the nature of the relationship between the putative father and the child and the level of care and support provided by the putative father to the mother and child. See MCL 710.39.[4] That is, the Adoption Code sets forth differing standards for terminating a putative father's parental rights depending on the

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[2] While I agree with the dissent that "[t]here are some reasons to question whether the Court of Appeals' analysis in *In re MKK* is firmly rooted in the plain language of the statutes it relies upon," and while perhaps "those statutes do not explicitly address whether an adoption proceeding should be stayed in favor of a competing paternity action," I believe the requirement that an adoption case be accorded the "highest priority" rather clearly expresses the Legislature's intention to not have adoption cases stayed for paternity cases, but to instead have paternity cases stayed for adoption cases, to avoid the very situation that resulted in this case in which the lower courts allowed a paternity case to take priority over an adoption case: namely, that the adoption case was rendered moot because of the order of filiation in the paternity case.

[3] MCL 710.36(6) provides:

> The court shall receive evidence as to the identity of the father of the child. In lieu of the mother's live testimony, the court shall receive an affidavit or a verified written declaration from the mother as evidence of the identity and whereabouts of the child's father. If the court determines that the affidavit or verified written declaration is insufficient, the court shall allow amendment of the affidavit or verified written declaration. If the court determines that the amendment of the affidavit or verified written declaration is insufficient, the court may receive live testimony from the mother. Based upon the evidence received, the court shall enter a finding identifying the father or declaring that the identity of the father cannot be determined.

[4] MCL 710.39 provides, in pertinent part:

nature of the relationship between the putative father and the child and the level of care and support provided by the putative father to the mother and child. *Id*. The Adoption Code also provides a means both of terminating the putative father's rights if he fails to satisfy the applicable standards and transforming him into a legal father with custody rights if he succeeds in meeting these standards. *Id*. Had the Legislature intended that the Paternity Act be used to thwart or subordinate adoption proceedings, it would not have created these detailed procedures. It would have simply called for the putative father to take a DNA test and determine his rights exclusively on the basis of those results as is done under the Paternity Act.[5]

If an adoption case can, in fact, be stayed for a paternity case, all these provisions within the Adoption Code will be undermined. An adoption case will not be given the "highest priority" contrary to MCL 710.25(1). The identity of the father will be determined by a DNA test rather than by an affidavit from the mother contrary to MCL 710.36(6).

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(1) If the putative father does not come within the provisions of subsection (2), and if the putative father appears at the hearing and requests custody of the child, the court shall inquire into his fitness and his ability to properly care for the child and shall determine whether the best interests of the child will be served by granting custody to him. If the court finds that it would not be in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child.

(2) If the putative father has established a custodial relationship with the child or has provided substantial and regular support or care in accordance with the putative father's ability to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA.

* * *

(5) If the mother's parental rights are terminated under this chapter or other law and are not restored under section 62 of this chapter and if the court awards custody of a child born out of wedlock to the putative father, the court shall enter an order granting custody to the putative father and legitimating the child for all purposes.

[5] Moreover, the Adoption Code provides that a person who files a notice of intention to claim paternity is entitled to notice of adoption proceedings. MCL 710.33(3). It is noteworthy that this is *all* that it provides; it does not provide that the adoption case should be stayed for the paternity case. And nothing within the Paternity Act suggests anything to the contrary.

The rights of putative fathers will also be determined by a DNA test rather than by the nature of the relationship between the putative father and the child and the level of care and support provided by the putative father to the mother and child, all contrary to MCL 710.39. Finally, adoption cases involving putative fathers will not be decided on a consistent basis because some will be resolved under the Adoption Code and others will be resolved under the Paternity Act, depending on whether the trial court finds "good cause" to stay the adoption case for the paternity case.

My interpretation is also more consistent with the fundamental purposes of the Adoption Code and the Paternity Act. While the purposes of the Adoption Code include "[t]o provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and [to] protect the rights of all parties concerned," MCL 710.21a(b), a purpose of the Paternity Act is "to confer upon circuit courts jurisdiction over proceedings to compel and provide support of children born out of wedlock," 1956 PA 205, title. That is, given that the purpose of the Adoption Code is to protect the rights of *all* those involved in an adoption case, while the purpose of the Paternity Act is to compel fathers of children born out of wedlock to pay child support, it makes considerable sense that a putative father's rights in an adoption case would be determined pursuant to the Adoption Code rather than the Paternity Act.

Because I do not believe *In re MKK* communicates what the Legislature intended, as best evidenced by the plain and straightforward language of the Adoption Code that adoption cases be given the "highest priority," I would overrule *In re MKK* and hold that adoption cases are to be given the "highest priority" and that there is no "good cause" exception to this requirement, in which the discretion of the judge replaces the judgment of the Legislature.

ZAHRA, J., joins the statement of MARKMAN, J.

VIVIANO, J. (*dissenting*). The majority concludes that the trial court erred by not staying the putative father's paternity action pending resolution of the adoption proceedings and by concluding that the putative father (Allen Brown) was a "do-something" father under MCL 710.39(2). I disagree with both conclusions and, therefore, respectfully dissent.

This case requires us to consider the interplay between two separate laws: the Michigan Adoption Code, MCL 710.21 *et seq*., and the Paternity Act, MCL 722.711 *et seq*. As stated by the majority, this case involves a petition for adoption, filed June 9, 2016, and a competing paternity action, filed July 15, 2016. Petitioners moved on three different occasions for a stay of the paternity action pending resolution of the adoption proceedings, once in Macomb County and twice after venue was transferred to Oakland County. The trial court denied each of these motions. On April 17, 2017, the trial court sua sponte entered an order staying the adoption proceedings. Petitioners appealed this order to the Court of Appeals and filed a motion for reconsideration in the trial court. On May 17, 2017, the trial court issued an opinion explaining its decision. The trial court relied upon the Court of Appeals decision in *In re MKK*, 286 Mich App 546 (2009), and explained that "[w]here contem-

poraneous actions are filed under the adoption code and paternity act, the putative father is entitled to have the adoption proceedings stayed pending resolution of the paternity action if he can establish good cause to do so . . . ." The court then proceeded to consider the facts of the case and concluded that "Mr. Brown's actions establish good cause." Thus, the trial court denied petitioners' motion for reconsideration of the stay.

On May 31, 2017, the Court of Appeals entered an order denying petitioners' motion for peremptory reversal. Puzzlingly, however, without analyzing the trial court's good-cause analysis or explicitly reversing the stay order, the Court of Appeals also ordered the trial court to "schedule a hearing pursuant to MCL 710.39 of the Adoption Code forthwith." On September 14, 2017, the trial court issued an opinion and order holding that Brown was a "do-something" father for purposes of MCL 710.39(2) and, therefore, declined to terminate Brown's parental rights. Petitioners appealed this determination to the Court of Appeals, which consolidated this appeal with the yet-pending appeal challenging the stay of the adoption proceedings. Subsequently, on October 4, 2017, the trial court entered an order of filiation in Brown's paternity action.

The Court of Appeals, in a published opinion, dismissed both appeals as moot. *In re MGR*, 323 Mich App 279 (2018). Regarding the appeal from the trial court's order staying the adoption proceedings, the Court of Appeals explained that the appeal was moot in light of the fact that the § 39 hearing had concluded. *Id*. at 284; *id*. at 292-294 (O'BRIEN, J., concurring in part and dissenting in part). Regarding the appeal from the trial court's § 39 determination, the Court of Appeals majority concluded that, in light of the order of filiation in the paternity action, Brown was a legal father and, accordingly, his rights could not be terminated pursuant to § 39. *Id*. at 284-286 (opinion of the court). Thus, because the Court of Appeals could not grant relief under § 39, it dismissed petitioners' appeal as moot. *Id*. at 288. Petitioners have appealed this decision to this Court.

The majority reverses the Court of Appeals' mootness holding because it concludes that the order of filiation should never have been entered in the paternity case. Relying on §§ 21a and 25 of the Adoption Code, as well as the trial court's "inherent authority to control the progress of a case," the majority holds that the trial court abused its discretion in denying the birth mother's motions to stay the paternity action in favor of the adoption proceeding.[1] For the reasons set forth below, I find this analysis problematic.

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[1] MCL 710.21a sets forth the "general purposes" of the Adoption Code, including, among other things:

> (b) To provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned. If conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount.

In *In re MKK*, 286 Mich App at 555, the Court of Appeals addressed "whether the Adoption Code or the Paternity Act takes precedence when contemporaneous actions have been filed under each." In that case, the putative father objected to the planned adoption and filed a notice of intent to claim paternity before the birth of the child. See MCL 710.33. And, a few weeks after the child was born, he filed his paternity action. The putative father filed a motion to stay the adoption proceedings pending the outcome of his paternity action and, at the hearing on his motion, presented the results of the DNA testing, which showed a 99.99% probability that he was the child's biological father. The trial court denied the motion to stay and proceeded with a hearing to determine the putative father's rights under MCL 710.39 of the Adoption Code.

On appeal from the trial court's application of the Adoption Code and decision to stay his paternity action in favor of the adoption proceedings, the Court of Appeals noted that "adoption proceedings must be completed as quickly as possible and, in general, be given priority on the court's docket." *In re MKK*, 286 Mich App at 562, citing MCL 710.21a(c) and (d); MCL 710.25(1). But, relying on the "good cause" exception contained in MCL 710.25(2), the Court of Appeals recognized that

> there may be circumstances in which a putative father makes a showing of good cause to stay adoption proceedings in favor of a paternity action. For example, in cases such as this, where there is no doubt that respondent is the biological father, he has filed a paternity action without unreasonable delay, and there is no direct evidence that he filed the action simply to thwart the adoption proceedings, there is good cause for the court to stay the adoption proceedings and determine whether the putative father is the legal father, with all the attendant rights and responsibilities of that status. [*Id.*]

Thus, the Court of Appeals held that "[a]lthough proceedings under the Adoption Code should, in general, take precedence over proceedings

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> (c) To provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time.
>
> (d) To achieve permanency and stability for adoptees as quickly as possible.

MCL 710.25 provides:

> (1) All proceedings under this chapter shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition.
>
> (2) An adjournment or continuance of a proceeding under this chapter shall not be granted without a showing of good cause.

under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis." *Id*. at 555.

I believe that *In re MKK* represents an admirable effort by the Court of Appeals to balance the competing rights, interests, and responsibilities of the parties when determining whether to go forward with proceedings under the Adoption Code or a case filed under the Paternity Act.[2] The majority does not quarrel with the *In re MKK* framework

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[2] There are some reasons to question whether the Court of Appeals' analysis in *In re MKK* is firmly rooted in the plain language of the statutes it relies upon—for one thing, those statutes do not explicitly address whether an adoption proceeding should be stayed in favor of a competing paternity action. For this same reason, I question the concurrence's conclusion that the statute clearly reflects a legislative mandate that an adoption case must always take priority over a paternity case. As noted above, MCL 710.25(1) provides that "[a]ll proceedings under this chapter shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition." Contrary to the concurrence's claim that it is "clearly expressed" and "plain and straightforward," the proviso that adoption proceedings "shall be considered to have the highest priority" is opaque at best. Despite the concurrence's attempt to recast this provision, the Legislature has not instructed that adoption proceedings shall be "given" or "accorded" or "must take" the highest priority, only that they "shall be considered to have" it. The concurrence's rewording of this provision does not help us understand the plain meaning of the words actually chosen by the Legislature. It is also unclear what is meant by the modifier "highest"—the word "priority" is relevantly defined as "in law, a precedence or preference in claims, etc.; as, certain debts are paid in *priority* to others." *Webster's New Twentieth Century Dictionary Unabridged* (2d Ed), p 1431. If, as the concurrence suggests, an adoption proceeding must always take precedence over a competing paternity action, what does it mean to take the "highest" precedence?

And what, precisely, does it mean for an adoption case to have the "highest priority"? Does "highest priority" refer to all the cases competing for the court's time and attention? Does it mean that no other case can proceed at all until the adoption proceedings are completed? Or does "highest priority" only refer to paternity actions or other cases on the court's docket involving the same parties? What if the paternity action is filed in a different court, or in the same court but is assigned to a different judge?

Moreover, while it is hard to understand what this phrase means, a contextual reading of the statute makes it clear that it cannot bear the

generally, as it notes, but, in my view, it places too much emphasis on which party moved to stay which proceeding. Although I agree with the

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freight that the concurrence would place on it. If adoption proceedings must always be given precedence, what work is left for the second phrase in MCL 710.25, which provides that adoption proceedings "shall be advanced on the court docket so as to provide for their earliest practicable disposition"? The concurrence's reading would render this phrase surplusage, an outcome courts should strive to avoid. See *People v Pinkney*, 501 Mich 259, 282 (2018) ("[A]s a general rule, we must give effect to every word, phrase, and clause and avoid an interpretation that would render any part of the statute surplusage or nugatory.") (quotation marks and citation omitted). In addition, what happens when an adjournment or continuance is granted under MCL 710.25(2)? Do all other matters on the court's docket grind to a halt so that the adoption case can continue to be given precedence? Or just those cases, like a paternity action, that may potentially interfere with the adoption proceeding? Neither the plain language of the statute nor its contexts provides the necessary frame of reference to help us answer these questions.

If the Legislature wished to mandate that the filing of an adoption case would negate a competing paternity action, it easily could have done so explicitly. The Legislature was aware that certain actions taken in an adoption case could have an impact on a paternity case. See, e.g., MCL 710.33 (stating that notice of intent to claim paternity "is admissible in a paternity proceeding under Act No. 205 of the Public Acts of 1956, as amended, being sections 722.711 to 722.730 of the Michigan Compiled Laws, and shall create a rebuttable presumption as to the paternity of that child for purposes of that act"). And, if it wished to alter the substantive rights of the parties in the manner the concurrence has suggested, meddling with the trial court's docket is a strange way to accomplish that goal. A more direct way would be to enact a law providing that once an adoption proceeding is filed, parental rights for the child may only be determined in accordance with the relevant provisions of the Adoption Code. Of course, such language is conspicuously absent from section 25(1).

Unlike the concurrence's all-or-nothing approach, the Court of Appeals' approach *In re MKK* at least has the virtue of attempting to harmonize these two potentially overlapping and conflicting acts by giving effect to each to the extent practicable. There may be policy reasons why it might be better to resolve all such disputes under the Adoption Code or, alternatively, why it might be better to determine a father's rights under the Paternity Act, at least when such an action is timely filed and diligently prosecuted. But, until the Legislature provides more guidance in this difficult area of the law, I am reluctant to read this opaque provision as calling upon us to negate an entire

majority that the putative father has the burden of establishing good cause, the majority seems to go further and require that the putative father file a motion to stay the adoption proceeding that specifically alleges good cause. However, I believe this requirement elevates form over substance since, as the majority's order acknowledges, good cause was at issue each time a stay of the paternity action was sought. Since the very same issue is implicated whether one of the parties is seeking to stay the paternity action or another party is seeking to stay the adoption proceeding, I would not require the putative father to file a separate motion to stay the adoption proceeding that specifically alleges good cause in order to preserve the issue.

In short, unlike the majority, I can think of no logical reason that application of this framework should depend on which party was seeking a stay of which action, or whether a motion to stay was filed at all. Nor do I believe *In re MKK* is distinguishable merely because here, the adoption petition was filed a few weeks before the paternity action.[3] Until the Legislature provides more guidance, I believe the *In re MKK* framework should be used by the trial court to determine whether to allow a paternity action to reach its natural conclusion before a contemporaneously filed adoption proceeding, regardless of which action was filed first, and regardless of which party filed a motion to stay or whether, like here, the stay is entered sua sponte by the trial court.[4]

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act—instead, I believe the more restrained approach is to view the "highest priority" language as aspirational, in accord with the general purposes of the Adoption Code stated elsewhere. See MCL 710.21a(c) (providing that one of the general purposes of the Adoption Code is "[t]o provide prompt legal proceedings to assure that the adoptee is free for adoptive placement at the earliest possible time").

[3] I agree that this should not be a " 'race to the courthouse,' where a paternity action takes precedence over an adoption proceeding [or vice versa] merely because the paternity action was filed first; rather, the timing of a paternity claim is but one factor to be considered in determining whether there is good cause under MCL 710.25(2) . . . ." *Id.* at 562.

[4] The majority, by contrast, appears to create a per se rule that, unless a putative father files a motion to stay the adoption proceeding, a trial court must always stay the paternity action in favor of a competing adoption proceeding. The majority gives several reasons for its new rule: (1) "[t]he trial court had the authority to stay the paternity action in favor of the adoption proceedings," (2) "absent good cause, adoption proceedings should be given priority, MCL 710.21a and MCL 710.25(1)," (3) "a trial court has the inherent authority to control the progress of a case," and (4) "petitioners had a right to appeal the . . . determination" made under MCL 710.39, meaning that "the trial court should have stayed the paternity proceedings pursuant to MCR 7.209(E)(2)(b) . . . ." As to the first and third reasons, simply acknowledging that the court had the authority

Accordingly, in this case, I believe the trial court was correct to apply the *In re MKK* good-cause analysis to determine the priority of the adoption proceedings and the paternity action.[5] Moreover, I believe the trial court did not abuse its discretion in finding that Brown's actions demonstrated good cause. In support of its finding of good cause, the trial court noted the following facts, which are not in serious dispute:

(1) "It is undisputed that Mr. Brown and Ms. Ross had a relationship during which time, in approximately October of 2015, [MGR] was conceived." Thus, here, like in *In re MKK*, there was little doubt that

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to stay the paternity proceeding does not explain why the trial court abused its discretion in not doing so. As to the second reason, while MCL 710.25(1) establishes the general principle that adoption proceedings "shall be considered to have the highest priority," the statute does not require that all other cases in general—or a paternity action between the same parties in particular—be stayed until the adoption proceedings are resolved. And, as noted above, MCL 710.25(2) has been interpreted as providing that the adoption proceedings may be stayed on a showing of good cause. Finally, as to the fourth reason given by the majority, MCR 7.209(E)(2)(b) only provides that "[a]n appeal does not stay execution" of a trial court's order unless "[t]he trial court grants a stay . . . as justice requires or as otherwise provided by statute . . . ." Here again, the fact that the trial court has the authority to stay a case does not make it an abuse of discretion for the trial court not to do so. Moreover, MCR 7.209(E)(2)(b) authorizes a trial court to stay the execution of the order appealed from; it does not speak to the authority or requirement of the court to stay one proceeding (i.e., the paternity action) pending the appeal of a separate proceeding (i.e., the adoption proceeding). In my view, the majority has failed to provide adequate support for its rule requiring—at least in the absence of a motion by the putative father to stay the adoption proceeding—that a paternity action must be stayed in favor a competing adoption proceeding.

[5] I agree with the Court of Appeals majority and dissent that petitioners' appeal from the trial court's order staying the adoption proceedings is moot: because the trial court completed the § 39 hearing following the Court of Appeals' order, the question of whether the trial court initially erred in staying the adoption proceedings is moot. However, as recognized by the majority in this Court, the question of whether the trial court erred in denying the motions to stay the paternity action is still relevant because, if the paternity action had been stayed, then the § 39 determination would not be moot. As I have explained above, I believe that the question of whether the trial court should have stayed the paternity action is a question of good cause. Thus, I believe that trial court's good-cause analysis, although made in the context of its sua sponte decision to stay the adoption proceeding, is still relevant to our analysis of petitioners' appeal from the § 39 determination.

Brown was the biological father. Although Brown himself expressed some doubts, the birth mother identified him as the child's father, which was later confirmed by DNA testing in the paternity action.

(2) Brown timely asserted his rights by refusing to consent to the planned adoption and filing a notice of intent to claim paternity before the birth of the child. See MCL 710.33.

(3) A few weeks after the child was born, Brown timely filed his paternity action in Macomb County, and I believe that he diligently prosecuted that action, in the face of many obstacles.[6]

Finally, although the trial court did not make an explicit finding on this point, there does not appear to be any direct evidence that Brown filed the paternity action simply to thwart the adoption proceedings—to the contrary, as the trial court noted, at various times during these lengthy proceedings, Brown has asserted his desire to parent the child.[7]

In light of these facts, I believe that the trial court did not abuse its discretion in finding that Brown satisfied the *In re MKK* test. Like in *In re MKK*, Brown took timely and reasonable steps to establish himself as the legal father of the minor child. Therefore, I would hold that the trial court did not err in allowing the paternity action to reach its conclusion even though the adoption proceedings were still pending on appeal.

As a result, I would affirm the Court of Appeals' decision holding that the trial court's determination of Brown's rights under MCL 710.39 of the Adoption Code was moot in light of the order of filiation.[8] However,

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[6] It took 446 days from the filing of the paternity action until an order of filiation was entered, which is significantly longer than it should take to resolve a paternity action. See Administrative Order No. 2013-12, 495 Mich cxx, cxxiii (2013) (providing that 75% of all paternity cases should be adjudicated within 147 days from the date of case filing and 95% within 238 days). Notably, most—if not all—of the delay was attributable to petitioners, who evaded service (necessitating the issuance of a second summons), filed motions to dismiss and change venue, and unsuccessfully requested a stay of the paternity case on three separate occasions.

[7] In considering whether this factor is satisfied, I believe it is important to determine whether the biological father has a genuine interest in becoming, and the willingness and ability to become, the custodial parent of the child.

[8] As the Court of Appeals explained, when the trial court entered the order of filiation in the paternity action, Brown was no longer the *putative* father—he became the child's *legal* father. Since Brown was no longer the putative father, no court could grant relief under MCL 710.39(1) or MCL 710.39(2), which both explicitly refer to only the "putative father." Thus, the issue became moot. See *TM v MZ*, 501 Mich 312, 317 (2018) ("A moot case presents nothing but abstract questions of law which do not rest upon existing facts or rights. It involves a case in which a judgment cannot have any practical legal effect upon a then existing controversy.") (citations and quotation marks omitted).

since the majority's order addresses the § 39 determination, I will do likewise. I disagree with the majority's conclusion "that the trial court abused its discretion in determining that the putative father was a 'do something' father under Section 39(2) of the Michigan adoption code." Instead, under the correct standard of review in this case—one that is deferential to the trial court—I believe there is sufficient evidence to support the trial court's ruling.[9]

I believe the record contains sufficient evidence to support the trial court's finding that Brown has "provided substantial and regular support or care *in accordance with the putative father's ability* to provide support or care for the mother during pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him . . . ." MCL 710.39(2) (emphasis added). Upon learning of the pregnancy, Brown offered the birth mother, along with her daughter from a previous relationship, a place to live, inviting them first to move in with him at his grandmother's house and later into an apartment that they rented together. For a time, Brown supported all three members of the family. Brown obtained medical care for the birth mother's daughter when it was necessary, and even bailed the birth mother out of jail when her bond in a prior criminal matter was revoked. When the birth mother left him, he continued to contact her, attempting to restore their relationship and to care for his unborn child. His efforts ceased, however, when the birth mother threatened him with a personal protection order (PPO). Brown also called Child Protective Services to ensure that the birth mother, and his unborn child, would have medical care.

Overlooking the threatened PPO, the majority faults Brown for failing to continue providing support to the child and birth mother after the child was born. But I do not read MCL 710.39(2) as requiring that a putative father continue to provide support even after being threatened with a PPO.[10] Instead, the statute requires that the putative father provide substantial and regular support "in accordance with [his]

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[9] I agree with the majority that a trial court's legal determination of whether a putative father is a "do something" father under MCL 710.39(2) should be reviewed for an abuse of discretion. In addition, I believe that the trial court's findings of fact should be reviewed for clear error. See, e.g., MCR 2.613(C) ("Findings of fact by the trial court may not be set aside unless clearly erroneous. In the application of this principle, regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it."); MCR 3.977(K) ("The clearly erroneous standard shall be used in reviewing the court's findings on appeal from an order terminating parental rights."); see also *Kren v Rubin*, 338 Mich 288, 294 (1953) ("We also give deference to the findings of facts by the trial judge due to his opportunity to observe the witnesses and thereby judge their credibility.").

[10] In addition, it is worth noting that, under the statute, the putative father can meet his burden by providing substantial and regular support or care either (1) "for the mother during pregnancy" *or* (2) "for

ability." In this case, Brown clearly provided regular support and care during the pregnancy until the birth mother left him. After that point, Brown attempted to continue to provide support, until he was rebuffed by the birth mother.[11]

In sum, under the circumstances presented in this case, I believe the trial court correctly concluded that Brown was a "do something" father under MCL 710.39(2). Accordingly, I respectfully dissent from the majority's decision to reverse the trial court's determination on this issue as well.

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either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him . . . ." MCL 710.39(2). Because I believe Brown's efforts during the pregnancy were sufficient, it is not necessary to address his efforts during the latter period.

[11] The partial dissent in the Court of Appeals argued that courts cannot consider the birth mother's interference with the putative father's attempts to provide care. See *In re MGR*, 323 Mich App 279, 298 (2018) (O'BRIEN, J., concurring in part and dissenting in part). The partial dissent acknowledged that the Court of Appeals reached the opposite conclusion in *In re Dawson*, 232 Mich App 690, 694 (1998), but argued that *Dawson* is "obsolete" in light of subsequent amendments of MCL 710.39(2). *In re MGR*, 323 Mich App at 301 (O'BRIEN, J., concurring in part and dissenting in part). In 1998, shortly after *Dawson* was decided, MCL 710.39(2) was amended as follows:

> If the putative father has established a custodial relationship with the child or has provided *substantial and regular* support or care *in accordance with the putative father's ability to provide support or care* for the mother during the pregnancy or for either mother or child after the child's birth during the 90 days before notice of the hearing was served upon him, the rights of the putative father shall not be terminated except by proceedings in accordance with section 51(6) of this chapter or section 2 of chapter XIIA. [1998 PA 94 (additions indicated by italics).]

In light of these amendments, the partial dissent contended that courts cannot consider factors such as whether the birth mother rejected offers of support, but that, instead, the "putative father must have actually done something on a regular basis." *In re MGR*, 323 Mich App at 301 (O'BRIEN, J., concurring in part and dissenting in part).

I do not think that the amendment to MCL 710.39(2) supports the dissent's conclusion. Under the statute as amended, "substantial and regular support" is required in the absence of a custodial relationship —but only "in accordance with the putative father's ability to provide support or care . . . ." In my view, consideration of the putative father's ability to provide support or care must include consideration of whether the birth mother impeded his efforts to do so.

In re LMB, MINOR, No. 157903; Court of Appeals No. 338169. On April 10, 2019, the Court heard oral argument on the application for leave to appeal the March 13, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals dismissing petitioners' appeal as moot, we vacate the Wayne Circuit Court's April 20, 2017 order reinstating the birth mother's parental rights, and we remand this case to the trial court for entry of an order terminating respondent-father's rights to the child under MCL 710.39(1) of the Michigan Adoption Code, MCL 710.21 *et seq*., and for further proceedings not inconsistent with this order.

Shortly after LMB's birth, he was placed with petitioners, who filed an adoption petition with the Family Division of the Wayne Circuit Court. Respondent-father, who was not established as LMB's legal father, objected to the adoption, and the case proceeded to a contested hearing under MCL 710.39(1). The trial court abused its discretion by declining to terminate respondent-father's rights following that hearing and by reinstating the birth mother's parental rights. The evidence related to the factors in MCL 710.22(g) at the Section 39 hearing established that it would not have been in the best interests of the child to grant custody to respondent-father. MCL 710.39(1) ("[If it is not] in the best interests of the child to grant custody to the putative father, the court shall terminate his rights to the child."); MCL 710.62; *In re TMK*, 242 Mich App 302, 304 (2000) (appellate courts review a lower court's decision to grant or deny an adoption petition for an abuse of discretion).

While the appeal from this decision was pending before the Court of Appeals, petitioners moved to stay respondent-father's related paternity action brought under the Paternity Act, MCL 722.711 *et seq*., which was pending before a different judge in the Family Division of the Wayne Circuit Court and which respondent-father filed after the Section 39 hearing was already underway. The trial court presiding in the paternity action abused its discretion by denying petitioners' motion and allowing the case to proceed to entry of an order of filiation while this adoption case was proceeding. See MCL 722.717. "All proceedings under [the Michigan Adoption Code] shall be considered to have the highest priority and shall be advanced on the court docket so as to provide for their earliest practicable disposition." MCL 710.25(1). "Although proceedings under the Adoption Code should, in general, take precedence over proceedings under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis." *In re MKK*, 286 Mich App 546, 555 (2009), citing MCL 710.25(2). Here, respondent-father never sought a stay of the adoption proceedings to pursue the paternity action, and no facts justified a stay in any event.

As a result, the trial court abused its discretion when it refused to stay the paternity action prior to entry of an order of filiation while this adoption proceeding was ongoing.[1] Identifying this error, the Court of

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[1] We respectfully disagree with the dissent that this order creates any per se rule.

Appeals reversed the trial court's order denying petitioners' motion for a stay of the paternity proceedings. *Sarna v Healy*, unpublished order of the Court of Appeals, entered December 18, 2017 (Docket No. 341211).[2]

The Court of Appeals erred in dismissing this appeal as moot. Because petitioners prevailed on their appeal of the trial court's decision in *Sarna v Healy* to deny their motion to stay the paternity proceedings, that July 7, 2017 order of filiation, which post-dated its denial of the motion to stay, was entered erroneously. The question in this appeal is whether the trial court abused its discretion in its best-interest determination. It did, and we reverse and remand this case for entry of an order terminating respondent-father's rights to the child under MCL 710.39(1) of the Michigan Adoption Code, MCL 710.21 *et seq*. Because the trial court's abuse of discretion in this hearing resulted in the collateral restoration of the mother's parental rights, we also vacate the Wayne Circuit Court's April 20, 2017 order entered under MCL 710.62, and we remand this case to the Family Division of the Wayne Circuit Court for further proceedings not inconsistent with this order. We do not retain jurisdiction.

MARKMAN, J. (*concurring*). For the reasons stated in my concurring statement in *In re MGR*, 504 Mich 852 (2019) (Docket No. 157821), I concur in the majority's decision to reverse the judgment of the Court of Appeals dismissing petitioners' appeal as moot, and, for the reasons stated by the majority, I concur in the majority's decision to vacate the trial court's order reinstating the birth mother's parental rights and remand this case to the trial court for entry of an order terminating respondent-father's rights to the child under MCL 710.39(1) and for further proceedings not inconsistent with this Court's order.

ZAHRA, J., joins the statement of MARKMAN, J.

VIVIANO, J. (*concurring in part and dissenting in part*). For the reasons set forth in my dissent in *In re MGR*, 504 Mich 852 (2019) (Docket No. 157821), I would apply the good-cause analysis set forth *In re MKK*, 286 Mich App 546 (2009), to determine whether the putative father's paternity action should have been stayed in favor of the adoption proceedings. For the reasons expressed in my dissent, I disagree with the majority's analysis, which I am concerned sets forth a rule that trial courts must always stay a paternity action in favor of adoption proceedings when the putative father has not filed a motion to stay the adoption proceedings. Applying the *In re MKK* good-cause analysis in this case, however, I believe that the majority has reached the right result. The putative father in this case failed to file a timely notice of intent to claim paternity, did not file a paternity action contemporaneously with the adoption proceeding, performed no actions

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[2] While the Court of Appeals correctly reversed the trial court's denial of the motion to stay the proceedings, it should have also specified that the trial court's order of filiation, which followed the trial court's erroneous denial of the stay, must be vacated. See *In re LMB*, unpublished per curiam opinion of the Court of Appeals, issued March 13, 2018 (Docket No. 338169), p 2.

to suggest he wanted to parent the child, and, according to the birth mother, did not initially object to the planned adoption. Thus, I believe the putative father is not able to show good cause "to allow [his] paternity action to reach its natural conclusion before a contemporaneously filed adoption proceeding . . . ." *In re MGR*, 504 Mich 852, 864 (2019) (Docket No. 157821) (VIVIANO, J., dissenting). Additionally, I agree with the majority that the trial court abused its discretion in declining to terminate the putative father's parental rights pursuant to MCL 710.39(1). Accordingly, I concur with the majority's disposition in this case.

BROWN v ROSS, No. 157997; Court of Appeals No. 341325. By order of October 5, 2018, the application for leave to appeal the May 11, 2018 order of the Court of Appeals was held in abeyance pending the decision in *In re MGR* (Docket Nos. 157821-2). The application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Oakland Circuit Court's October 4, 2017 order denying the defendant-mother's motion to stay.

"Although proceedings under the [Michigan] Adoption Code should, in general, take precedence over proceedings under the Paternity Act, adoption proceedings may be stayed upon a showing of good cause, as determined by the trial court on a case-by-case basis." *In re MKK*, 286 Mich App 546, 555 (2009), citing MCL 710.25(2). The plaintiff-father did not request that the trial court stay the adoption proceedings in favor of the paternity proceedings pursuant to MCL 710.25(2), and the facts did not justify a stay in any event. But the defendant-mother did ask the trial court to stay the paternity proceedings—once prior to the trial court issuing its Section 39 determination, and once while the Section 39 decision was on appeal. The trial court denied those requests, and entered the order of filiation after it had issued its Section 39 determination and after the petitioning prospective adoptive parents had appealed that decision to the Court of Appeals.

On June 7, 2017, the defendant-mother moved for stay, which was denied by the circuit court on June 14, 2017. Following petitioners' appeal of the trial court's Section 39 determination in the adoption case, the defendant-mother again moved to stay the paternity action pending appellate review of the adoption proceedings. On October 4, 2017, the trial court denied the motion and entered the order of filiation.

The trial court's denial of the defendant-mother's motions was an abuse of discretion given the unique circumstances of this case. The trial court had the authority to stay the paternity action in favor of the adoption proceedings: absent good cause, adoption proceedings should be given priority. MCL 710.21a and MCL 710.25(2). And a trial court has the inherent authority to control the progress of a case. See MCR 1.105; MCR 2.401; see also MCR 3.217(A) ("Procedure in actions under the Paternity Act, MCL 722.711 *et seq*., is governed by the rules applicable to other civil actions except as otherwise provided by this rule and the act."). Because the petitioners in the adoption case had a right to appeal the Section 39 determination and because good cause to delay those proceedings had not been alleged, the trial court should have stayed the

paternity proceedings pursuant to MCR 7.209(E)(2)(b) so that the appellate court could review that decision.

Because the trial court abused its discretion in denying the defendant-mother's motion to stay, the trial court also abused its discretion in granting the order of filiation. We vacate that order and remand this case to the Family Division of the Oakland Circuit Court for entry of an order of stay pending the court's resolution of *In re MGR*, which we have remanded for analysis under Section 39(1) of the Michigan Adoption Code, MCL 710.39(1), by order entered June 6, 2019. We do not retain jurisdiction.

MARKMAN, J. (*concurring*). For the reasons stated in my concurring statement in *In re MGR*, 504 Mich 852 (2019) (Docket No. 157821), I concur in the majority's decision to vacate our order of October 5, 2018, and the trial court's order denying the defendant-mother's motion to stay and to remand this case to the trial court for entry of an order of stay pending the resolution of *In re MGR*.

ZAHRA, J., joins the statement of MARKMAN, J.

VIVIANO, J. (*dissenting*). The majority holds that the trial court erred by not staying the putative father's paternity action pending resolution of the adoption proceedings. For the reasons set forth in my dissent in *In re MGR*, 504 Mich 852 (2019) (Docket No. 157821), I disagree and therefore respectfully dissent.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 7, 2019:

PEOPLE v VANDERPOOL, No. 158486; reported below: 325 Mich App 493. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the Tuscola Circuit Court had jurisdiction to extend the defendant's probationary term in September 2015; and (2) whether the extension of the probationary term without notice or a hearing violated the defendant's due-process rights. Compare *People v Marks*, 340 Mich 495 (1954), with *Gagnon v Scarpelli*, 411 US 778 (1973). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 7, 2019:

WOODRING v PHOENIX INSURANCE COMPANY, No. 158213; reported below: 325 Mich App 108.

ZAHRA, J. (*dissenting*). I would grant the application and revisit this Court's opinion in *Miller v Auto-Owners Ins Co*, 411 Mich 633 (1981), which was disavowed in part by *Frazier v Allstate Ins Co*, 490 Mich 381 (2011). In *Miller*, this Court held that an insured is entitled to compensation under the no-fault act, MCL 500.3101 *et seq*., for an injury sustained while performing "maintenance" of his or her vehicle without regard to whether the vehicle might be considered "parked" at the time of the injury. The Court concisely explained:

> There is an apparent tension between these two sections [MCL 500.3105 and MCL 500.3106] of the no-fault act: requiring, on the one hand, compensation for injuries incurred in the maintenance of a vehicle [MCL 500.3105] but not requiring, on the other hand, compensation for injuries incurred in the maintenance of a *parked* vehicle, with three exceptions [MCL 500.3106]. Since most, if not all, maintenance is done while the vehicle is parked, and since the three exceptions appear addressed to circumstances unrelated to normal maintenance situations, a conflict appears. [*Miller*, 411 Mich at 637-638.]

In *Miller*, the insurer invited the Court to "distinguish among parked vehicles according to whether they were parked involuntarily, as when a driver pulls onto the shoulder to repair a flat tire, or voluntarily, as in Miller's case." *Id*. at 638. Noting that "[s]uch a distinction, however, would often be difficult to draw," the Court declined to resolve the issue "solely by focusing on the term 'parked' . . . ." *Id*.

I tend to agree with *Miller* that the insurer's argument in that case was not persuasive, mostly, in my view, because there is no statutory basis to distinguish between cars parked voluntarily or involuntarily. But I disagree that the term "parked" should not be considered, and I certainly do not agree with *Miller*'s decision to ignore the term altogether ("Compensation is thus required . . . without regard to whether his vehicle might be considered 'parked' at the time of injury," *id*. at 641). The relevant common definition of "park" at the time was "to halt (one's vehicle) with the intention of not using it again immediately." *The Random House College Dictionary* (1975). There is clearly a temporal component to the term that suggests that the vehicle may continue to be used as a motor vehicle. But to hold, as did the Court in *Miller* and several other published cases, that a vehicle which cannot be operated is "parked" extends the term well beyond its ordinary meaning. So, in *Miller*, for instance, the plaintiff was severely injured when his automobile fell on his chest while he was attempting to replace a pair of shock absorbers. The vehicle was obviously not parked because it could not be driven at the time.

Consider some of the many cases in which an insured is injured while performing maintenance: *Mich Basic Prop Ins Ass'n v Mich Mut Ins Co*, 122 Mich App 420 (1983) (insured injured while removing an exhaust

manifold); *Great American Ins Co v Old Republic Ins Co*, 180 Mich App 508 (1989) (insured injured while using cutting torch to cut off metal pins that were holding hydraulic cylinders in place); *Wagner v Mich Mut Liability Ins Co*, 135 Mich App 767 (1983) (insured injured while warming oil pan with charcoal fire); *Stanley v State Auto Mut Ins Co*, 160 Mich App 434 (1987) (insured injured by car falling off jack); *Yates v Hawkeye-Security Ins Co*, 157 Mich App 711 (1987) (insured injured preparing to tow disabled vehicle); *Kudek v Detroit Auto Inter-Ins Exch*, 100 Mich App 635 (1980), rev'd 414 Mich 956 (1982) (insured injured while working on wheel assembly when tire exploded); *Mack v Travelers Ins Co*, 192 Mich App 691 (1992) (insured injured while pouring oil into engine); *Hackley v State Farm Mut Auto Ins Co*, 147 Mich App 115 (1985) (insured injured while inspecting engine for cause of stalling).

In all these cases, the maintenance was being performed on inoperable vehicles at the time the insureds were injured. In my view, none of these vehicles were "parked" in the common sense of the term. In each circumstance, a person can ask themselves, if they had been given the key to drive the vehicle, whether they would consider the inoperable vehicle "parked." I submit the reasonable answer would be no.

Further, this understanding is entirely consistent with the parked-car exceptions contained in MCL 500.3106. "Each exception pertains to injuries related to the character of a parked vehicle as a motor vehicle—characteristics which make it unlike other stationary roadside objects that can be involved in vehicle accidents." *Miller*, 411 Mich at 640. But the characteristics of an inoperable motor vehicle are in fact *like* other stationary roadside objects that can be involved in vehicle accidents. While I understand that giving meaning to the term "parked" in this context is not an easy task, I think this Court ought to attempt to do so before resorting to the "absurd results" doctrine. In other words, given that the term "parked" obviously does not refer to inoperable vehicles, I cannot conclude that " 'the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in' " ignoring the term "parked." Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 237, quoting 1 Story, Commentaries on the Constitution of the United States (2d ed), § 427, p 303.

MARKMAN, J., joins the statement of ZAHRA, J.

PEOPLE v YOREL FOSTER, No. 158673; Court of Appeals No. 343668.

MARKMAN, J. (*dissenting*). I respectfully dissent from the Court's order denying leave to appeal and would instead reverse the circuit court's affirmance of the district court's order suppressing the firearm seized from defendant or, in the alternative, remand to the Court of Appeals for consideration as on leave granted. Defendant was charged with carrying a concealed weapon, felon in possession of a firearm, and felony-firearm. At the preliminary examination, the district court dismissed the case, finding that the discovery of the firearm was unconstitutional, and the circuit court affirmed. The Court of Appeals then denied leave to appeal, but Chief Judge MURRAY would have granted leave to appeal.

The prosecutor argues that the lower courts (the district and circuit courts) erred in finding that the discovery of the firearm was unconstitutional. These courts determined that the police engaged in unconstitutional conduct by approaching defendant as he was walking in public and engaging him in conversation. However, approaching a person walking in public and engaging him in conversation does not amount to a seizure of that person. *People v Shabaz*, 424 Mich 42, 56 (1985) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.") (quotation marks and citation omitted); *United States v Drayton*, 536 US 194, 200 (2002) ("Law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen."). Therefore, I agree with the prosecutor that the officer did not seize defendant when he approached defendant and asked him if he possessed a weapon.

Rather, defendant was not seized until the officer ordered him to place his hands in the air, at which point the officer could see the handgun in defendant's jacket. However, this seizure was justified because by that time the officer had already noticed a bulge in defendant's pocket and when asked about it, defendant became nervous, grabbed the bulging object, and turned sideways away from the officer. That is, at the point at which the officer asked defendant to place his hands in the air, he possessed a "reasonable suspicion that crime [was] afoot," which was sufficient to justify a *Terry*[1] "stop and frisk." *People v Champion*, 452 Mich 92, 98 (1996) (quotation marks and citation omitted). During this "stop and frisk," when the officer saw the handgun and determined that defendant lacked a concealed weapons permit, the officer possessed probable cause to arrest defendant. For these reasons, I agree with the prosecutor that the lower courts erred in finding a constitutional violation here, instead of recognizing an effective law enforcement effort.

Thus, I would reverse the circuit court's affirmance of the district court's order suppressing the firearm seized from the defendant or, in the alternative, remand to the Court of Appeals as on leave granted for consideration of *People v Anthony*, 327 Mich App 24 (2019) (Docket No. 337793), in which the Court of Appeals reversed a circuit court order suppressing evidence based in part on the same theory as both lower courts applied in the present case—that the police engage in unconstitutional conduct by approaching a suspect in a public area.

ZAHRA, J., would remand this case to the Court of Appeals as on leave granted.

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[1] *Terry v Ohio*, 392 US 1 (1968).

Summary Disposition June 11, 2018:

BERDY v BUFFA, No. 159725; reported below: 328 Mich App 550. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. We agree with the dissenting Court of Appeals judge that the Warren Charter provides for a single class of city council members, subject to the term limits of the greater of three complete terms or 12 years in that office. See Warren Charter, §§ 4.3(d) and 4.4(d). We also agree that, because it is not disputed that the challenged candidates will have served those maximum terms by the time of the 2019 election, they are ineligible under the Warren Charter to be certified as candidates for that election. Further, we agree with the dissenting judge that plaintiff's ability to show a clear legal right or a clear legal duty for purposes of mandamus does not depend upon the difficulty of the legal question presented. See *Berry v Garrett*, 316 Mich App 37, 41 (2016) (" 'In relation to a request for mandamus, a clear, legal right is one clearly founded in, or granted by, law; a right which is inferable as a matter of law from uncontroverted facts *regardless of the difficulty of the legal question to be decided*.' ") (emphasis added and citation omitted). See also 55 CJS, Mandamus, § 74, p 107 ("[T]he requirement that a duty be clearly defined to warrant issuance of a writ does not rule out mandamus actions in situations where the interpretation of the controlling statute is in doubt. As long as the statute, once interpreted, creates a peremptory obligation for the officer to act, a mandamus action will lie.").

We disagree, however, with both the Court of Appeals majority and dissent regarding the proper interpretation and application of § 4.2 of the Warren Charter, which provides that "[t]he council shall be the judge of the election and qualifications of its members, subject to the general election laws of the state and review by the courts, upon appeal." The Court of Appeals majority concluded that, under § 4.2, "[n]either the elections commission nor the city clerk has the power to apply the terms of the charter and determine whether candidates are ineligible to run for office." *Berdy v Buffa*, 328 Mich App 550, 557-558 (2019). The dissent, by contrast, concluded that § 4.2 may not have any role to play in light of MCL 168.323, which places on city election commissioners the duty "to prepare the primary ballots . . . ." *Id*. at 568 n 5 (TUKEL, P.J., dissenting). We believe both of these conclusions are incorrect.

City charter provisions of this type are not unusual. See 3 McQuillin, Municipal Corporations (3d rev ed), § 12:148, p 671 ("Municipal charters and laws applicable usually confer power upon the council or governing legislative body to judge of the election and qualifications of its own members, and such laws are generally sustained."). These provisions have a long lineage, see *Naumann v Bd of City Canvassers of Detroit*, 73 Mich 252 (1889), and are based on analogous provisions in the federal and state constitutions, see US Const, art I, § 5 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . ."); Const 1963, art 4, § 16 ("Each house shall be the sole judge of the qualifications, elections and returns of its members, and

may, with the concurrence of two-thirds of all the members elected thereto and serving therein, expel a member.").

Our Court has opined in the past about the policies undergirding municipal charter provisions similar to the one at issue here. In *Naumann*, 73 Mich at 253-254, we stated as follows:

> It has been very common in this State, for obvious reasons, to prevent delay and litigation, to vest in the legislative boards of municipal corporations the same power of determining the claims of persons to belong to them that is vested in Congress and the State Legislature. It is always important to have as little delay and confusion as possible in the organization of such bodies, which directly represent the people, and are assumed to have as correct a sense of official duty as any other representative bodies. Public policy does not favor needless disturbances in the tenure of office, and the practice referred to has commended itself generally, and is probably as little liable to error as any other popular administrative machinery.[1]

Accordingly, Michigan courts have regularly given effect to such provisions, declining to second-guess a determination made by such a legislative body. See, e.g., *McLeod v State Bd of Canvassers*, 304 Mich 120, 129 (1942) (recognizing "the rule of law that where constitutional or statutory provisions make a legislative body the sole judge of the election and qualifications of its own members, the final decision rests in such body, and courts cannot interfere"); *Crossman v Hanson*, 4 Mich App 98, 102 (1966) ("[T]he council, by refusing to take affirmative action on the eligibility and qualifications of [the intervening defendant] has, by this very refusal, acted. It is well settled that a duty can be performed by a determination to take no action and that such a determination is not subject to review."); *Houston v McKinlay*, 4 Mich App 94, 97 (1966) ("In the instant case, the city charter gives the power to determine these qualifications to the council. In such a situation, quo warranto will not issue.").[2]

Importantly, however, Michigan courts applying either Const 1963, art 4, § 16, or an equivalent municipal charter provision, have consis-

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[1] The provision at issue in that case, contained in the Detroit Charter, provided that " 'the board of aldermen shall be the judges of the election and qualifications of its own members, and shall have the power to determine contested elections to said board.' " *Id*. at 254.

[2] We note that § 4.2 of the Warren Charter is arguably distinguishable from the provisions discussed in the above cases because § 4.2 expressly provides for judicial review of determinations made by the Warren City Council. See Warren Charter, § 4.2 ("The council shall be the judge of the election and qualifications of its members, subject to the general election laws of the state and *review by the courts, upon appeal*.") (emphasis added). We offer no opinion on the effect of such language on a post-election challenge, since that issue is not before us.

tently done so in the context of a *post-election* challenge to the results of an election. In addition to the cases cited above, every other case we have found (and that the parties have directed us to) applying such a provision has done so in the context of a challenge to the results of an election. See, e.g., *People ex rel Cooley v Fitzgerald*, 41 Mich 2 (1879); *Cooley v Ashley*, 43 Mich 458, 458 (1880); *Alter v Simpson*, 46 Mich 138, 139 (1881); *Auditor General v Bd of Supervisors of Menominee Co*, 89 Mich 552, 567 (1891); *Belknap v Bd of Canvassers of Ionia Co*, 94 Mich 516, 516-517 (1893); *Attorney General ex rel Beers v Bd of Canvassers of Seventh Senatorial Dist*, 155 Mich 44, 45 (1908); *Sinclair v Common Council of City of Grand Rapids*, 181 Mich 186, 187 (1914).

This makes sense—by their plain language, these provisions grant a legislative body the authority to review the election and qualifications "of its members."[3] See Warren Charter, § 4.2 ("The council shall be the judge of the election and qualifications *of its members* . . . .") (emphasis added); Const 1963, art 4, § 16 ("Each house shall be the sole judge of the qualifications, elections and returns *of its members* . . . .") (emphasis added). Until an election is actually completed, and a winner announced, a challenged individual is merely a *candidate*, rather than a *member*, of a legislative body. See *Webster's New Collegiate Dictionary* (1974) (defining "candidate" as "one that aspires to or is nominated or qualified for an office, membership, or award" and "member" as "one of the individuals composing a group"). A mere candidate would have no grounds for claiming membership within a legislative body before an election has occurred. Cf. *Barry v United States ex rel Cunningham*, 279 US 597, 614 (1929) ("It is enough to say of this, that upon the face of the returns he had been elected and had received a certificate from the Governor of the state to that effect. Upon these returns and with this certificate, he presented himself to the Senate, claiming all the rights of membership. *Thereby the jurisdiction of the Senate to determine the rightfulness of the claim was invoked and its power to adjudicate such right immediately attached by virtue of § 5 of Article I of the Constitution.*") (emphasis added).

Accordingly, it is no surprise that, as demonstrated above, our caselaw has consistently applied such provisions in the context of a challenged election result. Moreover, our understanding is consistent with the purposes of such provisions, which, as mentioned, are "to have as little delay and confusion as possible in the organization of such bodies" and to avoid "needless disturbances in the tenure of office . . . ."

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[3] When interpreting charter provisions we apply the same principles applicable to other legal texts. See *Barrow v City of Detroit Election Comm*, 305 Mich App 649, 663 (2014) ("When reviewing the provisions of a home rule city charter, we apply the same rules that we apply to the construction of statutes. The provisions are to be read in context, with the plain and ordinary meaning given to every word. Judicial construction is not permitted when the language is clear and unambiguous. Courts apply unambiguous statutes as written.") (quotation marks and citation omitted).

Naumann, 73 Mich at 254. In the context of a post-election contest, these concerns make sense, as judicial review of an election leaves the legislative body in limbo. However, in the context of a pre-election challenge, judicial review can have the opposite effect, avoiding post-election challenges to an official who was ineligible to have his or her name included on the ballot in the first place. We conclude, therefore, that § 4.2 does not apply to a pre-election challenge. As a result, plaintiff was not required under § 4.2 to present his challenge to the Warren City Council.

For the reasons articulated by the Court of Appeals dissent, we conclude that the city elections commission had a clear legal duty to perform the ministerial act of removing the names of the challenged contestants from the ballots. See *Barrow v City of Detroit Election Comm*, 301 Mich App 404, 412-413 (2013). Accordingly, we reinstate the Macomb Circuit Court's ruling, which correctly granted the requested mandamus relief.

MARKMAN, J. (*concurring*). I concur in the result reached by the majority—that the judgment of the Court of Appeals be reversed and the Macomb Circuit Court's grant of plaintiff's requested mandamus relief be reinstated. But as observed by the Court of Appeals dissent, I believe it is only necessary that this Court address the issue of relief in the pre-election context because the proposition that "the Charter makes the council the sole and exclusive judge of the qualifications of its members, is inapplicable" in the present pre-election context. *Berdy v Buffa*, 328 Mich App 550, 568 n 5 (2019) (TUKEL, P.J., dissenting). Furthermore, I am in agreement with the analysis of the Court of Appeals dissent that plaintiff is entitled to mandamus relief, in particular its analysis that the Warren Charter provides for a single class of city council members subject to the term limits of three terms in office or a total of 12 years' service. And it is not disputed that the challenged candidates here will have served those limits by the time of the 2019 election and thus are ineligible under the Warren Charter, §§ 4.3(d) and 4.4 (d).

ZAHRA, J., joins the statement of MARKMAN, J.

Summary Disposition June 12, 2019:

In re PAROLE OF RONALD IRWIN, No. 158077; Court of Appeals No. 342963. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the Parole Board clearly abused its discretion by granting parole. We note that a similar issue was presented in *In re Parole of Layman* (Docket No. 157104), which we remanded to the Court of Appeals for consideration as on leave granted by order dated April 3, 2018, and which was decided in *In re Parole of Layman*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 341112). Further, we note that a similar issue is presented in *In re Parole of Plunkett* (Docket No. 159032), which we remanded to the Court of Appeals for consideration as on leave granted by order dated June 12, 2019. In all other respects, leave to

appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

VIVIANO, J., did not participate because he presided in the circuit court as the sentencing judge in the underlying criminal case.

PEOPLE v SKINNER, No. 158220; Court of Appeals No. 343906. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and direct that court to decide the case on an expedited basis.

PEOPLE v WILDER, No. 159001; Court of Appeals No. 327491. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part III of the Court of Appeals opinion, and we remand this case to that court for reconsideration of the defendant's argument. The Court of Appeals erred in asserting that the erroneously admitted testimony of Tameachi Wilder regarding her knowledge of the defendant's prior firearms-related convictions was harmless due to the "untainted and unequivocal testimony" of two police officers that they saw the defendant in possession of the gun. The Court of Appeals failed to acknowledge that two other witnesses (Charmell Richardson and Carlos Wilder) offered testimony that contradicted that testimony. That failure resulted in the Court of Appeals effectively determining that the officers' testimony was credible and that Richardson's and Wilder's was not. On remand, the Court of Appeals shall engage in "an examination of the entire cause," *People v Lukity*, 460 Mich 484, 495-496 (1999), and reconsider whether it is more probable than not that the error was outcome-determinative. We do not retain jurisdiction.

In re PAROLE OF MICHAEL THOMAS PLUNKETT, No. 159032; Court of Appeals No. 346216. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that a similar issue was presented in *In re Parole of Layman* (Docket No. 157104), which we remanded to the Court of Appeals for consideration as on leave granted by order dated April 3, 2018, and which was decided in *In re Parole of Layman*, unpublished per curiam opinion of the Court of Appeals, issued September 20, 2018 (Docket No. 341112). Further, we note that a similar issue is presented in *In re Parole of Irwin* (Docket No. 158077), which we remanded to the Court of Appeals for consideration as on leave granted by order dated June 12, 2019.

Leave to Appeal Denied June 12, 2019:

SCHUSTER v RIVER OAKS GARDEN APARTMENTS, LLC, No. 157328; Court of Appeals No. 335246.

PUETZ v SPECTRUM HEALTH HOSPITALS, No. 158178; reported below: 324 Mich App 51.

PEOPLE v MARQUIES DAVIS, No. 158271; Court of Appeals No. 338101. With regard to any future motion for relief from judgment filed by the

defendant, the December 21, 2016 motion for relief from judgment shall not be counted for purposes of determining whether the motion is a successive one under MCR 6.502(G).

DAYSTAR SELLER FINANCING, LLC v HUNDLEY, No. 158664; reported below: 326 Mich App 31.

BROWN v CIVIL SERVICE COMMISSION, No. 158953; Court of Appeals No. 342616.

PEOPLE v HASTINGS, No. 158986; Court of Appeals No. 336596.

Summary Disposition June 14, 2019:

PEOPLE v BRUNER, No. 158545; Court of Appeals No. 325730. Pursuant to MCR 7.305(H)(1), and in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a new trial. The Court of Appeals erred in concluding that the prosecution established that the confrontation violation was harmless beyond a reasonable doubt. Reviewing the record de novo, we cannot conclude that admission of Westley Webb's testimony—the only evidence that placed a gun in the defendant's hand—"did not tip the scale in favor of the prosecution and contribute to the jury's verdict." *People v Anderson*, 446 Mich 392, 407 (1994). Instead, it seems "reasonable to believe that this evidence affected the jury's decision to convict." *Id.* We do not retain jurisdiction.

ZAHRA, J. (*dissenting*). I would deny leave to appeal because I agree with the Court of Appeals that the Confrontation Clause error in this case, the admission of Westley Webb's preliminary-examination testimony at defendant's joint trial with codefendant, was harmless beyond a reasonable doubt.[1] It is true that the erroneously admitted testimony was the only evidence explicitly placing a gun in the possession of defendant. But as the panel noted after an examination of the record, the prosecution presented a very strong circumstantial case against defendant.[2]

Evidence was presented showing that defendant possessed a motive to shoot the security guards, as defendant was reportedly very angry

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[1] The applicable harmless-error standard requires "the beneficiary of the error to prove, and the court to determine, beyond a reasonable doubt that there is no 'reasonable possibility that the evidence complained of might have contributed to the conviction.' " *People v Anderson (After Remand)*, 446 Mich 392, 406 (1994), quoting *Chapman v California*, 386 US 18, 23 (1967) (quotation marks omitted).

[2] " 'Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime.' " *People v Nowack*, 462 Mich 392, 400 (2000), quoting *People v Carines*, 460 Mich 750, 757 (1999) (quotation marks omitted).

that he been ejected from the club for fighting. Defendant subsequently lingered around the club, and witnesses testified that defendant pointed angrily or made hand gestures and stated that he would be back. Defendant was denied reentry to the club to look for his phone because he refused to be searched, at which point he was described as "[s]till hostile."[3] Security guards working at the club reported that defendant was watching them from across the street before defendant was observed riding past the club multiple times in the passenger seat of a vehicle driven by codefendant. This caused at least two of the security guards to draw their weapons and hold them at their sides. The security guards noticed defendant's sudden absence from the vehicle, and were actively looking for him just seconds before they were shot at from behind. After the shooting, defendant engaged in abnormal behavior by abruptly cutting off communication with the victim's mother and abandoning plans to meet up with his girlfriend. This circumstantial evidence is compelling.

Moreover, I question the impact of Webb's testimony. While Webb's testimony was certainly inculpatory, it was also convoluted, inconsistent, and somewhat confusing. And Webb was effectively impeached by codefendant's trial counsel, who emphasized Webb's prior convictions and the fact that Webb only testified pursuant to a deal with the prosecutor. For these reasons, I conclude that the erroneous admission of Webb's testimony was harmless beyond a reasonable doubt.

MARKMAN, J., joins the statement of ZAHRA, J.

In re RHEA BRODY LIVING TRUST, DATED JANUARY 17, 1978, AS AMENDED, No. 158599; reported below: 325 Mich App 476. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that the terms "child" and "beneficiary" in MCL 700.1105(c) are not modified by the phrase "and any other person that has a property right in or claim against a trust estate," as this holding was unnecessary to resolving this case in light of its conclusion that Petitioner Cathy Deutchman was an "interested person" under MCR 5.125(C)(33)(g) and MCL 700.7603(2). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered June 14, 2019:

SMITH V CITY OF DETROIT, No. 158300; Court of Appeals No. 337708. On order of the Court, the application for leave to appeal the July 24, 2018 judgment of the Court of Appeals and the application for leave to appeal

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[3] Security guards testified that the purpose of such a search was "[f]or security reasons"; it was not permitted to "bring a weapon in the building." Defendant's refusal to be patted down by the security guards at least supports an inference that he possessed a weapon, apart from Webb's testimony.

as cross-appellant are considered. We direct the Clerk to schedule oral argument on the application for leave to appeal as cross-appellant. MCR 7.305(H)(1).

The plaintiff cross-appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the defendant cross-appellee maintained possession and control over the sidewalk such that plaintiff's claim sounded in premises liability rather than ordinary negligence. Compare *Orel v Uni-Rak Sales Co Inc*, 454 Mich 564 (1997), and *Finazzo v Fire Equip Co*, 323 Mich App 620 (2018), with *Fraim v City Sewer of Flint*, 474 Mich 1101 (2006). In addition to the brief, the plaintiff shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The defendant shall file a supplemental brief within 21 days of being served with the plaintiff's brief. The defendant shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the plaintiff. A reply, if any, must be filed by the plaintiff within 14 days of being served with the defendant's brief. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

The application for leave to appeal remains pending.

Leave to Appeal Denied June 14, 2019:

YOUNG v WALTON OIL, INC, No. 157533; Court of Appeals No. 333794.

JOHN DOES 11-18 v DEPARTMENT OF CORRECTIONS and JOHN DOES 1-10 v DEPARTMENT OF CORRECTIONS, Nos. 157729, 157730, and 157731; reported below: 323 Mich App 479. On order of the Court, the application for leave to appeal the March 27, 2018 judgment of the Court of Appeals is considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

ZAHRA, J. (*dissenting*). I would grant the application in these two consolidated class actions.

These consolidated cases feature a long and protracted legal history that has yet to include any substantive review by this Court. Plaintiffs represent juvenile prisoners who claim that they were subjected to sexual assaults, sexual harassment, and degrading treatment by prison staff and adult prisoners. Plaintiffs, who are mostly juvenile male inmates serving terms of imprisonment in the custody of the Department of Corrections (DOC), brought claims against the Governor, the DOC, the former and current heads of the DOC, and many prison wardens. Plaintiffs alleged violations of the Civil Rights Act (CRA), MCL 37.2101 *et seq*., for sexual assaults, a sexually hostile prison environ-

ment, age discrimination, and other claims arising from the DOC's alleged failure to segregate them from adult prisoners and failure to report abuse or neglect.

In *Neal v Dep't of Corrections (On Rehearing)*,[1] the Court of Appeals concluded that prisons were not excluded from the definition of "public service." In response, the Legislature amended the CRA in 1990. "Enacting section 1" provides:

> This amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision Neal v Department of Corrections, 232 Mich App 730 (1998). This legislation further expresses the original intent of the legislature that an individual serving a sentence of imprisonment in a state or county correctional facility is not within the purview of this act.[2]

The amendment redefined "public service" to add the italicized phrase:

> a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof or a tax exempt private agency established to provide service to the public, *except that public service does not include a state or county correctional facility with respect to actions and decisions regarding an individual serving a sentence of imprisonment*.[3]

This amendment plays a critical role in these cases.

In *Doe v Dep't of Corrections*,[4] a split panel of the Court of Appeals held that defendants were entitled to summary disposition for failure to comply with the disclosure requirements of the prison litigation reform act (PLRA), MCL 600.5501 *et seq*., and that plaintiffs could not amend their complaint to cure the defect.[5] The majority also concluded that the challenged provisions of the CRA did not violate the right to equal protection.[6] Judge BECKERING dissented, asserting that the amendment of the CRA violated Michigan's Equal Protection Clause.[7] Plaintiffs sought leave to appeal, and this Court vacated the Court of Appeals'

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[1] *Neal v Dep't of Corrections (On Rehearing)*, 232 Mich App 730 (1998), superseded in part by 1999 PA 202.

[2] 1999 PA 202.

[3] MCL 37.2301(b) (emphasis added).

[4] *Doe v Dep't of Corrections*, 312 Mich App 97 (2015), vacated in part 499 Mich 886 (2016).

[5] *Id*. at 112-114, 138.

[6] *Id*. at 136.

[7] The dissent emphasized the following terms in Michigan's Equal Protection Clause:

constitutional analysis regarding equal protection, observing: "In light of the Court of Appeals ruling that plaintiffs' complaint should be

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> "*No person* shall be denied the equal protection of the laws; nor shall *any person* be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature *shall implement* this section by appropriate legislation." [*Doe*, 312 Mich App at 145 (BECKERING, J., dissenting), quoting Const 1963, art 1, § 2.]

The dissent noted that the use of the singular within the clause demonstrated that it was "unquestionably the intent of the ratifiers that civil rights protections be extended to *any* and *all* persons." *Doe*, 312 Mich App at 145 (BECKERING, J., dissenting). The dissent further stated that, under the second sentence, the Legislature was constitutionally mandated to implement protection to any and all persons and lacked authority to exclude anyone. *Id*. at 146-147. In response to that mandate, the Legislature enacted the CRA, which also contains the singular: "a person shall not '[d]eny an individual . . . .' " *Id*. at 147, quoting MCL 37.2302(a).

The dissent also noted that following *Neal (On Rehearing)*, the Legislature amended the statute and, in so doing, violated its constitutional mandate. *Doe*, 312 Mich App at 148-149 (BECKERING, J., dissenting). The dissent explained:

> The parties and the majority frame the issue at hand as one calling for a determination of whether the 1999 amendment to the [CRA] violates equal protection by denying prisoners, as a class, protections under the [CRA]. In my opinion, this focus is directed at the wrong section of Const 1963, art 1, § 2. I believe that the analysis misses a more significant and dispositive issue. That is, whether the Legislature has authority, given the constitutional directive in Const 1963, art 1, § 2 pertaining to *all citizens*, to carve out a particular class of individuals and exclude them from the protections of the [CRA].
>
> I would hold that the Legislature acted outside of its constitutional authority by removing prisoners from the scope of the [CRA] and thereby denying protection to all. Where the analysis in this case should start, and end, in my opinion, is with the idea that Const 1963, art 1, § 2 contains more than just the guarantee of equal protection of the laws; it contains a directive to the Legislature to implement legislation that protects the rights of *all* citizens.

* * *

dismissed under the [PLRA], it was unnecessary to resolve the remaining issues."[8] The matter was remanded to the trial court where some but not all of plaintiffs' claims were dismissed. Defendant again moved for summary disposition, and the court again denied the motion, ruling that the CRA's 1999 amendment excluding prisoners from its purview violated equal protection and was unconstitutional. The court also denied defendants' claim of governmental immunity on the CRA claims.

Defendant appealed. The Court of Appeals affirmed in a split decision, adopting the constitutional analysis set forth in Judge BECKERING's dissent in the prior appeal.[9] Judge O'CONNELL issued a sharp dissent. He conducted a "traditional constitutional analysis" and concluded there was obviously a rational basis for the Legislature to exclude prisoners from the CRA.[10] He questioned the majority's approach, wondering "what, if any, law would pass such a contrived test . . . ."[11] He also identified the primary error of the majority opinion as its adoption of plaintiffs' assertion that prisoners and nonprisoners are similarly situated in all aspects of this case. He concluded that "[p]risoners and nonprisoners have never been similarly situated, are not currently similarly situated, and hopefully will never be similarly situated. That a rational basis exists for treating prisoners differently from free citizens is obvious."[12] He explained that "the deterrence of meritless lawsuits and the preservation of scarce resources through the

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> . . . [T]he Legislature is not permitted, pursuant to the implementation language contained in Const 1963, art 1, § 2, to define the persons to whom civil rights are guaranteed. The Constitution already answers that question, unequivocally guaranteeing that legislation to protect civil rights must be extended to all, without reservation or limitation. Any implementation language contained in Const 1963, art 1, § 2 should not be construed as giving the Legislature "the authority to circumvent the protections that the section guarantees." See *Midland Cogeneration* [*Venture Ltd Partnership v Naftaly*], 489 Mich [83, 95 (2011)]. If it did, just as the Court cautioned in *Midland Cogeneration*, the protection of "any person" would "lose [its] strength" and the Legislature would render such protection meaningless. See *id*. Consequently, I would hold that the 1999 amendment, by eradicating a constitutional guarantee, violates Const 1963, art 1, § 2. [*Id*. at 149-150, 153-154.]

[8] *Doe*, 499 Mich at 886.

[9] *Does 11-18 v Dep't of Corrections (After Remand)*, 323 Mich App 479 (2018).

[10] *Id*. at 500-503 (O'CONNELL, P.J., dissenting).

[11] *Id*. at 501.

[12] *Id*.

reduction of costs associated with resolving those lawsuits reflects a legitimate government interest,"[13] stating:

> Prisoners file an unprecedented number of lawsuits, and the cost to the state has skyrocketed. In one instance, a prisoner has filed 5,813 lawsuits and counting. The Legislature recognized that including prisons in the definition of "public service," MCL 37.2301(b), is problematic. Prisoners could sue for the loss of their right to vote or for the loss of their Second Amendment right to carry a gun in prison.[14]

The stark contrast between the opinions of Judge O'CONNELL and Judge BECKERING speaks volumes as to why leave to appeal should be granted in the instant case. This Court should have the final word on this significant issue of Michigan constitutional law.[15]

Further, the Court of Appeals majority's conclusion that Article 3 of the CRA operates as a waiver of governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., presents great tension if not outright conflict with this Court's opinion in *Hamed v Wayne Co*.[16] There, we addressed "whether Wayne County and its sheriff's department may be held vicariously liable for a civil rights claim under MCL 37.2103(i) based on a criminal act of a deputy sheriff committed during working hours but plainly beyond the scope of his employment."[17] In doing so, the Court cautioned:

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[13] *Id*. at 501-502 (quotation marks and citation omitted).

[14] *Id*. at 502.

[15] Regardless of whether the Court of Appeals reached the correct result, its reasoning was highly questionable. In ruling that the amendment of the CRA violated Const 1963, art 1, § 2, the Court of Appeals relied solely on the implementation clause of that provision, which states that "[t]he legislature shall implement this section by appropriate legislation." See *Does 11-18*, 323 Mich App at 488-489. By doing so, the Court of Appeals ruled that there was an equal-protection violation without engaging in an equal-protection analysis. See *id*. That is, the Court of Appeals failed to apply the rational-basis standard (or any other standard of review recognized by the courts, for that matter) in addressing plaintiffs' equal-protection claim. The Court of Appeals' reasoning in this regard strikes me as a quite peculiar deviation from decades of equal-protection caselaw and would seem to warrant our review, particularly because "[t]his Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318 (2010).

[16] *Hamed v Wayne Co*, 490 Mich 1 (2011).

[17] *Id*. at 5.

> Artful pleading would also allow a plaintiff to avoid governmental immunity under the [GTLA]. A school district, for example, could not be vicariously liable in tort for a teacher's sexual molestation of a student because the GTLA would bar the claim. However, if the plaintiff styled its claim as a CRA action, the school district could be vicariously liable under a theory of quid pro quo sexual harassment affecting public services. Plaintiff's preferred approach, under which public-service providers would be strictly liable for *precisely the same conduct* as that for which they would typically be immune, is inherently inconsistent with the Legislature's intent. If the Legislature had intended such a result, it should have clearly abrogated the common-law rule for purposes of the CRA.[18]

As pointed out by Judge O'CONNELL, "*Hamed* clearly holds that plaintiffs cannot avoid the GTLA by simply alleging a violation of the [CRA]."[19] And yet, "to their innovative credit," plaintiffs appear to "have artfully pleaded a cause of action exactly as the *Hamed* Court cautioned should not be done."[20]

In sum, the instant case presents two questions of great jurisprudential significance that this Court should resolve. I would grant the application for leave to appeal.

MARKMAN, J., joins the statement of ZAHRA, J.

CLEMENT, J., did not participate due to her prior involvement as chief legal counsel for the Governor.

FARRIS v MCKAIG, No. 158015; reported below: 324 Mich App 349.

PEOPLE v BARRITT, No. 158506; reported below: 325 Mich App 556.

ZAHRA, J. (*dissenting*). I would grant leave to appeal, both because the Court of Appeals opinion is published and because the dissenting Court of Appeals Judge BOONSTRA makes a compelling case that defendant was not in "custody" and therefore the interview did not rise to the level of a custodial interrogation that requires disclosure of *Miranda*[1] rights.

This case arises out of the death of defendant's girlfriend, Amy Wienski, whose body was dumped into the Flint River. Her car was burned in Mt. Morris Township. After she was reported missing, the Calhoun County Sheriff's Department obtained and executed a search warrant at her home. During the search, defendant arrived at the victim's home, where he was interviewed for roughly 10 minutes by detectives from the Calhoun County Sheriff's Department. Detectives then asked defendant if he would go to the village of Homer, where the Calhoun County Sheriff had a satellite office, so they could talk in a

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[18] *Id*. at 29 n 74.

[19] *Does 11-18*, 323 Mich App at 495 (O'CONNELL, P.J., dissenting).

[20] *Id*. (emphasis omitted).

[1] *Miranda v Arizona*, 384 US 436 (1966).

better environment. Defendant agreed and accepted law enforcement's offer of a ride to the satellite office.[2] Defendant rode unrestrained in the back seat of a marked deputy sheriff's car.

Upon arrival at the satellite office, a 90-minute interview ensued. The door to the interrogation room was not locked. Moreover, the "interview" was largely casual. For example, defendant was offered a beverage and felt so comfortable in the setting that he jokingly asked for a beer. Similarly, at one point, defendant was left alone in the room with a canine officer, Brad Hall, and his dog. Hall and defendant discussed dogs, and defendant interacted with Hall's canine. Defendant joked with Hall about his canine, suggesting that the dog could probably be mean if Hall commanded him to be. Hall responded that the dog would "blow you right off your feet if I send him."

Toward the end of the interview it became apparent to defendant that the deputies did not believe that he was being truthful during the interview. Detectives asked defendant how he would fare if he underwent a polygraph examination. Defendant responded that he would pass, but that he was not going to take one because the detectives were clearly pointing their fingers at him. He then said, "I think I need a lawyer." The detectives told defendant that he was not under arrest. Defendant then asked if they could finish the interview, and the detectives responded that they could finish at any time. Defendant equivocated, indicating that he was not going to continue with the questioning but then expressing a desire to help the detectives find Wienski. One of the detectives told him that he needed to "man up" and reveal what happened to her. He denied knowing, indicating that he did not like how the interview was going and that he was going to have to get a lawyer. He was handed over to the Mt. Morris Township Police Department, which was investigating the destruction of Ms. Wienski's vehicle. At no point before or during the interview was defendant notified of his Miranda rights.

Officer Hall then told defendant that the most important thing was to "get this thing taken care of" and that defendant needed to help the detectives by being as truthful as possible. He told defendant that the truth always comes out and the sooner it comes out, the easier it is. Hall also told defendant that it looks bad when someone goes "hard core" and holds back information until the end. He told defendant that the detectives knew the answers to 75 percent of the questions they ask and that he could see on defendant's face that defendant knew information that he was not revealing. Defendant denied this. The interviewing detectives reentered the room, and defendant continued to deny any knowledge of what happened to Wienski. At this time, defendant was informed he was under arrest and would be transported to Genesee County.

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[2] Defendant was driven to the victim's home by Ronald Greenway, who drives people for compensation. Defendant claimed that he had very recently met Greenway. Greenway independently agreed to meet the deputies in Homer. The investigating deputies did not suggest that defendant not ride to Homer with Greenway, and defendant did not ask or otherwise indicate that he preferred to ride to Homer with Greenway.

Defendant was later charged with felony murder, carjacking, second-degree arson, fourth-degree arson, and tampering with evidence. The trial court granted defendant's motion to suppress the interview from evidence at trial. The Court of Appeals granted the prosecution's application for leave to appeal, and a majority of the panel, in a published opinion, affirmed the trial court's decision.[3] The prosecutor sought leave to appeal, and this Court vacated that part of Court of Appeals' holding that defendant was subjected to custodial interrogation and remanded the case to the trial court for a determination of "(1) whether a reasonable person would have felt that he was not at liberty to terminate the interrogation and leave; and (2) whether the environment presented the same inherently coercive pressures as the type of station house questioning at issue in *Miranda v Arizona*[.]"[4]

On remand, the trial court again suppressed defendant's statements, and the Court of Appeals, in a split decision, affirmed in a published opinion.[5] The prosecutor again seeks leave to appeal in this Court. The Attorney General has filed an amicus brief in support of the prosecution.

In *Miranda*, the United States Supreme Court held that if there is a custodial interrogation of an individual and it is not preceded by adequate warnings of the individual's rights against self-incrimination, then any incriminating statements made during that interrogation may not introduced in evidence at an accused's criminal trial.[6] The Court also explained that custodial interrogation is to be interpreted as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."[7] In contrast, if the interview is not deemed to be a custodial interrogation, then a statement made to law enforcement officers may be admitted into evidence regardless of whether *Miranda* warnings were given.[8] "Custody" depends upon whether undue coercive pressure results " 'from the interaction of custody and official interrogation.' "[9]

The first step in determining whether the individual is in custody is to evaluate whether "a reasonable person [would] have felt he or she was

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[3] *People v Barritt*, 318 Mich App 662 (2017), vacated in part 501 Mich 872 (2017).

[4] *People v Barritt*, 501 Mich 872 (2017).

[5] *People v Barritt*, 325 Mich App 556 (2018). On December 28, 2017, the trial court granted a stay of the trial, in light of the prosecutor's appeal of its decision.

[6] *Miranda*, 384 US at 444-445.

[7] *Id*. at 444.

[8] See *People v Hill*, 429 Mich 382, 391 (1987).

[9] *People v Elliott*, 494 Mich 292, 306 (2013), quoting *Maryland v Shatzer*, 559 US 98, 112 (2010) (quotation marks, citation, and emphasis omitted).

not at liberty to terminate the interrogation and leave."[10] Not all restraints on freedom of movement amount to custody.[11] There are several relevant factors used to evaluate these situations, such as the location of the questioning, duration, statements made during the questioning, the presence or absence of physical restraints during the questioning, and whether the interviewee was released at the end of questioning.[12] The determination relates to whether the relevant environment of the interview " 'present[ed] the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*.' "[13] "That atmosphere is said to generate 'inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely.' "[14]

In this case, none of the relevant factors set out by the applicable caselaw lead to the conclusion that defendant was in "custody." Although defendant was questioned at a small satellite office of the Calhoun County Sheriff by two deputy sheriffs, defendant was not subjected to the same type of coercive environment present in *Miranda*. The duration of the interview was short. The door to the interrogation room was not locked. Defendant was not restrained. The tone of the conversation was largely casual. Defendant was offered a beverage and felt so comfortable in the setting that he jokingly asked for a beer. He then asked for a soft drink and was provided with one. Defendant petted the canine officer's dog and joked with the canine officer. The setting and tone of the interview simply lacked the kind of coercive nature that lends itself to coerced confessions.

Moreover, defendant's references to counsel were equivocal and followed by defendant-initiated conversation with law enforcement. Notably, defendant was not interrogated about the whereabouts of the victim or her car after defendant mentioned needing a lawyer. Because serious concerns exist regarding whether defendant was subjected to a custodial interrogation that would trigger a right to be informed of *Miranda* rights, I would grant leave to appeal to assess the accuracy of the published Court of Appeals opinion.

MARKMAN, J., joins the statement of ZAHRA, J.

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[10] *Howes v Fields*, 565 US 499, 509 (2012) (quotation marks and citation omitted); see also *Yarborough v Alvarado*, 541 US 652, 663 (2004); *Elliott*, 494 Mich at 305.

[11] *Illinois v Perkins*, 496 US 292, 296 (1990); *Berkemer v McCarty*, 468 US 420, 437 (1984); *Hill*, 429 Mich at 397-398; *Elliott*, 494 Mich at 302-303.

[12] *Howes*, 565 US at 509.

[13] *Elliott*, 494 Mich at 308, quoting *Howes*, 565 US at 509.

[14] *Perkins*, 496 US at 296, quoting *Miranda*, 384 US at 467.

PEOPLE v JACOB HUGHES, PEOPLE v MARY HUGHES, and PEOPLE v HANNAN, Nos. 159667, 159668, and 159669; Court of Appeals Nos. 347866, 347998, and 348003.

Summary Disposition June 19, 2019:

PEOPLE v KATHLEEN WILLIAMS, No. 157565; reported below: 323 Mich App 202. By order of July 27, 2018, the application for leave to appeal the February 22, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Davis* (Docket No. 156406) and *People v Price* (Docket No. 156180). On order of the Court, we vacate that part of our July 27, 2018 order that held this application in abeyance for *People v Price* (Docket No. 156180). *People v Davis* (Docket No. 156406) having been decided on March 22, 2019, 503 Mich 984 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part II.B. of the February 22, 2018 judgment of the Court of Appeals related to mutually exclusive convictions and reinstate the defendant's conviction of larceny in a building.

In this case, the jury was instructed that to convict the defendant of larceny from a person, it must find that the defendant took the property from the victim's person or immediate presence. See MCL 750.357; *People v Smith-Anthony*, 494 Mich 669 (2013). However, with respect to the larceny in a building conviction, the jury was *not* instructed that it must find that the property was *not* taken from the victim's person or immediate presence. Since, with respect to the larceny in a building conviction, the jury never found that the property was not taken from the victim's person or immediate presence, a guilty verdict for that offense was not mutually exclusive to the defendant's guilty verdict for larceny from a person, where the jury affirmatively found that the property was taken from the victim's person or immediate presence. As we explained in *Davis*, regardless of whether this state's jurisprudence recognizes the principle of mutually exclusive verdicts, that issue is not presented in these circumstances. Accordingly, the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate the defendant's larceny in a building conviction.

PEOPLE v STOVALL, No. 158557; Court of Appeals No. 342440. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

BROZ v PLANTE & MORAN, PLLC, No. 159002; reported below: 326 Mich App 528. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II.A. of the Court of Appeals judgment addressing professional negligence (malpractice), and we remand this case to that court for reconsideration of that issue in light of *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1 (2002) (holding MCL 600.2912a does not apply to nurses). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction.

BARNOWSKI v CLEARY UNIVERSITY, No. 159122; Court of Appeals No. 344917. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ESCOBEDO, No. 159166; Court of Appeals No. 346371. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the January 17, 2018 amended judgment of sentence, and we remand this case to the Cass Circuit Court to reinstate the December 15, 2017 judgment of sentence. *People v Comer*, 500 Mich 278 (2017). We further vacate that part of the December 15, 2017 judgment of sentence imposing a $500 fine. MCL 769.1k(1)(b)(*i*). MCL 750.520b does not authorize a fine. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Leave to Appeal Granted June 19, 2019:

PEOPLE v BETTS, No. 148981; Court of Appeals No. 319642. On March 6, 2019, the Court heard oral argument on the application for leave to appeal the February 27, 2014 order of the Court of Appeals. On order of the Court, the application is again considered, and it is granted. The parties shall include among the issues to be briefed: (1) whether the requirements of the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*., taken as a whole, amount to "punishment" for purposes of the Ex Post Facto Clauses of the Michigan and United States Constitutions, US Const, art I, § 10; Const 1963, art 1, § 10; see *People v Earl*, 495 Mich 33 (2014), see also *Does #1-5 v Snyder*, 834 F3d 696, 703-706 (CA 6, 2016), cert den sub nom *Snyder v John Does #1-5*, 138 S Ct 55 (Oct 2, 2017); (2) if SORA, as a whole, constitutes punishment, whether it became punitive only upon the enactment of a certain provision or group of provisions added after the initial version of SORA was enacted; (3) if SORA only became punitive after a particular enactment, whether a resulting ex post facto violation would be remedied by applying the version of SORA in effect before it transformed into a punishment or whether a different remedy applies, see *Weaver v Graham*, 450 US 24, 36 n 22 (1981) ("[T]he proper relief . . . is to remand to permit the state court to apply, if possible, the law in place when his crime occurred."); (4) if one or more discrete provisions of SORA, or groups of provisions, are found to be ex post facto punishments, whether the remaining provisions can be given effect retroactively without applying the ex post facto provisions, see MCL 8.5; (5) what consequences would arise if the remaining provisions could not be given retroactive effect; and (6) whether the answers to these questions require the reversal of the defendant's conviction pursuant to MCL 28.729 for failure to register under SORA.

The Attorney General, the Criminal Defense Attorneys of Michigan, the Prosecuting Attorneys Association of Michigan, and the American Civil Liberties Union of Michigan are invited to file briefs amicus curiae.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 19, 2019:

PEOPLE v TILLMAN, No. 156243; Court of Appeals No. 331440.

PEOPLE v ALANA, No. 157651; Court of Appeals No. 339938.

BRASPENICK v JOHNSON LAW, PLC, No. 158003; Court of Appeals No. 338556.

CBC JOINT VENTURE v THE CITY OF THE VILLAGE OF CLARKSTON, No. 158649; Court of Appeals No. 337750.

VIRGINIA PARK SUBDIVISION ASSOCIATION v BROWN, No. 159153; Court of Appeals No. 339762.

VIRGINIA PARK SUBDIVISION ASSOCIATION v BROWN, No. 159154; Court of Appeals No. 339808.

PEOPLE v SOUCIE, No. 159199; Court of Appeals No. 346449.

PEOPLE v WILLIAM SPENCER, No. 159254; Court of Appeals No. 343468.

Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal Entered June 21, 2019:

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017–2021, Nos. 158305 and 158306; reported below: 325 Mich App 207. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that 2016 PA 341 does not authorize the Michigan Public Service Commission to impose a local clearing requirement on individual alternative electric suppliers. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the respective appellee's brief. The parties should not submit mere restatements of their application papers.

We further order that this case be argued and submitted to the Court together with the case of *In re Reliability Plans of Electric Utilities for 2017–2021* (Docket Nos. 158307-8), at such future session of the Court as both cases are ready for submission. The total time allowed for oral argument shall be 40 minutes: 20 minutes for Consumers Energy Company and Michigan Public Service Commission, and 20 minutes for

Energy Michigan, Inc. and Association of Businesses Advocating Tariff Equity, to be divided at their discretion. MCR 7.314(B)(2).

The Michigan Chamber of Commerce, Midcontinent Independent System Operator, and DTE Electric Company are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *In re Reliability Plans of Electric Utilities for 2017–2021* (Docket Nos. 158305-6) only and served on the parties in both cases.

In re RELIABILITY PLANS OF ELECTRIC UTILITIES FOR 2017–2021, Nos. 158307 and 158308; reported below: 325 Mich App 207. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that 2016 PA 341 does not authorize the Michigan Public Service Commission to impose a local clearing requirement on individual alternative electric suppliers. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the respective appellee's brief. The parties should not submit mere restatements of their application papers.

We further order that this case be argued and submitted to the Court together with the case of *In re Reliability Plans of Electric Utilities for 2017–2021* (Docket Nos. 158305-6), at such future session of the Court as both cases are ready for submission. The total time allowed for oral argument shall be 40 minutes: 20 minutes for Consumer Energy Company and Michigan Public Service Commission, and 20 minutes for Energy Michigan, Inc. and Association of Business Advocating Tariff Equity, to be divided at their discretion. MCR 7.314(B)(2).

The Michigan Chamber of Commerce, Midcontinent Independent System Operator, and DTE Electric Company are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *In re Reliability Plans of Electric Utilities for 2017–2021* (Docket Nos. 158305-6) only and served on the parties in both cases.

SCOLA V JPMORGAN CHASE BANK, No. 158903; Court of Appeals No. 338966. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred in holding that the appellant's claim sounded in premises liability rather than ordinary negligence. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as

required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied June 21, 2019:

In re HENDERSON/TORRES, MINORS, No. 159589; Court of Appeals No. 344745.

Reconsideration Denied June 21, 2019:

In re KM HOUSER, MINOR, No. 159414; Court of Appeals No. 344712. Leave to appeal denied at 503 Mich 1027.

Leave to Appeal Granted June 24, 2019:

COUNCIL OF ORGANIZATIONS AND OTHERS FOR EDUCATION ABOUT PAROCHIAID V STATE OF MICHIGAN, No. 158751; reported below: 326 Mich App 124. The parties shall include among the issues to be briefed whether MCL 388.1752b violates Const 1963, art 8, § 2.

Public Funds Public Schools is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

MARKMAN, J. (*concurring*). If the present case is eventually resolved on its merits, there are two principal outcomes that might result. MCL 388.1752b will either be sustained or nullified on the basis of this Court's assessment of Const 1963, art 8, § 2; *Traverse City Sch Dist v Attorney Gen*, 384 Mich 390 (1971); and whatever other sources of law we determine to be relevant. Sustaining MCL 388.1752b would perhaps be in tension with the Establishment Clause, while nullifying MCL 388.1752b would perhaps be in tension with the Free Exercise Clause. Because the recent decision of the United States Supreme Court in *Trinity Lutheran Church of Columbia, Inc v Comer*, 582 US ___; 137 S Ct 2012 (2017), may well be highly relevant in avoiding either of these potentially unsustainable outcomes, I would respectfully urge the parties to brief and to be prepared to respond to questions concerning the impact, if any, of *Trinity Lutheran*. Indeed, for the following reasons, I do

not believe we can undertake a disciplined assessment of this case absent consideration of *Trinity Lutheran*.

First, *Traverse City Sch Dist* itself sought specifically to harmonize Const 1963, art 8, § 2 with the Free Exercise Clause to avoid "serious constitutional problems" with the state constitutional provision. *Traverse City Sch Dist*, 384 Mich at 430. In particular, we stated that a "literal perspective on [the provision's] mandate of no public funds for non-public schools would . . . [i]n the case of parochial or other church-related school children . . . violate the free exercise of religion clause . . . ." *Id*. Thus, it would be difficult to disconnect the analysis of either *Traverse City Sch Dist* or Const 1963, art 8, § 2, from the harmonizing authority itself, the Free Exercise Clause.

Second, it is a rule of state constitutional interpretation that "wherever possible an interpretation that does not create constitutional invalidity is preferred to one that does." *Traverse City Sch Dist*, 384 Mich at 406. Consequently, in *Traverse City Sch Dist*, we accorded a particular interpretation to Const 1963, art 8, § 2 specifically to avoid a conclusion that it violated the Free Exercise Clause. Where this Court may conceivably be obligated to render an interpretation of Const 1963, art 8, § 2 that is consistent, rather than inconsistent, with the Free Exercise Clause, it would be problematic for it to fail to give full consideration to interpreting our state Constitution in accord with the Free Exercise Clause as it is now understood.

Third, *Trinity Lutheran* held that a state agency's denial of state funds to a religious school based on a Missouri constitutional provision similar to Const 1963, art 8, § 2 violated the Free Exercise Clause. *Trinity Lutheran*, 582 US at ___; 137 S Ct at 2017. While the Missouri provision expressly required the denial of state funds based on the religious classification of a putative recipient, whereas Const 1963, art 8, § 2 is facially neutral on the matter, this Court noted in *Traverse City Sch Dist* that "with 98 percent of the private school students being in church-related schools," the classification set forth in Const 1963, art 8, § 2 "is nearly total" in the " 'impact' " of the classification on religious schools. *Traverse City Sch Dist*, 384 Mich at 434. As a result, if Const 1963, art 8, § 2 is deemed to be effectively indistinguishable from the Missouri provision addressed in *Trinity Lutheran*, the denial of state funds in this case may well raise Free Exercise concerns under *Trinity Lutheran*.

Fourth, Const 1963, art 8, § 2 may reasonably be characterized as upholding the values of the Establishment Clause by precluding state funds from being used to assist religious institutions. Yet the Establishment Clause and the Free Exercise Clause may often "tend to clash with the other" because each sets forth objectives seemingly in tension. *Walz v Tax Comm of City of New York*, 397 US 664, 669 (1970). Thus, to the extent that Const 1963, art 8, § 2 furthers a valid purpose as to the Establishment Clause, it may consequently be in some tension with the Free Exercise Clause. It would therefore be difficult to assess the validity of Const 1963, art 8, § 2 under the Establishment Clause without also assessing its validity under the Free Exercise Clause.

This Court owes the parties, and the people of this state, a final decision in this case that fairly considers all inextricably connected issues. The need to fully and finally resolve the present dispute has been made especially critical by the fact that it has now been nearly three years since our Legislature enacted MCL 388.1752b and since a lower court of this state issued a preliminary injunction preventing that law from taking effect. Whether MCL 388.1752b is ultimately sustained, or nullified, it is long past time that this Court, the highest of our state, determine decisively which of these outcomes is warranted, so that the product of our legislative process is no longer maintained in limbo. With that in mind, I concur with the grant order.

CLEMENT, J., not participating due to her prior involvement as chief legal counsel for the Governor.

Summary Disposition June 26, 2019:

PEOPLE v MCKAY, No. 156444; Court of Appeals No. 337715. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court, which shall, in accordance with Administrative Order 2003-03, determine whether the defendant is indigent and, if so, appoint counsel to represent the defendant at an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the failure to timely seek appellate review was caused by the ineffective assistance of counsel. See *Roe v Flores-Ortega*, 528 US 470 (2000). In making this determination, the circuit court shall consider whether "the defendant . . . filed a delayed request for the appointment of counsel pursuant to MCR 6.425(G)(1) within the 6-month period," MCR 7.205(G)(4)(a)—such that MCR 7.205(G)(4), as in force at the time of the defendant's appeal, applies to this case. If the court rule does apply, the circuit court shall consider the impact, if any, of the court rule on the determination of whether the defendant's former appellate attorneys were ineffective.

If the circuit court determines that one or both of the former appellate attorneys were ineffective, the defendant, with the assistance of counsel, may file an application for leave to appeal his convictions and sentences in the Court of Appeals under the standard for direct appeals, and/or any appropriate post-conviction motions in the circuit court, within six months of the date of the circuit court's ruling. The defendant may include among the issues raised, but is not required to include, the issues that were raised in the motion for relief from judgment that was filed in 2015.

Accordingly, the motion to remand and motion for an evidentiary hearing are granted in part to the extent consistent with this order. The motions to supplement are also granted. The motions for peremptory reversal, motion for bond pending appeal, motions to strike the attorneys' responses, and motion for miscellaneous relief are denied. We do not retain jurisdiction.

Leave to Appeal Denied June 26, 2019:

PEOPLE v AMES, No. 156077; Court of Appeals No. 337848. On January 24, 2019, the Court heard oral argument on the application for leave to appeal the May 12, 2017 order of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

Summary Disposition June 28, 2019:

PEOPLE v WORTH-MCBRIDE, No. 156430; Court of Appeals No. 331602. On January 23, 2019, the Court heard oral argument on the application for leave to appeal the July 13, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we vacate the Court of Appeals judgment and remand this case to the Court of Appeals for consideration of whether the defendant's due-process right to be informed of the nature of the charges against her was violated where the trial court convicted her as a principal of second-degree murder, MCL 750.317, and first-degree child abuse, MCL 750.136b(2), despite the prosecution proceeding solely on a theory that the defendant aided and abetted the victim's father in the commission of these crimes. See *Cole v Arkansas*, 333 US 196, 201 (1948). The trial court did not resolve prior to trial the defendant's motion to quash the bindover, in which the defendant asserted that the evidence was insufficient to support an accomplice-liability theory, see MCL 767.39, because the evidence only showed that the defendant had failed to prevent the victim's father from harming their son. See *People v Burrel*, 253 Mich 321, 323 (1931) (" 'Mere presence, even with knowledge that an offense is about to be committed or is being committed, is not enough to make a person an aider or abettor . . . nor is mere mental approval, sufficient, nor passive acquiescence or consent.' ") (citation omitted). The Court of Appeals may also address whether the record evidence supports a finding that defendant was guilty as an aider and abettor and any other issue the Court of Appeals determines is necessary to resolve the issue we have remanded to it, in addition to any issues that the defendant raises that relate to the trial court's stated explanation for its verdict, see MCR 6.403. We do not retain jurisdiction.

PEOPLE v SAMANTHA HUGHES, No. 159839; Court of Appeals No. 348991. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and direct that court to decide the case on an expedited basis.

Leave to Appeal Denied June 28, 2019:

In re CL HAMAN, MINOR, No. 159631; Court of Appeals No. 345265.

Summary Disposition July 2, 2019:

PEOPLE v MCCONNELL, No. 158527; Court of Appeals No. 344498. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 2, 2019:

PEOPLE v RAPOZA, No. 158175; Court of Appeals No. 339846.

PEOPLE v LEMOINE, No. 158349; Court of Appeals No. 336691.

PEOPLE v GERMIRA CARTER, No. 158386; Court of Appeals No. 343116.

CASTLE v SHOMAM, No. 158511; Court of Appeals No. 337969.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BRINKLEY, No. 158565; Court of Appeals No. 337437.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v RICE, Nos. 158568 and 158569; Court of Appeals Nos. 339247 and 334266.

PEOPLE v CHRIS DAVIS, No. 158585; Court of Appeals No. 343687.

PEOPLE v ANTHONY WRIGHT, No. 158605; Court of Appeals No. 338920.

WILLIAMS v ST LOUIS CORRECTIONAL FACILITY WARDEN, No. 158662; Court of Appeals No. 344166.

PEOPLE v NAYMON STEWART, No. 158666; Court of Appeals No. 344724.

MERCANTILE BANK MORTGAGE COMPANY, LLC v NGPCP/BRYS CENTRE, LLC, Nos. 158670 and 158671; Court of Appeals Nos. 335600 and 335715.

PEOPLE v RICKY EDWARDS, No. 158712; Court of Appeals No. 337354.

PEOPLE v JAMES, No. 158719; reported below: 326 Mich App 98.

UNDERWOOD v WALLOON LAKE COUNTRY CLUB, No. 158723; Court of Appeals No. 339949.

PEOPLE v BRACK, No. 158737; Court of Appeals No. 335385.

PEOPLE v FIELD, No. 158765; Court of Appeals No. 340396.

PEOPLE v VELASQUEZ, No. 158779; Court of Appeals No. 345219.

PEOPLE v LUNDY, No. 158784; Court of Appeals No. 343447.

PEOPLE v PESQUERA, No. 158792; Court of Appeals No. 344693.

In re ESTATE OF MARTHA NATSIS, No. 158802; Court of Appeals No. 338442.

PEOPLE v JACK, No. 158807; Court of Appeals No. 344726.

PEOPLE v HILL, No. 158831; Court of Appeals No. 345358.

PEOPLE v ADAM FERGUSON, No. 158839; Court of Appeals No. 344020.

PEOPLE v TONY VANLUVEN, No. 158850; Court of Appeals No. 344206.

PEOPLE v JAQAVIOUS WILLIAMS, No. 158867; Court of Appeals No. 345499.

HARRIS v FOX, No. 158884; Court of Appeals No. 340160.

STONISCH v FORTHRIGHT IV, LLC, Nos. 158885, 158886, 158887, and 158888; Court of Appeals Nos. 335635, 335821, 339558, and 340787.

PEOPLE v HINDS, No. 158909; Court of Appeals No. 344725.

In re WILLA M DURHAM LIVING TRUST, No. 158921; Court of Appeals No. 338687.

PEOPLE v GIDLEY, No. 158927; Court of Appeals No. 345153.

PEOPLE v GOMERY, No. 158933; Court of Appeals No. 344499.

PEOPLE v POWER, No. 158952; Court of Appeals No. 345996.

PEOPLE v DEMAR PAYNE, No. 158969; Court of Appeals No. 344910.

CITY OF ROSEVILLE v MUSTA, No. 158977; Court of Appeals No. 338535.

PEOPLE v MORGAN, No. 158982; Court of Appeals No. 335855.

PEOPLE v WATT, No. 158987; Court of Appeals No. 338927.

PEOPLE v JOHN BROWN, No. 158990; Court of Appeals No. 338113.

PEOPLE v HREHA, No. 158991; Court of Appeals No. 344908.

PEOPLE v MARCHBANKS, No. 158992; Court of Appeals No. 345899.

PEOPLE v KRENITSKY, No. 159000; Court of Appeals No. 338958.

PEOPLE v RODRIGUEZ, No. 159009; Court of Appeals No. 344831.

LANSING PARKVIEW, LLC v K2M GROUP, LLC, Nos. 159017 and 159018; Court of Appeals Nos. 338284 and 339030.

WORKMAN v BRENT, No. 159019; Court of Appeals No. 330325.

PEOPLE v OLIVER, No. 159029; Court of Appeals No. 344873.

PEOPLE v MICHAEL COLEMAN, No. 159035; Court of Appeals No. 336663.

OAKLAND PARK, LLC v CITY OF DETROIT, No. 159036; Court of Appeals No. 339610.

PEOPLE v AVONDRE YOUNG, No. 159041; Court of Appeals No. 346187.

PEOPLE v MCGINNIS, No. 159046; Court of Appeals No. 345379.

COMERICA BANK v PARS ICE CREAM COMPANY, INC, No. 159049; Court of Appeals No. 339516.

MERTZ v BYRON CENTER PUBLIC SCHOOLS, No. 159051; Court of Appeals No. 344146.

OLSON v BOSANAC, No. 159052; Court of Appeals No. 341478.

PEOPLE v ROBERTSON, No. 159056; Court of Appeals No. 345217.

PEOPLE v EVERIC ALLEN, No. 159057; Court of Appeals No. 345982.

In re LOUIS G BASSO, JR, REVOCABLE LIVING TRUST, No. 159060; Court of Appeals No. 345962.

PEOPLE v TRAMBLE, No. 159067; Court of Appeals No. 339210.

PEOPLE v KEEL-HAYWOOD, No. 159078; Court of Appeals No. 338949.

PEOPLE v SEABROOKS, No. 159100; Court of Appeals No. 345112.

PEOPLE v TERPENING, No. 159101; Court of Appeals No. 344907.

PEOPLE v FINN, No. 159102; Court of Appeals No. 345224.

In re BENNETT, No. 159109; Court of Appeals No. 344763.

PEOPLE v JASON MILLER, No. 159121; Court of Appeals No. 346059.

PEOPLE v CHAD STEWART, No. 159130; Court of Appeals No. 339169.

PEOPLE v HOWELL, No. 159133; Court of Appeals No. 340773.

WINTHROP v DECK, No. 159139; Court of Appeals No. 338773.

PEOPLE v DARRYL BROWN, No. 159140; Court of Appeals No. 346288.

METRO DEVELOPERS v KNIGHT, No. 159144; Court of Appeals No. 346706.

PEOPLE v RENFROE, No. 159157; Court of Appeals No. 346374.

PEOPLE v TOWNSEND, No. 159159; Court of Appeals No. 339909.

PEOPLE v DRUCKENMILLER, No. 159162; Court of Appeals No. 346435.

PEOPLE v SHAUTEZ LAWSON, No. 159163; Court of Appeals No. 338135.

PEOPLE v VIRGIL BROWN, Nos. 159164 and 159165; Court of Appeals Nos. 346317 and 346318.

PEOPLE v BERNARDO REEVES, No. 159171; Court of Appeals No. 338438.

PEOPLE v HEAVLIN, No. 159183; Court of Appeals No. 337758.

PEOPLE v DRACO JONES, No. 159216; Court of Appeals No. 339435.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

MURAWSKI v CITY OF ESSEXVILLE, No. 159221; Court of Appeals No. 341857.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, PC.

PEOPLE v HEAD, No. 159244; Court of Appeals No. 339676.

PEOPLE v ST JOHN, No. 159251; Court of Appeals No. 346452.

PEOPLE v KENNETH WRIGHT, No. 159255; Court of Appeals No. 346125.

PEOPLE v EASTERWOOD, No. 159268; Court of Appeals No. 339395.

PEOPLE v AMISON, No. 159276; Court of Appeals No. 337349.

PEOPLE v SCHWARTZ, No. 159278; Court of Appeals No. 346919.

PEOPLE v GARY, No. 159281; Court of Appeals No. 346519.

PEOPLE v RYAN BROWN, No. 159282; Court of Appeals No. 346782.

PEOPLE v CHRISTIAN HILLMAN, No. 159283; Court of Appeals No. 339917.

PEOPLE v GLASS, No. 159285; Court of Appeals No. 346707.

PEOPLE v ULRICH, No. 159293; Court of Appeals No. 346328.

PEOPLE v AARON YOUNG, No. 159298; Court of Appeals No. 341946.

PEOPLE v ANKTON, No. 159299; Court of Appeals No. 345853.

PEOPLE v PALMORE, No. 159302; Court of Appeals No. 345252.

PEOPLE v BOS, No. 159316; Court of Appeals No. 347038.

PEOPLE v SKUPIN, No. 159322; Court of Appeals No. 336554.

PEOPLE v KIRK, No. 159324; Court of Appeals No. 339258.

PEOPLE v DANIEL JENKINS, No. 159326; Court of Appeals No. 340386.

PEOPLE v MCMAHON, No. 159331; Court of Appeals No. 347242.

PEOPLE v HAMILTON, No. 159332; Court of Appeals No. 347179.

PEOPLE v SWEENEY, No. 159334; Court of Appeals No. 339500.

PEOPLE v FRICK, No. 159340; Court of Appeals No. 347025.

CADWELL v CITY OF HIGHLAND PARK, Nos. 159356 and 159357; Court of Appeals Nos. 341026 and 341284.

PEOPLE v CLARMONT, No. 159363; Court of Appeals No. 347035.

PEOPLE v DANARD CARTER, No. 159364; Court of Appeals No. 346612.

PEOPLE v JAMIA ROBINSON, No. 159368; Court of Appeals No. 347267.

In re DONAHUE, No. 159372; Court of Appeals No. 343366.

KRUIS v METROPOLITAN HEALTH CORPORATION, No. 159376; Court of Appeals No. 345523.

PEOPLE v SHARYL WATKINS, No. 159386; Court of Appeals No. 341266.

PEOPLE v DELJEVIC, No. 159394; Court of Appeals No. 339315.

PEOPLE v DELEON, No. 159419; Court of Appeals No. 337134.

PEOPLE v LONG, No. 159421; Court of Appeals No. 342877.

PEOPLE v MCCLURE, No. 159440; Court of Appeals No. 340030.

AHMED v MOSLIMANI, No. 159454; Court of Appeals No. 346314.

PEOPLE v KINSEY, No. 159475; Court of Appeals No. 337133.

PEOPLE v WILKIE, No. 159486; Court of Appeals No. 338007.

PEOPLE v WILLIAM SPENCER, No. 159572; Court of Appeals No. 348890.

PEOPLE v WILLIAM SPENCER, No. 159579; Court of Appeals No. 348905.

Reconsideration Denied July 2, 2019:

PEOPLE v SYKES, No. 156583; Court of Appeals No. 338845. Leave to appeal denied at 503 Mich 945.

PEOPLE v BLANTON, No. 158316; Court of Appeals No. 342152. Leave to appeal denied at 503 Mich 947.

PEOPLE v GOLDMAN, No. 158319; Court of Appeals No. 342072. Leave to appeal denied at 503 Mich 954.

PEOPLE v ERVIN, No. 158433; Court of Appeals No. 343665. Leave to appeal denied at 503 Mich 954.

PEOPLE v KANE, No. 158468; Court of Appeals No. 341694. Leave to appeal denied at 503 Mich 954.

TRADER v COMERICA BANK, No. 158487; Court of Appeals No. 339577. Leave to appeal denied at 503 Mich 949.

In re SUMPTER, No. 158488; Court of Appeals No. 342853. Leave to appeal denied at 503 Mich 949.
VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v BLUMKE, No. 158543; Court of Appeals No. 338058. Leave to appeal denied at 503 Mich 955.

PEOPLE v FLENOID GREER, No. 158576; Court of Appeals No. 343219. Leave to appeal denied at 503 Mich 949.

In re LOUIS G BASSO, JR, REVOCABLE LIVING TRUST, No. 158629; Court of Appeals No. 337321. Leave to appeal denied at 503 Mich 949.

PEOPLE v HACKLER, No. 158740; Court of Appeals No. 338561. Leave to appeal denied at 503 Mich 1002.

Leave to Appeal Denied July 3, 2019:

PEOPLE v LEE, No. 157176; Court of Appeals No. 334308.

PEOPLE v KELVIN WILLIS, No. 157465; reported below: 322 Mich App 579. On May 7, 2019, the Court heard oral argument on the application for leave to appeal the January 11, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

However, we take this opportunity to bring the issues presented in this case to the attention of the Legislature. While, in our judgment, the Court of Appeals properly sustained defendant's conviction under MCL 750.145c(2), see *People v Willis*, 322 Mich App 579, 586 (2018), defendant has nonetheless raised pertinent concerns regarding the breadth of the statute that may warrant further review by the Legislature.

MCL 750.145c(2) proscribes child sexually abusive activity and child sexually abusive material:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a [felony.]

For purposes of this statute, a "child" is defined as "a person who is less than 18 years of age, subject to the affirmative defense created in [MCL 750.145c(7)] regarding persons emancipated by operation of law." MCL 750.145c(1)(c). "Child sexually abusive activity," in turn, "means a child engaging in a listed sexual act." MCL 750.145c(1)(n). And "listed sexual act[s]" include "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, [and] erotic nudity." MCL 750.145c(1)(i).

As the Court of Appeals has previously recognized, MCL 750.145c(2) "imposes criminal liability [upon] three distinct groups of 'person[s] . . . .' " *People v Adkins*, 272 Mich App 37, 40 (2006). The first clause imposes liability upon a person "who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually

abusive activity for the purpose of producing any child sexually abusive material . . . ." MCL 750.145c(2). The second clause imposes liability upon any person who "arranges for, produces, makes, copies, reproduces, or finances . . . any child sexually abusive activity or child sexually abusive material . . . ." *Id*. The third clause imposes liability on a person "who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material . . . ." *Id*.

Only as it pertains to the first "group" must a person act "for the purpose of producing any child sexually abusive material" in order to violate MCL 750.145c(2). In contrast, as it pertains to the second and third groups, the person must act in an effort to facilitate "child sexually abusive activity *or* child sexually abusive material . . . ." *Id*. (emphasis added). The Legislature's use of the disjunctive "or" in the statute is determinative. *Mich Pub Serv Co v Cheboygan*, 324 Mich 309, 341 (1949) (" 'Or' is . . . used to indicate a disunion, a separation, an alternative."). "[O]r" thus indicates the Legislature's intention to criminalize not only efforts to produce child sexually abusive material, but also efforts to engage in child sexually abusive activity. See *id*. Had the Legislature intended to only proscribe activity that is undertaken with the purpose of creating child sexually abusive material, it would have said as much, as it did in setting forth the first group of violators under MCL 750.145c(2).

Accordingly, the Court of Appeals correctly upheld defendant's conviction under MCL 750.145c(2). *Willis*, 322 Mich App at 582. Defendant, a 52-year-old man at the time of the conduct relevant to this case, offered a 16-year-old boy, i.e., a "child" under MCL 750.145c, money in exchange for sexual activities. Thus, defendant "attempt[ed] . . . to arrange for . . . or finance . . . child sexually abusive activity . . . for personal . . . purposes . . . ." MCL 750.145c(2).

Defendant argues that this interpretation does not accurately reflect the genuine intentions of the Legislature. More specifically, he argues that the Legislature did not intend for the statute to criminalize such a broad range of conduct. Consider, for example, an 18-year-old and 17-year-old couple who discuss engaging in sexual intercourse after their high school prom. The 17-year-old is a "child" for purposes of MCL 750.145c; sexual intercourse is a "listed sexual act" under MCL 750.145c(1)(i); and thus, it appears that, under the statute, the 18-year-old could be convicted of "a felony punishable by imprisonment for not more than 25 years," MCL 750.145c(2)(b), because he or she "arrange[d] for . . . child sexually abusive activity" with a person under 18 years old. We question whether this was a result the Legislature genuinely sought when it enacted MCL 750.145c(2), although the conduct indisputably falls within the purview of the language of this statute.

Indeed, defendant raises a reasonable argument that MCL 750.145c(2), as written, elevates the age of consent in Michigan from 16 years old to 18 years old, effectively nullifying several otherwise important and often-employed criminal statutes of our state. The relevant age of consent under the criminal sexual conduct statutes is 16 years old. See MCL 750.520b to MCL 750.520e. Specifically, "[a] person

is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist: (a) That other person is at least 13 years of age and under 16 years of age." MCL 750.520d(1). Revisiting the previous example, the 18-year-old would not have violated MCL 750.520d if he or she had not engaged in sexual intercourse with his or her 17-year-old partner. Nonetheless, the 18-year-old could still be convicted under MCL 750.145c(2) because he or she had "arrange[d] for . . . child sexually abusive activity . . . ." In effect, then, the age of consent is no longer 16 years old, but 18 years old, as any sexually listed act with an individual under 18 years old could result in criminal liability under MCL 750.145c(2). Similarly,

> [a] person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse . . . is guilty of a felony punishable by imprisonment for not more than 4 years . . . . [MCL 750.145a.]

Again, the relevant age for purposes of the solicitation statute is 16 years old. Therefore, one who entices a 17-year-old to engage in sexual intercourse would not be criminally liable under MCL 750.145a. Under MCL 750.145c(2), however, one who "arranges for" that same 17-year-old to engage in sexual intercourse could be held criminally liable.

Accordingly, it is somewhat difficult to harmonize the expansiveness of MCL 750.145c(2) with the rest of Michigan's criminal sexual conduct scheme. As illustrated above, MCL 750.145c(2) appears to criminalize behavior that is otherwise permissible under the criminal sexual conduct statutes. This Court, however, is bound by statutory language —"[t]he Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748 (2002). And MCL 750.145c(2) does not require that a person act with the purpose of producing child sexually abusive material in order to fall within the second or third groups subject to criminal liability. Accordingly, defendant's conviction must be upheld, and a denial of defendant's application for leave to appeal is warranted. Nonetheless, defendant has highlighted concerns regarding the breadth of MCL 750.145c(2). The Legislature may, or may not, wish to assess these concerns and possibly clarify and harmonize our child sexual abuse statutory scheme.

VIVIANO, J. (*dissenting*). This case raises two issues: (1) whether, to sustain a conviction under MCL 750.145c(2), the prosecution must always prove that the defendant acted for the purpose of producing child sexually abusive material, and (2) whether the evidence in this case was sufficient to support defendant's conviction under that provision. The Court of Appeals concluded that a defendant may violate MCL 750.145c(2) without acting for the purpose of producing sexually abusive

materials and that defendant in this case violated the statute by "arrang[ing] for . . . or . . . attempt[ing] or prepar[ing] . . . to arrange for . . . child sexually abusive activity . . . ." MCL 750.145c(2). I agree with the majority that the Court of Appeals' interpretation raises the question of whether the Legislature intended MCL 750.145c(2) to raise the age of consent in Michigan from 16 to 18 years old. Even under the Court of Appeals' broad interpretation of the statute, however, I disagree with the Court of Appeals' conclusion that the evidence in this case was sufficient to sustain defendant's conviction.[1] Therefore, because I would reverse the Court of Appeals, I respectfully dissent from the Court's order denying leave to appeal.

I. FACTS AND PROCEDURAL HISTORY

Defendant encountered the victim in this case, a 16-year-old male, on August 12, 2015. The victim testified at trial that he was familiar with defendant because defendant lived in an apartment complex across the street from where the victim lived with his grandmother. According to the victim's testimony, he was outside talking to a neighbor when he saw defendant, who beckoned him over. Defendant engaged the victim in conversation, asking how he was doing and how old he was, and exchanged phone numbers with the victim. Defendant then asked if the victim wanted to come inside his apartment and hang out, and the victim agreed to do so.

After the victim went inside, defendant locked the door to the apartment and sat next to the victim on the couch. Then, defendant began to argue with another person in the apartment and left the room momentarily. When defendant returned, he stood next to the victim and showed him a video on his phone of "two men having sexual intercourse." Defendant told the victim, "[T]his is what I like to do," and proceeded to offer the victim $25 if he would allow defendant to engage in sexual acts with him. The victim refused and stood to leave, but defendant grabbed him by the shoulder and pulled him back onto the couch. Defendant then offered the victim $100 if he would "have sexual intercourse" with him. When the victim again refused, defendant left the room once again to talk to the other person in the apartment. At that point, the victim ran out the front door and found a neighbor, who called the police after hearing the victim recount what had occurred.

Defendant was charged with two counts of child sexually abusive activity, one count of distributing obscene material to a minor, and one count of possession of cocaine (which the police found when they arrested him). The district court refused to bind defendant over for trial on the child sexually abusive activity counts, concluding that the prosecution was required to show that defendant had acted with the intent to produce child sexually abusive material. The court explained:

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[1] As a result, I do not opine on whether the Court of Appeals correctly interpreted MCL 750.145c(2).

> The Court, having had an opportunity to review the authority referenced by the People, is of the opinion that the charged violations in Counts 1 and 2 would, in fact, require some evidence —competent evidence—that there be a persuasion, inducement, enticement, coercion causing or knowingly allowing a child under the age of eighteen to engage in a sexually abusive activity for the purpose of producing child sexually abusive material . . . .

Following the bindover on the remaining counts,[2] the prosecution filed a motion to amend the information to reinstate the two child sexually abusive activity charges. The circuit court granted the motion, making the following findings:

> The Court finds that the examining magistrate clearly erred in its interpretation of the law, that the examining magistrate interpreted the law incorrectly and that the statute—although I think it's understandable and confusing particularly in light of the fact that the complaint and warrant was drafted with the same wording, that there's no requirement under the statute that material such as video, pictures or any other type of material has to be produced, that the sexually abusive activity is a broader act, has a broader definition, and in this particular case the Defendant's conduct, as testified to at the exam, of having the child go into the apartment for the purposes of offering him money, asking him if he would engage in certain sexual activity, that being sexual intercourse, which is defined as a sexually abusive activity and is a listed sexual act and masturbation, is listed as a—listed sexual act that the Defendant attempted, prepared or attempted to make—arrange to have someone, meaning the complainant, engage in the sexually abusive activity with him and that the person was under eighteen years of age.

At the conclusion of trial, the court instructed the jury regarding the crime as follows:

> [T]he Defendant is charged with a second count of child sexually abusive activity. So in Count II the Defendant is charged with a crime known as child sexually abusive activity. The Defendant has

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[2] After the district court dismissed the two counts of child sexually abusive activity, the prosecution amended the information to add two counts of engaging or offering to engage the services of person under 18 for purposes of prostitution under MCL 750.449a(2). That provision states, "A person who engages or offers to engage the services of another person, who is less than 18 years of age and who is not his or her spouse, for the purpose of prostitution, lewdness, or assignation, by the payment in money or other forms of consideration, is guilty of a crime punishable as provided in section 451"—i.e., "by imprisonment for not more than 5 years or a fine of not more than $10,000.00, or both," MCL 750.451(4).

> plead [sic] not guilty to this charge. To prove this charge the prosecution must prove each of the following elements beyond a reasonable doubt and there are two elements for Count II.
>
> First, that the Defendant attempted, prepared or attempted to make or arrange to have someone engage in sexually abusive activity with a person. Second, that this person was under eighteen years of age.
>
> So on the next page I've defined—I have the definition of child sexually abusive activity that applies to Count I and Count II.
>
> Sexually abusive activity is defined by law as a child engaging in any of the following sexual acts. A, sexual intercourse whether genital, anal or oral. B, fondling of a person's clothed or unclothed genitals, public [sic] area, buttocks or female breasts for the purpose of sexual gratification. C, masturbation.

Following deliberations, the jury acquitted defendant of one count of child sexually abusive activity, but convicted him on the remaining charged counts.

Defendant appealed, and the Court of Appeals affirmed. Relying on its prior decision in *People v Adkins*,[3] the Court of Appeals first rejected defendant's argument that MCL 750.145c(2) requires the prosecution to prove that a defendant acted with the intent to produce child sexually abusive material. The court explained:

> This Court has recognized that MCL 750.145c(2) applies to three distinct groups of persons. The first category includes a person "who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material . . . ." MCL 750.145c(2)[.] This category refers to those who are engaged in the production of pornography. It is undisputed that defendant does not fall within this group. The second category includes a person who "arranges for, produces, makes, copies, reproduces, or finances . . . any child sexually abusive activity or child sexually abusive material . . . ." MCL 750.145c(2)[.] The last category is defined to include a person "who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity or child sexually abusive material . . . ." MCL 750.145c(2)[.] The use of the disjunctive "or" in the second and third categories clearly and unambiguously indicates that persons who arrange for or attempt or prepare to arrange for child sexually abusive activity face criminal liability. The Legislature thus omitted from the second and third groups subject to criminal liability any requirement that the individuals therein must have acted for the ultimate purpose of creating any child sexually abusive material, a specific requirement applicable to the first group of criminals. Accordingly, we reject defendant's

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[3] *People v Adkins*, 272 Mich App 37 (2006).

> argument that MCL 750.145c is limited to conduct involving the production of sexually abusive material. The allegations against defendant squarely place him within the group of persons on whom MCL 750.145c(2) imposes criminal liability.[4]

The Court of Appeals then concluded that, under its interpretation of the statute, the evidence was sufficient to convict defendant. The Court of Appeals explained that "defendant arranged for, or attempted to arrange or prepare for, child sexually abusive activity" when he "invited the 16-year-old victim into his apartment, showed the victim a pornographic video of two men engaging in sexual intercourse, offered the victim $25 to allow defendant to insert his fingers into the victim's anus while he masturbated, and later offered the victim $100 to engage in sexual intercourse."[5] In support of this conclusion, the Court of Appeals compared this case to *People v Aspy*, in which the Court of Appeals found sufficient evidence that the defendant had "prepar[ed] . . . to arrange for" child sexually abusive activity in violation of MCL 750.145c(2) where he communicated online with an individual posing as an underage girl, made plans to see her in person, and drove to Michigan to meet her.[6] Thus, the Court of Appeals in this case affirmed defendant's convictions.[7]

II. ANALYSIS

Regardless of whether we interpret MCL 750.145c(2) as always requiring that a defendant act with the purpose of creating sexually abusive materials, I believe that the evidence in this case is insufficient because defendant did not "arrange[] for" child sexually abusive activity. MCL 750.145c(2) provides, in relevant part:

> A person who persuades, induces, entices, coerces, causes, or knowingly allows a child to engage in a child sexually abusive activity for the purpose of producing any child sexually abusive material, or a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or

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[4] *People v Willis*, 322 Mich App 579, 585-586 (2018) (citations and quotation marks omitted).

[5] *Id*. at 586.

[6] *People v Aspy*, 292 Mich App 36, 42 (2011).

[7] The Court of Appeals also rejected defendant's claims that the trial judge pierced the veil of judicial impartiality and that his sentence was an unreasonable departure from the guidelines. Defendant has not raised the latter claim before our Court. Because I would reverse based on the insufficiency of the evidence, I do not address defendant's judicial partiality claim.

> finance any child sexually abusive activity or child sexually abusive material for personal, distributional, or other purposes if that person knows, has reason to know, or should reasonably be expected to know that the child is a child or that the child sexually abusive material includes a child or that the depiction constituting the child sexually abusive material appears to include a child, or that person has not taken reasonable precautions to determine the age of the child is guilty of a crime . . . .

The prosecutor argues that "[v]iewing the evidence in a light most favorable to the People, there is sufficient evidence that the Defendant arranged for, or attempted to arrange for, child sexually abusive activity."[8] Thus, in order to properly analyze whether the evidence was sufficient to convict defendant in this case, the focus must be on the proper interpretation of "arranges for" within the context of the statute.[9] Looking to the dictionary, the word "arrange" has two potentially relevant definitions: "to make plans or preparations: *They arranged for a conference on Wednesday*" or "to make a settlement; come to an agreement: *to arrange with the coal company for regular deliveries*."[10]

To determine the appropriate definition, we "must use the context in which a given word appears to determine its aptest, most likely sense."[11]

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[8] Prosecutor's Supplemental Brief on Appeal, p 12.

[9] The Court of Appeals held that the evidence was sufficient to show that defendant "arranged for, or attempted to arrange or prepare for, child sexually abusive activity . . . ." *Willis*, 322 Mich App at 586. This deviates slightly from the language of the statute. Section 145c(2) does not include in its prohibited conduct "preparing for" child sexually abusive activity. Instead, the statute prohibits penalizes "a person who attempts or prepares . . . to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity . . . ." Thus, the focus must be on whether defendant "arrange[d] for" or "attempt[ed] or prepare[d] . . . to arrange for" child sexually abusive activity.

[10] Dictionary.com <https://www.dictionary.com/browse/arrange> (accessed June 17, 2019) [https://perma.cc/N757-FF6N]. The definitions provided above are the two possible definitions of "arrange" when it is used as an intransitive verb, meaning that it has no direct object. See *id*. "Arrange" as used in the statute is intransitive because it is followed not by a direct object, but instead by a prepositional phrase—"for . . . child sexually abusive activity . . . ." *Webster's New Collegiate Dictionary* (1974) provides two similar definitions of "arrange" when used as an intransitive verb: "to bring about an agreement or understanding <*arranged* to have a table at the restaurant>" and "to make preparations: PLAN <*arranged* for a vacation with his family>."

[11] Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 418.

Here, replacing the term in the statute with the two potential definitions, the statute either reads "[to make plans or preparations] for . . . child sexually abusive activity" or "[to come to an agreement] for . . . child sexually abusive activity." I believe the more natural reading—i.e., the term's "aptest, most likely sense"—is the former option.[12] That this is the more natural reading is especially pronounced when inserting the statute's definition of "child sexually abusive activity": "a child engaging in a listed sexual act."[13] Then, the statute reads either "[to make plans or preparations] for . . . any child engaging in a listed sexual act" or "[to come to an agreement] for . . . any child engaging in a listed sexual act." While making preparations for a child engaging in sexual acts has a clear meaning, it is not at all clear what it means to come to an agreement for a child engaging in a sexual act.

That the former definition is appropriate is also supported by the fact that the statute does not specify with whom a defendant must "come to an agreement" to be guilty of violating the statute. While plans or preparations require only unilateral action, an agreement requires the involvement of another party. But who is other party under the statute? A codefendant? The victim? Anyone, as long as there is an agreement somewhere? That the statute does not answer this question supports the conclusion that "come to an agreement" is not the aptest definition of "arrange" in the context of the statute. As a result, I believe that the most likely sense of "arrange," as used in the statute, is "to make plans or preparations."[14]

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[12] Notably, the examples following the "make preparations" definition of "arrange" in both the dictionaries cited above fit the sentence structure used in the statute—i.e., "arranged for a conference," "arranged for a vacation," and "arrange[d] for . . . child sexually abusive activity."

[13] See MCL 750.145c(1)(n) (" 'Child sexually abusive activity' means a child engaging in a listed sexual act.").

[14] While I believe this interpretation of "arrange" most closely adheres to the plain language of the statute, the rule of lenity would compel this reading even if the two definitions of "arrange" were equally apt. Under the rule of lenity, "penal statutes are to be strictly construed and any ambiguity is to be resolved in favor of lenity[.]" *People v Gilbert*, 414 Mich 191, 211 (1982); *id*. ("The scope of this statute is at least uncertain; it should be applied only to those acts which the Legislature clearly meant to proscribe."); *People v Dempster*, 396 Mich 700, 715 (1976) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.") (citation and quotation marks omitted); *People v Goulding*, 275 Mich 353, 359 (1936) ("Defendant ought not to be convicted unless he is clearly and unequivocally within the language of a statute which by its terms covers his case."). In this case, if the competing definitions of the statutory term are both reasonable under the statute, then the rule of lenity compels the application of the

But there is no indication in the record that defendant "ma[de] plans or preparations" for child sexually abusive activity. Instead, the record reflects that defendant happened upon the victim outside his apartment and took advantage of the chance opportunity to lure the victim into his apartment. Indeed, the prosecutor acknowledged at oral argument that defendant only encountered the victim "by happenstance."[15] While defendant proceeded to take advantage of the "happenstance" encounter by inviting the victim into his house and seeking to solicit sexual acts, there is no indication that defendant did anything to plan or prepare for the child sexually abusive activity beforehand.

In concluding that defendant had "arrange[d] for" child sexually abusive activity, the Court of Appeals relied on its prior decision in *Aspy*.[16] In *Aspy*, the defendant engaged in sexual conversations online over a one-month period with a person posing as a 14-year-old girl.[17] The defendant, who lived in Indiana, eventually agreed to drive to Michigan to meet the purported 14-year-old and take her camping while her mother was out of town.[18] Before driving to meet her, the defendant reserved a campsite and purchased the girl's favorite alcoholic beverage, which he brought along.[19]

As in this case, the prosecutor in *Aspy* "charged [the] defendant with attempting, preparing, or conspiring to arrange for child sexually abusive activity."[20] The defendant argued that the acts establishing a violation of MCL 750.145c(2) occurred only in Indiana, and thus the Michigan courts lacked jurisdiction over the crime. The Court of Appeals disagreed, explaining:

> Defendant, however, fails to acknowledge he also prepared to commit child sexually abusive activity while in Michigan, not Indiana. . . . He drove into Michigan to a location where he intended to meet a child whom he believed to be under the age of 18. There is substantial evidence that he intended to take a girl under the age of 18 to a reserved campsite and engage in behavior wrongful under MCL 750.145c(2). Since preparation to arrange for child sexually abusive activity is an element of MCL 750.145c(2),

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definition under which defendant is not criminally liable. See *Reading Law*, p 300 (criticizing a court decision for not applying the rule of lenity in a case involving competing interpretations of a statutory term).

[15] See Michigan Supreme Court, Oral Arguments in *People v Willis* <https://www.youtube.com/watch?v=I1V0Qdf_N34> at 19:22 to 19:26 (accessed May 30, 2019).

[16] *Aspy*, 292 Mich App 36.

[17] *Id.* at 38-39.

[18] *Id.* at 39.

[19] *Id.* at 39-40.

[20] *Id.* at 42.

> we reject defendant's contention that Michigan lacked territorial jurisdiction for his prosecution under MCL 762.2.[21]

Aspy is distinguishable in two important ways. First, the Court of Appeals in that case focused on whether the relevant actions took place in Michigan or Indiana, rather than explaining why the defendant's actions constituted "arrang[ing] for" child sexually abusive activity. The Court of Appeals did summarily conclude that "the prosecution presented more than sufficient evidence to allow a rational jury to conclude that defendant prepared and attempted to commit child sexually abusive activity . . . ."[22] Notably, however, the language used by the Court of Appeals does not adhere to the statute, as the statute says nothing about preparing or attempting to "commit" child sexually abusive activity, but only preparing or attempting to "arrange for" child sexually abusive activity. Thus, the basis for the Court of Appeals' conclusion regarding the sufficiency of the evidence is unclear.

Aspy is also distinguishable on its facts. In *Aspy*, the defendant was in contact with the supposed 14-year-old for a month before planning a trip to visit her. He reserved a campsite, purchased a particular beverage, and traveled across state lines with the intent of meeting with the girl and engaging in sexual activity. In other words, the defendant "ma[de] plans or preparations" for child sexually abusive activity. In this case, by contrast, the record does not contain any evidence that defendant made any preparations beforehand for his encounter with the victim. Instead, defendant encountered the victim by chance and, in a continuous sequence of events, obtained his number, invited him to hang out, showed him pornography, and offered him money for sex.

The conclusion that defendant did not "arrange[] for" child sexually abusive activity within the meaning of the statute is supported by the fact, as noted above, that MCL 750.145c(2) does not proscribe the act of engaging in child sexually abusive activity.[23] The statute does not refer to a person who commits, engages in, or solicits child sexually abusive activity, but only "a person who arranges for, produces, makes, copies, reproduces, or finances, or a person who attempts or prepares or conspires to arrange for, produce, make, copy, reproduce, or finance any child sexually abusive activity." Given that the statute does not prohibit the act itself, or even an attempt to commit the act itself, "arranges for" must mean something more than an attempt to commit child sexually abusive activity. In this case, however, the most that can be said of

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[21] *Id.* at 43-44.

[22] *Id.* at 42-43.

[23] MCL 750.145c(1)(n) does define "[c]hild sexually abusive activity" as "a child engaging in a listed sexual act." But MCL 750.145c(2) does not proscribe the *defendant*'s act of engaging in child sexually abusive activity.

defendant's conduct is that he attempted to engage in sexual activity with the victim, as the record does not reveal any preparation on defendant's part.

III. CONCLUSION

For the reasons set forth above, regardless of whether MCL 750.145c(2) always requires that a defendant act with the purpose of producing sexually abusive materials, I believe the evidence presented in this case did not establish that defendant did anything to "arrange[] for" for child sexually abusive activity within the meaning of the statute.[24] As a result, I would hold that the evidence was insufficient to convict defendant.[25] I respectfully dissent.

MCCORMACK, C.J., joins the statement of VIVIANO, J.

In re APPLICATION OF DETROIT EDISON COMPANY RE LICENSING RULES, No. 157717; Court of Appeals No. 332605.

MARKMAN, J. (*dissenting*). I respectfully dissent. This case concerns whether the Court of Appeals correctly ruled that the Public Service Commission (PSC) possesses the regulatory power to issue an order prohibiting industrial and commercial consumers of electricity in Michigan from participating in federally established "wholesale electric markets" for demand-response resources during times of peak electricity demand. As simply put as possible, "wholesale demand response," as it is called, "pays consumers for commitments to curtail their use of power, so as to curb wholesale rates and prevent grid breakdowns." *Federal Energy Regulatory Comm v Electric Power Supply Ass'n*, 577 US 260, 270 (2016). While I hold no particular view at this time as to whether the Court of Appeals erred by its thoughtful

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[24] Although I do not believe defendant "arrange[d] for . . . child sexually abusive activity" within the meaning of MCL 750.145c(2), I do not mean to suggest that defendant's actions in this case were acceptable. Indeed, defendant's conduct may violate another statute, such as MCL 750.449a, under which the prosecution charged defendant after the district court dismissed the charges of child sexually abusive activity. See note 1 of this statement.

[25] In the denial order, the majority, quoting MCL 750.145c(2), concludes that defendant " 'attempt[ed] . . . to arrange for . . . *or finance* . . . child sexually abusive activity . . . for personal . . . purposes . . . .' " (Emphasis added.) The prosecution, however, has not argued that defendant attempted to "finance" child sexually abusive activity by offering money in exchange for sex. Nor did the trial court include "finance" within the jury instruction. Accordingly, I would decline to address whether defendant "attempt[ed] to . . . finance . . . child sexually abusive activity" within the meaning of the statute.

decision, the issue is one that, in my judgment, merits the fullest review of this Court and I would grant leave to address the following concern.

"The [PSC] is a creature of the Legislature and, as such, possesses only those powers conferred upon it by statute." *Union Carbide Corp v Pub Serv Comm*, 431 Mich 135, 148 (1988). In ruling that the PSC possessed the power to issue its order in this case, the Court of Appeals cited two statutory provisions, MCL 460.6(1) and MCL 460.54, but applied only MCL 460.6(1). MCL 460.6(1) reads in relevant part:

> The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except a municipally owned utility, the owner of a renewable resource power production facility as provided in [MCL 460.6d], and except as otherwise restricted by law. The public service commission is vested with the power and jurisdiction to *regulate all rates, fares, fees, charges, services, rules, conditions of service*, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of public utilities . . . . [Emphasis added.]

And MCL 460.54 reads in relevant part:

> In addition to the rights, powers and duties vested in and imposed on said commission by the preceding section, its jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state, producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use.

I am uncertain whether MCL 460.6(1) or MCL 460.54 confers specific power upon the PSC. See *Consumers Power Co v Pub Serv Comm*, 460 Mich 148, 160 (1999) ("This Court has consistently held . . . that the broad language of [MCL 460.6] serves as an outline of the PSC's jurisdiction, not a grant of specific powers."); *Building Owners & Managers Ass'n of Metro Detroit v Pub Serv Comm*, 424 Mich 494, 502 (1986) (describing MCL 460.54 as a "statutory provision[] governing the PSC's jurisdiction"). But assuming that MCL 460.6(1) and MCL 460.54 do confer specific power, because the PSC order affects electricity rates during times of peak demand in Michigan, it could arguably be deemed within its power to "regulate" and "fix" electricity "rates" under both MCL 460.6(1) and MCL 460.54. Similarly, because the PSC order places a "condition" upon a customer's receipt of electricity—such receipt is contingent on the customer's nonparticipation in the federal markets—it may also be deemed within PSC's power to "regulate . . . conditions of service" under MCL 460.6(1).

However, I question whether such relatively broad statutory grants of power—assuming they are, in fact, grants of power—invest the PSC with the power over what is, in effect, a private managerial decision on

the part of industrial and commercial entities to reduce electricity consumption in exchange for compensation from the federal markets. Such an interpretation may additionally suggest that the PSC possesses power over virtually any conduct on the part of a utility customer that is even incidentally related to, or that tangentially "affects," the electricity itself or electricity rates. For instance, the utilization of solar panels by a customer might well also have a downward effect on electricity rates because less electricity would obviously be demanded of the power grid under such circumstances. Yet, a prohibition against customers utilizing solar panels would seem to exceed the PSC's considerably more limited grant of statutory power over "rates" and "conditions of service." I am concerned that the Legislature did not intend to authorize the PSC to regulate conduct that is so arguably attenuated from the delivery and pricing of the electricity itself. Rather, an alternative understanding of MCL 460.6(1) and MCL 460.54 would seem to be that the Legislature has authorized the PSC, albeit only in a more direct and limited manner, to regulate the rates and service of electricity.

In re PB CAMPBELL, MINOR, No. 159645; Court of Appeals No. 344885.

PEOPLE V KIYA, No. 159756; Court of Appeals No. 340965.

MARKMAN, J. (*dissenting*). For the reasons set forth by the Court of Appeals dissent, I would reverse the judgment of the Court of Appeals and reinstate defendant's conviction and sentence.

PEOPLE V LATAUSHA SIMMONS, No. 159814; Court of Appeals No. 348067.

Order Directing the Filing of Supplemental Briefs Entered July 5, 2019:

In re HOUSE OF REPRESENTATIVES REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 & 369 and *In re* SENATE REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2018 PA 368 & 369, Nos. 159160 and 159201. By order of April 3, 2019, the Clerk scheduled these cases for oral argument to be held July 17, 2019. The Court respectfully directs the Attorney General to file separate supplemental briefs by 5:00 p.m. on July 10, 2019, addressing both sides of the following questions: (1) whether this Court has jurisdiction to issue an opinion under Const 1963, art 3, § 8 after the effective date of legislation, compare *In re 2005 PA 71*, 479 Mich 1, 13 (2007) ("Because the House of Representatives requested an advisory opinion well before [the effective] date, this Court indisputably has jurisdiction under art 3, § 8 to render an advisory opinion in this matter."), with 2 Official Record, Constitutional Convention 1961, p 3368 (Const 1963, art 3, § 8 "empowers the supreme court to furnish advisory opinions . . . only as to legislative acts that are already passed and signed by the governor, *and before they become effective*.") (emphasis added); and (2) the stare decisis effect of *In re 2005 PA 71* on this determination, compare Const 1963, art 3, § 8 ("[T]he legislature . . . may request the opinion of the supreme court . . . as to the constitutionality of legislation . . . ."), with *Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10)*, 396 Mich

465, 477 (1976) ("An advisory opinion is not precedentially binding upon the Court and represents only the opinions of the parties signatory.").

Summary Disposition July 9, 2019:

DROUILLARD v AMERICAN ALTERNATIVE INSURANCE CORPORATION, No. 157518; reported below: 323 Mich App 212. On May 7, 2019, the Court heard oral argument on the application for leave to appeal the February 27, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, which held that summary disposition for the defendant was proper because the plaintiff was not entitled to coverage under the insurance policy's uninsured motor vehicle provision as a matter of law. See MCR 2.116(C)(10). We remand this case to the St. Clair Circuit Court for further proceedings not inconsistent with this order.

Uninsured motorist coverage is not statutorily mandated, and therefore, the terms of the contract control whether a claimant is entitled to benefits. *DeFrain v State Farm*, 491 Mich 359, 367 (2012). We review de novo the interpretation of an insurance contract. *Twichel v MIC Gen Ins Corp*, 469 Mich 524, 533 (2004). "An insurance policy is enforced in accordance with its terms. Where a term is not defined in the policy, it is accorded its commonly understood meaning." *Id*. at 534. "In determining what a typical layperson would understand a particular term to mean, it is customary to turn to dictionary definitions." *Mich Millers Mut Ins Co v Bronson Plating Co*, 445 Mich 558, 568 (1994), rev'd on other grounds by *Wilkie v Auto-Owners Ins Co*, 469 Mich 41 (2003). Only "[w]here ambiguity is found" will a court "construe the term in the manner most favorable to the insured." *Id*. at 567.

The defendant's policy insuring Tri-Hospital Emergency Medical Services Corporation for the period of September 1, 2014 to September 1, 2015 includes the following in its definition of an "uninsured motor vehicle" in Paragraph (3), Subparagraph (d), of Section F, "Additional definitions":

> "[A] land motor vehicle or 'trailer'
>
> * * *
>
> d. [t]hat is a hit-and-run vehicle and neither the driver nor [the] owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto" or a vehicle an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".

The Court of Appeals erred by concluding that the unidentified truck in this case did not "cause[] an object to hit the insured ambulance"

when the ambulance hit the drywall left in the road by the truck. *Drouillard v American Alternative Ins Corp*, 323 Mich App 212, 222-223 (2018). According to the Court of Appeals, the ambulance hit the object, and not vice versa, because the drywall in this case lay "stationary [in the road] at the time of the accident . . . ." *Id*. at 223. Neither party disputes that the drywall left the bed of the truck; that the drywall came to rest in the road; and that, shortly thereafter, the ambulance collided with the drywall as the drywall lay stationary in the road. Using the commonly understood meaning of the provision's terms, see *Twichel*, 469 Mich at 534, one way of triggering coverage under the provision is for an unidentified vehicle to cause an object to come in contact with a covered auto. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" as "to come in contact with <the ball [hit] the window>"). See also *Merriam-Webster's Dictionary and Thesaurus* (2007) (defining "hit" as "to make or bring into contact: collide"). That is exactly what happened when the unidentified vehicle in this case lost its load in the path of the oncoming ambulance. By depositing the drywall directly in the path of an oncoming vehicle, the unidentified vehicle caused the drywall to come in contact with the oncoming vehicle. Thus, whether the drywall was moving or was stationary at the time of the contact is not dispositive.

We disagree with the defendant and the dissenting statement that coverage is precluded because the drywall was stationary when the collision occurred. The dissenting statement wants to reframe the issue as a theoretical semantic one, asking whether a stationary object can be said to "hit" a moving one. But in doing so, the dissenting statement fails to apply the ordinary meaning of the term "hit" or to interpret it in the context in which it appears in the policy provision at issue.[1] As discussed above, we believe the pertinent inquiry under the policy is whether a vehicle that has lost its load in a roadway, thereby placing a stationary object in the path of a moving vehicle, can be said to have caused the stationary object to come in contact with the moving vehicle. When the question is properly framed, the answer is straightforward: depositing drywall directly in the path of an oncoming vehicle is

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[1] The dissenting statement's reference to hammers and nails, fists and noses, and golf clubs and balls does not add clarity because the word "hit" has a different meaning in those contexts than it does in the context of the policy provision in this case. As it pertains to hammers and nails (or fists and noses), the word "hit" is defined as "to deal a blow or stroke to: *Hit the nail with the hammer*." Dictionary.com <https://www.dictionary.com/browse/hit#> (accessed July 3, 2019) [https://perma.cc/CUC7-QDKV]. See also *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" in this context as "to deliver (as a blow) by action"). As it pertains to golf clubs and balls, the word "hit" means "to strike (as a ball) with an object (as a bat, club, or racket) . . . ." *Id*. We choose the contextually appropriate ordinary meaning. See *In re Erwin*, 503 Mich 1, 33 n 15 (2018) (VIVIANO, J., dissenting).

sufficient to cause it to come in contact with that vehicle. Accordingly, the phrase "cause an object to hit" does not preclude coverage under the uninsured motor vehicle provision in this case merely because the drywall was stationary at the time of the accident.

Our conclusion is further supported by the presence of the word "hit" in both scenarios in which a hit-and-run accident may give rise to uninsured motorist benefits as prescribed in the second sentence of Subparagraph (d)—when an unidentified vehicle has "hit" a covered auto and when an unidentified vehicle has "cause[d] an object to hit" a covered auto.[2] The defendant concedes that, when the term "hit" appears for the first time in the second sentence, its meaning does not depend on whether the unidentified vehicle "hits" the insured vehicle, or vice versa, so long as the vehicles come into contact with each other. The defendant nevertheless argues that, when the term appears for the second time in the same sentence, coverage is available only if the object "hits" the insured vehicle, but not if the insured vehicle "hits" the object.[3] Because Subparagraph (d) does not distinguish between "hit" in circumstances involving a collision between vehicles and "hit" in circumstances involving a collision between an object and a vehicle, the defendant's argument is belied by the principle recognized in our Court that "[i]dentical language should certainly receive identical construction when found in the same act."[4] *Empire Iron Mining Partnership v Orhanen*, 455 Mich 410, 426 n 16 (1997) (quotation marks and citation omitted).

MARKMAN, J. (*dissenting*). The issue here is remarkably straightforward: whether certain drywall lying stationary on a road can properly be said to have "hit" a moving insured motor vehicle, thereby entitling plaintiff to uninsured motorist coverage. The Court of Appeals majority concluded that, while the moving vehicle "hit" the stationary drywall, the stationary drywall did not "hit" the moving vehicle and therefore plaintiff is not entitled to coverage. This conclusion makes sense, as it would be highly unorthodox in common parlance for a speaker of the American-English language to observe that a stationary object had "hit"

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[2] The dissenting statement's disapproval of this method of construction is misguided. The sole issue before us was and is construction of Subparagraph (d), and we must therefore consider the meaning of the same word used elsewhere in the same sentence of the policy, regardless of whether a party has raised or disputed that specific construction argument.

[3] See Michigan Supreme Court, Oral Arguments in *Drouillard v American Alternative Ins Corp* <https://www.youtube.com/watch?v=OGXiXCaoEaY> at 20:19-22:33 (accessed July 3, 2019).

[4] We believe this principle applies equally to contract interpretation and probably with even more force here, where the same word is used not just in the same policy or provision of the policy, but in the same sentence. See *Twichel*, 469 Mich at 534.

a moving object. To take just one example, one would not ordinarily declare during a game of pick-up baseball that a window in a nearby home had "hit" a stray baseball. Rather, one would declare that the ball had "hit" the window. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" as "to come in contact with <*the ball* [*hit*] *the window*>") (emphasis added). The majority reverses the Court of Appeals and effectively holds that, as a matter of law, a stationary object can be fairly described as having hit a moving object. Because I do not believe that any reasonable speaker of our language would concur with this analysis and contend that the stationary drywall here "hit" the moving vehicle, I respectfully dissent from this Court's order reversing the decision of the Court of Appeals.

The insurance policy at issue provides coverage for an injury caused by an "uninsured motor vehicle" and further provides that an "uninsured motor vehicle" encompasses a vehicle

> that is a hit-and-run vehicle and neither the driver nor owner can be identified. The vehicle must hit, or cause an object to hit, an "insured", a covered "auto", or a vehicle an "insured" is "occupying". If there is no direct physical contact with the hit-and-run vehicle, the facts of the "accident" must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such "accident".

Thus, the first sentence provides for coverage only if: (a) an accident is caused by a "hit-and-run vehicle," and (b) "neither the driver nor owner can be identified." The second sentence adds that the insured is only entitled to coverage if *either*: (a) the hit-and-run vehicle "hits" the insured vehicle, *or* (b) the hit-and-run vehicle "causes an object to hit" the insured vehicle. Finally, the third sentence provides a heightened evidentiary burden for claims as to which "there is no direct physical contact with the hit-and-run vehicle . . . ." For such claims, "the facts of the 'accident' must be corroborated by competent evidence, other than the testimony of any person having a claim under this or any similar insurance as the result of such 'accident'." To summarize, the first and second sentences provide the prerequisites for coverage under the contractual provision, while the third sentence establishes a heightened evidentiary burden for a particular class of claims under the provision.

Plaintiff does not allege that the unidentified vehicle itself "hit" the insured vehicle. Thus, the question is simply whether the unidentified vehicle "cause[d] an object to hit" the insured vehicle where the drywall fell out of the unidentified vehicle onto the road and the insured vehicle struck it moments later, when the drywall was lying stationary on the road.[1] In other words, the question is whether the stationary drywall

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[1] Judge TUKEL's concurrence in the Court of Appeals raises a substantial argument that a "hit-and-run vehicle" is one in which a driver of a vehicle hits another vehicle, recognizes that he has hit that other vehicle, and then runs immediately thereafter in order to flee the scene

"hit" the moving vehicle. As this Court has long recognized, terms in a contract "must be interpreted by common sense and common usage, unless some special reason exists to the contrary in a given case." *Burkam v Trowbridge*, 9 Mich 209, 210-211 (1861). Any speaker of English would recognize that it is principally the moving object that "hits" the stationary one; stationary objects can be hit *by* something else, but they do not themselves do the hitting. Once again, the window does not *hit* the ball, just as the nail does not *hit* the hammer, the golf ball does not *hit* the golf club, the nose does not *hit* the fist, and the fire hydrant does not *hit* the vehicle careening into it. As the Court of Appeals majority aptly noted:

> [T]he relevant policy language reflects a clear distinction between the direct object and the indirect object. Coverage is available under the policy only if the subject of the sentence (the "vehicle," meaning the hit-and-run vehicle), caused the direct object ("an object") to hit the indirect object ("an 'insured', a covered 'auto' or a vehicle an 'insured' is 'occupying' "). The order of the words in this sentence is grammatically distinct from the language that would be used to describe circumstances in which the hit-and-run vehicle caused the insured to hit an object. Interpreting the language at issue in a manner that would include those circumstances would require a "forced or constrained construction," which should be avoided. [*Drouillard*, 323 Mich App at 221-222.]

This commonsense understanding of the term "hit" is supported by empirical data from the Corpus of Contemporary American English (COCA). While this data is not without its limitations, this Court has recognized it as a tool to "analyze[] ordinary meaning through a method that is quantifiable and verifiable." *People v Harris*, 499 Mich 332, 347 (2016) (quotation marks and citation omitted). COCA enables users to search more than 560 million words spread evenly across 1990–2017 to discover linguistic patterns and exercises of common usage. Its remarkably comprehensive database includes transcripts of live television broadcasts, newspapers, magazines, academic journals, and fiction. Davies, Corpus of Contemporary American English <https://www.english-corpora.org/coca/> (accessed June 25, 2019) [https://perma.cc/Y7KA-SHK3]. Of the 1,895 relevant excerpts in COCA in which the word "hit" (employed as a verb) is collocated within four words of objects that are generally stationary (a wall, a fence, a guardrail, a nail,

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of the accident. See *Drouillard v American Alternative Ins Corp*, 323 Mich App 212, 223-229 (2018) (TUKEL, J., concurring). However, the proper interpretation of a "hit-and-run vehicle" need not be addressed in this case, as I agree with the unanimous conclusion of the Court of Appeals (including Judge TUKEL himself) that even if this interpretation of a "hit-and-run vehicle" is correct, there remains a question of fact as to whether the driver of the unidentified vehicle was cognizant of the accident prior to leaving the scene. Accordingly, plaintiff is not, as a matter of law, precluded from coverage on this basis.

a curb, a post, a mailbox, a floor, the ground),[2] there are only thirteen excerpts at the most—approximately .68% of all relevant excerpts—that could even arguably be interpreted as communicating that a stationary object can "hit" something else.[3] The remaining 1,882 excerpts—approximately 99.3% of all relevant excerpts—describe the stationary object as being "hit" by something else, not as doing the "hitting." These data reinforce what I believe is already a commonly understood proposition: in common American-English parlance, the moving object "hits" the stationary object; the stationary object does not "hit" the moving object.

The majority rejects this reasoning, concluding that because the word "hit" can be defined as "come in contact with," and the drywall "c[a]me in contact with" the insured vehicle, the drywall thus "hit" the insured vehicle and plaintiff is entitled to coverage. *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "hit" as "to come in contact with <the ball [*hit*] the window>"). However, this understanding of "hit" is hardly contrary to the common understanding explained above. The

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[2] The number of excerpts in COCA in which the verb "hit" appears within four words to the right or the left of the relevant search term (used as a noun) for each term, in order from the most to the fewest number of excerpts, is: ground (1,174), wall (637), floor (549), nail (207), fence (48), post (44), curb (25), guardrail (12), and mailbox (10). Because of the high volume of results for the search involving the words "hit" and "ground," I analyzed only an entirely randomly selected 500-excerpt sample for this opinion. For the other search terms, I analyzed every excerpt in the database. Of the 2,032 excerpts I analyzed, 137 of them, for various reasons, did not support either party's position. For example, in the search for the words "hit" and "post," there were excerpts in which the word "hit" was within four words of "The Washington Post." Because the word "hit" was used in conjunction with a proper noun rather than a stationary object, these excerpts did not assist in determining whether the stationary object does or does not "hit" the moving object in ordinary usage. Additionally, there were some excerpts in which "hit" and the search term appeared in different sentences and therefore there was no relationship between "hit" and the search term to analyze.

[3] Of the thirteen excerpts that could arguably support the majority's conclusion, four of these compare something moving as hitting something else "like a wall," for example, "the howling rush of air hit like a wall." While the fact that something moving is described as "hitting" something "like a wall" arguably suggests that a stationary wall can "hit" something, this is dubious support for the conclusion that a stationary wall "hits" something else. Rather, this phrase appears to be an essentially literary or metaphorical device whereby emphasis is given to the proposition that something being hit by a moving object with sufficient force has *effectively* hit the moving object.

majority seems to presume that the phrase "come in contact with" itself does not require movement or the terminus of a process, but simply identifies an occurrence, i.e., that to "come in contact with" signifies one item contacting another, regardless of which item had been "moving" when the contact occurred. But definitions of the word "come" and "in" indicate that only a moving object actually "hits" another. The first two definitions of the word "come" in the same dictionary employed by the majority require motion. *Id.* ("to move toward something: approach <[*come*] here>"; "to move or journey to a vicinity with a specified purpose <[*come*] see us> <[*come*] and see what's going on>"). Moreover, "in" can be defined as the equivalent of the first definition of "into," which is "a function word to indicate entry, introduction, insertion, superposition, or inclusion <came [*into*] the house>." *Id*. These definitions strongly suggest that an object only "come[s] in contact with" another if the contact is the product of that object *moving* to contact the other.[4]

Admittedly, some of the dictionary definitions of "in" and "come" in *Merriam-Webster's Collegiate Dictionary* could be pasted together in a manner that sustains the majority's position, i.e., that a stationary object can "hit" a moving object. However, other definitions (as well as a reasonable understanding of actual use of the English language) are compatible with defendant's conclusion, i.e., that only a moving object "hits" another object. Additionally, the sentence provided with the dictionary definition cited by the majority—"the ball hit the window"—supports defendant's understanding. It appears clear that in this example the object doing the hitting—the ball—is in motion while the object being hit—the window—is stationary. The stationary window is not hitting the moving ball, the moving ball is hitting the stationary window. Thus, the majority's dictionary definitions, far from contradicting defendant's position, affirmatively support that position.

Moreover, as this Court has recognized, "the dictionary should be seen as a tool to facilitate [legal] judgments, not conclusively resolve linguistic questions. . . . The dictionary is but one data point; it guides our analysis, but it does not by itself settle it." *In re Estate of Erwin*, 503 Mich 1, 19-20, 21 (2018). Reference to dictionary definitions is valuable precisely because it provides *evidence* as to a term's common usage. *People v Morey*, 461 Mich 325, 330 (1999) ("[W]e may turn to dictionary definitions to aid our goal of construing those terms in accordance with their ordinary and generally accepted meanings.") In other words, a dictionary can help this Court *determine* a term's common usage, but a dictionary cannot *supplant* or *nullify* a term's common usage. See

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[4] The majority also cites *Merriam-Webster's Dictionary and Thesaurus* (2007), which defines "hit" as "to make or bring into contact: COLLIDE." However, this definition is also not necessarily inconsistent with common understandings, given that the word "collide" is defined as "to come together with solid impact" and "come" is defined, in part, as "to move toward something: APPROACH." *Id*. Thus, this definition also contributes little to the majority's argument, as it also requires the hitting object to be in motion at the time the physical contact occurs.

Henderson v State Farm Fire & Cas Co, 460 Mich 348, 356 (1999) (holding that when interpreting a contractual provision, this Court must "determine what the phrase conveys to those familiar with our language and its contemporary usage," which may not be completely reflected in dictionary definitions). At the very least, when dictionary definitions might conceivably support either of the two proffered interpretations (and even this is a highly favorable conclusion to the majority in the present circumstance), this Court is bound to apply the interpretation that is *most* consistent with common usage.

The majority fails entirely to explain why its preferred definition of "hit" is more consistent with common usage than the understanding that only a moving object can "hit" another object. The majority's only support for this holding is grounded in defendant's concession as to an issue that is entirely extraneous to the issue in this case.[5] Specifically, the majority argues that because defendant concedes that when an accident involves two moving vehicles it does not matter which vehicle does the "hitting," and the term "hit" should be interpreted consistently throughout different parts of the insurance policy, it stands to reason that it is irrelevant whether the object "hit" the vehicle or vice versa. I agree with the majority that as a general proposition identical terms in an insurance contract should be interpreted consistently. However, the issue here is the distinct one of whether the stationary drywall "hit" the moving vehicle, and defendant did not concede that a stationary vehicle can "hit" a moving vehicle, but only that it was irrelevant *which* of two moving vehicles did the "hitting." Thus, I fail to see how this concession supports the majority's conclusion that a stationary object can hit a moving object.

Moreover, even if this Court could somehow conclude that defendant had conceded that a stationary vehicle can "hit" a moving vehicle, how and why should this concession affect the interpretation of the relevant

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[5] The majority rightly declines to endorse plaintiff's argument that the phrase "direct physical contact" in the third sentence of the relevant provision compels the conclusion that "hit" as used in this policy is synonymous with "direct physical contact." As discussed above, the third sentence merely heightens a claimant's *evidentiary* burden for a particular class of claims under the provision; it does not define the threshold circumstances under which a party is entitled to coverage under the policy. In other words, the third sentence defines what quantum of evidence must be provided to demonstrate the occurrence of a situation entitling a claimant to coverage under the policy but does not define the circumstances under which that claimant is entitled to coverage. Accordingly, the third sentence cannot reasonably be understood to define the term "hit" as used in the preceding sentence. While parties to a contract are certainly free to define a contractual term in whatever esoteric manner they desire, the instant provision here does not do so, and therefore we must define the term "hit" consistently with common usage.

contractual term? Neither party contends that two vehicles here contacted each other, and therefore neither briefed the appropriate definition of the word "hit" in relation to collisions between multiple vehicles.[6] However, defendant clearly argues that the drywall did not "hit" the insured vehicle because the drywall was lying stationary on the road. Assuming that defendant wrongly presumes that the term "hit" has a different meaning when applied to physical contact between multiple vehicles than it does when applied to physical contact between a vehicle and a stationary object, that does not mean as a result that defendant is incorrect in arguing that a "hitting" object must be in motion. In other words, even if defendant wrongly argued that the common usage of "hit" applies only in the context of one provision, when it should for the sake of consistency apply in the other context as well, defendant remains correct in its reasoning as it applies to *this* case. I would decline to employ the majority's attenuated reasoning, especially when the result of this reasoning is plainly to misinterpret the unambiguous contractual provision at issue.

In conclusion, the proper disposition of this case turns on one specific issue: whether the stationary drywall can properly be said to have "hit" the moving insured motor vehicle. It is reasonably clear to most speakers of American English that a stationary object does not "hit" a moving object, i.e., that the window does not "hit" the ball. This understanding is fully consistent with the dictionaries utilized by the majority in support of its contrary conclusion, as these indicate that only a moving object can "hit" another object. Because the parties concede that the drywall was altogether stationary when the accident occurred, the unidentified vehicle did not cause an object to "hit" the insured vehicle and therefore plaintiff is not entitled to coverage under the policy. Plaintiff argues that it is "senseless" to base coverage under the policy on whether an object was stationary or in motion when it contacted the insured vehicle. However "senseless" one might find this distinction, it is this Court's responsibility to enforce contractual provisions, not to rewrite them in a manner that is consistent with the Court's own sense of fairness and to further erode what should be a disciplined and faithful process by which this Court gives meaning to disputed contracts.

ZAHRA, J., joins the statement of MARKMAN, J.

Leave to Appeal Denied July 10, 2019:

PEOPLE v CAMERON, No. 155849; reported below: 319 Mich App 215.

MCCORMACK, C.J. (*concurring*). I concur in the Court's order denying leave to appeal because I agree that MCL 769.1k(1)(b)(*iii*) distinctly states a tax and that the appellant has not established that the statute lacks an intelligible principle or violates the nondelegation doctrine.

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[6] This issue appears to have been raised for the first time in an amicus brief filed by the Michigan Association for Justice five days before oral argument.

Even so, I write separately because it's unclear to me that the statute does not prevent the judicial branch from "accomplishing its constitutionally assigned functions." *Nixon v Administrator of Gen Servs*, 433 US 425, 443 (1977).

My concerns about the constitutionality of MCL 769.1k(1)(b)(*iii*) are underscored by the troubling letters submitted by amicus curiae Michigan District Judges Association (MDJA). They describe the pressures they face as district judges to ensure their courts are well-funded. For example, one city threatened to evict a district court from its courthouse because it was unable to generate enough revenue. Another judge noted that the same city suggested that judges eliminate personnel if they could not generate enough revenue to cover the operational costs. A third judge recounted that his local funding unit referred to the district court as "the cash cow of our local government."

The MDJA contends that MCL 769.1k(b)(*iii*) creates a conflict of interest by shifting the burden of court funding onto the courts themselves. In the MDJA's telling, MCL 769.1k(1)(b)(*iii*) incentivizes courts to convict as many defendants as possible. The "constant pressure to balance the court's budgets could have a subconscious impact on even the most righteous judge." MDJA Brief, p 16. They believe that the statute thus violates the Fourteenth Amendment, because the "possible temptation," *Tumey v Ohio*, 273 US 510, 532 (1927), of raising more revenue by increasing the number of convictions infringes defendants' due-process rights.

The MDJA could be right. The United States Supreme Court has consistently overturned convictions where the presiding judge had any form of pecuniary interest in a defendant's conviction. E.g., *Tumey*, 273 US 510 (in which a "Liquor Court" judge was also the mayor, and his judge/mayor paycheck came directly from court costs for convicted defendants); *Ward v Village of Monroeville*, 409 US 57 (1972) (overturning traffic convictions because a substantial portion of village income came from fines, fees, and costs imposed against defendants by the village mayor in judicial capacity; mayor's executive responsibilities for village presented a "possible temptation" when adjudicating traffic offenses). No matter how neutral and detached a judge may be, the burden of taxing criminal defendants to finance the operations of his court, coupled with the intense pressures from local funding units (and perhaps even from the electorate), could create at least the appearance of impropriety. Assigning judges to play tax collector erodes confidence in the judiciary and may seriously jeopardize a defendant's right to a neutral and detached magistrate.

These issues have not been squarely presented in this case, and I am not comfortable answering them today and without a fully developed record. But I expect we will see them brought directly to us before long.

I recognize that denying leave to appeal in this case will allow our current system of trial court funding in Michigan to limp forward—at least until MCL 769.1k(1)(b)(*iii*) sunsets next year. Yet our coordinate branches have recognized the long-simmering problems. The interim report of the Trial Court Funding Commission shows a potential way forward that promises to address these (and other) concerns. I urge the

Legislature to take seriously the recommendations of the Commission, before the pressure placed on local courts causes the system to boil over.

BERNSTEIN, J., joins the statement of MCCORMACK, C.J.

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

CITIZENS INSURANCE COMPANY OF AMERICA v MONGEFRANCO, No. 159523; Court of Appeals No. 345626.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, PC.

Leave to Appeal Denied July 12, 2019:

HOME-OWNERS INSURANCE COMPANY v JANKOWSKI, No. 156240; Court of Appeals No. 331934. On November, 19, 2018, the Court heard oral argument on the application for leave to appeal the May 11, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH, J., did not participate in the disposition of this matter because the Court considered it before she assumed office.

Summary Disposition July 17, 2019:

PEOPLE v ALDERMAN, No. 159717; Court of Appeals No. 347769. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court to address whether, in light of this Court's decision in *People v Burrell*, 417 Mich 439 (1983), the defendant's continued detention, after she produced a valid temporary driver's license and the police confirmed that the car she was driving was registered to the holder of the license, was supported by "specific and articulable facts," *Terry v Ohio*, 392 US 1, 21 (1968), which, taken together with rational inferences from those facts, provided the police with "a particularized and objective basis," for suspecting the defendant of criminal activity. *United States v Cortez*, 449 US 411, 417 (1981).

Summary Disposition July 19, 2019:

PEOPLE v ANTJUAN JACKSON, No. 156502; reported below: 320 Mich App 514. On May 7, 2019, the Court heard oral argument on the application for leave to appeal the July 25, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, vacate the sentence of the Kalamazoo Circuit Court, and remand this case to that court for resentencing.

MCL 777.19 provides that, in addition to the enumerated felonies in part II, attempts to commit certain enumerated felonies are to be sentenced under the guidelines if the attempt constitutes a felony. Thus,

MCL 777.19 is of course a relevant consideration when the sentencing offense (unlike in this case) is an attempt. MCL 777.19 is also relevant to identify the offense classification of a prior attempt conviction for purposes of scoring Prior Record Variable (PRV) 1, MCL 777.51, and PRV 2, MCL 777.52, which expressly incorporate the sentencing guidelines' offense classifications. See *People v Wright*, 483 Mich 1130 (2009).

In contrast to PRV 1 and PRV 2 (as well as other sentencing guidelines variables), Offense Variable (OV) 13, MCL 777.43, does not expressly incorporate the sentencing guidelines' offense classifications. Rather, OV 13 is scored for "felonious criminal activity"—that is, prior conduct that meets the definition of a felony, "regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The Code of Criminal Procedure defines a "felony" as "a violation of a penal law of this state for which the offender . . . may be punished by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(f).

A prior conviction for attempted resisting and obstructing does not, on its face, establish felonious criminal activity. The defendant's *convictions* for attempted resisting and obstructing were not punishable with imprisonment for more than one year, see MCL 750.81d(1), MCL 750.92(3), and MCL 750.479(2). And MCL 777.19 does not "expressly designate[]" the defendant's attempt convictions to be felonies. MCL 761.1(f). The Court of Appeals erred when it held otherwise in *People v Mosher,* unpublished per curiam opinion of the Court of Appeals, issued January 23, 2014 (Docket No. 312996). Thus, the Court of Appeals' reliance on *Mosher* here was error. Accordingly, on remand, the sentencing court shall determine in the first instance whether the defendant's conduct in attempting to violate MCL 750.81d or MCL 750.479, when combined with the sentencing offense, establishes "a pattern of felonious criminal activity involving 3 or more crimes against a person" for purposes of scoring OV 13. MCL 777.43(1)(c). We do not retain jurisdiction.

Leave to Appeal Denied July 19, 2019:

PEOPLE V STRAUGHTER, No. 156198; Court of Appeals No. 328956. On October 9, 2018, the Court heard oral argument on the application for leave to appeal the April 11, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, there being no majority in favor of granting leave to appeal or taking other action.

VIVIANO, J. (*concurring*). I concur with the Court's order denying leave to appeal by equal division and write separately to explain my reasoning.

Defendant, Alphonso Straughter Jr., was convicted of carjacking, armed robbery, conspiracy to commit armed robbery, second-degree home invasion, and unlawful imprisonment and, relevant for the purposes of this appeal, was sentenced as a second-offense habitual offender. Notwithstanding the prosecutor's failure to comply with the

habitual-offender statute, the trial court sentenced defendant as a second-offense habitual offender. In his subsequent appeal, the Court of Appeals affirmed defendant's convictions, but vacated defendant's sentence and remanded for resentencing without the habitual-offender sentencing enhancement because the prosecutor failed to show that notice was served on defendant, since no proof of service was filed with the trial court as required under MCL 769.13. In the prosecutor's application for leave to appeal in our Court, the prosecutor argues for the first time that the trial court's error was harmless because the record reflects that defendant had actual notice of his habitual-offender status within the time period set forth in the statute.

In relevant part, MCL 769.13 reads as follows:

> (1) In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense.
>
> (2) A notice of intent to seek an enhanced sentence filed under subsection (1) shall list the prior conviction or convictions that will or may be relied upon for purposes of sentence enhancement. The notice shall be filed with the court and served upon the defendant or his or her attorney within the time provided in subsection (1). The notice may be personally served upon the defendant or his or her attorney at the arraignment on the information charging the underlying offense, or may be served in the manner provided by law or court rule for service of written pleadings. The prosecuting attorney shall file a written proof of service with the clerk of the court.

In *People v Head*, the Court of Appeals held that "[t]he failure to file a proof of service of the notice of intent to enhance the defendant's sentence may be harmless if the defendant received the notice of the prosecutor's intent to seek an enhanced sentence and the defendant was not prejudiced in his ability to respond to the habitual offender notification."[1] In concluding that the error in that case was harmless, the Court of Appeals relied on the following facts: (1) "[d]efendant does not claim that he and defense counsel never received a copy of the charging documents"; (2) "[a]t the arraignment on the information, defendant waived a formal reading of the information"; (3) "[t]here was no indication at the arraignment hearing that defendant or his attorney had not received a copy of the felony information"; (4) "defendant and defense counsel exhibited no surprise at sentencing when defendant was sentenced as a fourth-offense habitual offender"; and (5) "[d]efendant

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[1] *People v Head*, 323 Mich App 526, 543-544 (2018).

has not asserted in the trial court or on appeal that he had any viable challenge to his fourth-offense habitual offender status."[2]

Because this case was decided before *Head*, the Court of Appeals in this case was not bound by *Head*. While this Court has the discretion to remand for reconsideration in light of *Head*, because I have concerns with *Head*'s analysis, I do not believe that we should exercise our discretion to do so.

In particular, I question whether the Court of Appeals in *Head* erred by placing the burden on the defendant of proving that the prosecutor's error was harmless. Typically, the burden is on the defendant to show that a preserved nonconstitutional error is harmless.[3] In this context, however, placing the burden on the prosecutor may be appropriate since the prosecutor committed the error and the prosecutor is best able to prove whether the defendant received actual notice. The Court of Appeals' analysis in *Head*, which relies almost exclusively on negative inferences from the record, reflects the concerns with placing this burden on the defendant.[4]

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[2] *Id.* at 544-545. The Court of Appeals also noted that "defendant received actual notice on the record at the preliminary examination that he was being charged as a fourth-offense habitual offender" and that "the fact that the prosecutor was seeking to enhance defendant's sentence as a fourth-offense habitual offender was acknowledged on the record by defendant and defense counsel at a pretrial hearing during the discussion of the prosecutor's final plea offer." *Id*. The Court of Appeals does not explain, however, whether either of these hearings took place "within 21 days after the defendant's arraignment on the information," such that the defendant would have received actual notice within the time period required under MCL 769.13(1).

[3] See *People v Lukity*, 460 Mich 484, 491-496 (1999).

[4] Unlike Justice MARKMAN, I would be hesitant to conclude that simply filing the relevant charging documents with the court—something that happens in every case—is sufficient to render harmless the prosecutor's error in failing to serve the habitual notice on the defendant or his attorney within the time period set forth in MCL 769.13. Among other things, this would render nugatory the remaining requirements of the statute since the prosecutor would never be penalized for ignoring them. It would also be strange to excuse the prosecutor's noncompliance when the defendant waives his arraignment on the information, since the statute expressly contemplates such waivers and makes no exceptions from its requirements for them. See MCL 769.13(1) (providing that a habitual notice must be filed "within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offense").

Therefore, while the Court of Appeals' decision in this case is at odds with *Head*, because of my concerns with *Head*'s framework, I would not exercise our discretion to remand this case for reconsideration in light of *Head*. Instead, I believe that denying leave to appeal is appropriate.

MARKMAN, J. (*dissenting*). I respectfully dissent from the order denying leave to appeal. Instead, I would reverse the Court of Appeals' judgment and reinstate defendant's sentences for carjacking, armed robbery, conspiracy to commit armed robbery, second-degree home invasion, and unlawful imprisonment because defendant here possessed actual notice of the prosecutor's intention to seek to enhance defendant's sentence as a second-offense habitual offender under MCL 769.10.

The prosecutor committed clear error by failing to comport with the procedures set forth in MCL 769.13. In particular, she failed to show service of written notice of her intention to seek sentencing enhancement within 21 days of defendant's arraignment on the information by filing written proof of service with the circuit court. See MCL 769.13(1) and (2). Nonetheless, such error here was harmless because defendant possessed actual notice of the prosecutor's intention to seek sentencing enhancement. MCL 769.26. First, each of the relevant charging documents filed in the district and circuit courts, i.e., the felony warrant, the felony complaint, and the felony information, specifically informed defendant that he was "subject to the penalties provided by MCL 769.10" and detailed the effect of sentencing enhancement under MCL 769.10. Indeed, defendant himself concedes in his brief that the language contained in the charging documents would constitute habitual-offender notice. Moreover, *Black's Law Dictionary* (6th ed) defines "subject to" as "governed or affected by." Therefore, the prosecutor informed defendant that he was "governed or affected by" habitual-offender sentencing enhancement. There is no apparent reason for the prosecutor to have included this information in the charging documents other than to apprise defendant that she intended to seek sentencing enhancement under MCL 769.10, and this is not disputed by defendant. Second, at his arraignment on the information, defendant waived a formal reading of the information. This waiver effectively communicated that defendant already possessed a copy of the felony information and thus possessed notice of the prosecutor's intent to seek habitual-offender sentencing enhancement.[1] Third, at sentencing, defense counsel displayed no surprise at the enhanced sentence, and neither counsel

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[1] Contrary to Justice VIVIANO's concurrence, this dissent does not "conclude that simply filing the relevant charging documents with the court—something that happens in every case—is sufficient to render harmless the prosecutor's error in failing to serve the habitual notice on the defendant or his attorney within the time period set forth in MCL 769.13." More precisely, I conclude that the inclusion of the *habitual-offender notice* within the charging documents may in certain circumstances indicate the defendant's actual notice of the prosecutor's intention to seek habitual-offender enhancement. That is, where such notice is included within the information and the defendant has waived

nor defendant objected to the enhancement. In fact, defense counsel actually *corrected* the trial court that defendant was only a second-offense, rather than third-offense, habitual offender.

Because defendant here possessed actual notice of the prosecutor's intention to seek a habitual-offender enhancement to his sentence, the error by the prosecutor, in my judgment, was altogether harmless. And as a result, defendant has failed to show that it is "more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496 (1999). Accordingly, in my judgment, he was properly sentenced as a second-offense habitual offender.

ZAHRA, J., joins the statement of MARKMAN, J.

CLEMENT, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal because I believe the more prudent disposition would be to vacate the Court of Appeals opinion and remand to the Court of Appeals so that it may engage in a harmless-error analysis pursuant to *People v Head*, 323 Mich App 526, 544-546 (2018).

CAVANAGH, J., did not participate in the disposition of this case because the Court considered it before she assumed office.

PEOPLE V JILL TUCKER, No. 159186; Court of Appeals No. 338514.

CLEMENT, J. (*dissenting*). I dissent from the Court's denial of leave to appeal. Because I do not believe defendant is entitled to relief under the best-evidence rule, I would reverse the Court of Appeals and remand to that Court for consideration of the issues raised by defendant which that Court did not reach.

Defendant was charged with, *inter alia*, violating MCL 750.411s by "texting" certain nude photographs of a female coworker to several male coworkers of defendant and the victim, as well as with sending the pictures to defendant's boyfriend, a police officer. The photos were apparently retrieved from the victim's cell phone. Trial was scheduled to begin on March 6, 2017. On February 15, 2017, defense counsel filed a motion in limine alleging that the prosecutor's office had, on February 9, disclosed screen shots captured from the police officer's phone that were images of text messages between the officer and defendant regarding these events. Defendant asked that the screen shots be excluded from the trial because they had not been properly disclosed in discovery. At a heated hearing on the motion on March 1, the prosecutor asserted that

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arraignment on the information, it has been effectively established that the defendant or the defendant's attorney has physical possession of the information and thus from the very onset of the case possesses notice of the prosecutor's intention to seek enhancement. While this process plainly does not satisfy the requirements of MCL 769.13, it does nonetheless fully satisfy the obvious purpose of the statute—to ensure that the defendant has been timely notified of an intention to pursue habitual-offender enhancement. While indisputably an error on the part of the prosecutor, the failure to satisfy MCL 769.13 was a manifestly harmless error in this case.

he was unaware of the existence of any such text messages until a phone conversation he had with the police officer on February 8 disclosed their existence. The officer sent the material to the prosecutor, and the prosecutor notified defense counsel—resulting in defendant's motion. The trial court concluded "that the prosecutor, I do not believe was acting in bad faith." The court chalked up any failure to provide proper discovery to there having been "too many hands that . . . handled this file from one to the other that caused a gap in the . . . prosecutor . . . discovering these screen shots on this phone," but the court did not believe the prosecutor was acting in bad faith "in light of the statements of the prosecutor as to how quick he reacted after he . . . became aware of . . . that information." The judge denied the motion to exclude the photos and directed the lawyers to "meet between [March 1] and [March 6] and look at that phone."

On March 6, the trial began. While giving the jury preliminary instructions, the court instructed the jury that defendant was charged with having violated MCL 750.411s, which involved "the defendant [having] sent nude photographs of [the victim] to other people." After the jury was instructed, defense counsel said he had "never received nor have I ever seen any nude . . . pictures of" the victim. A heated exchange ensued, in which the prosecutor said that he offered to show the photos to defense counsel when defense counsel came to the prosecutor's office; the prosecutor said defense counsel had represented that he did not need to see the pictures. Defense counsel accused the prosecutor of having lied and insisted that lack of access to the photos had denied the defendant an opportunity to scrutinize the authenticity of the photographs. The trial court asked the prosecutor whether he had provided the photos to defense counsel and had this exchange:

> [*The Prosecutor*]: I did not make copies of them because they're naked—
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> *The Court*: All right. Did you show it to him?
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> [*The Prosecutor*]: I offered them.
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> *The Court*: Did you show those? I'm going to, you're, this case, you're going to proceed without those photos going in. You may make reference to them. I'm not going to have those photos going in.
>
> [*The Prosecutor*]: Judge what's the basis?
>
> *The Court*: Basis of that [defense counsel] has . . . argued in the past about having some . . . discovery . . . issues come forward and we went so far as last week as . . . having you two gentlemen meet to go over text messages . . . so that everybody could know what evidence was going on. If this evidence of these photographs that have been in a sealed envelope and they haven't been shown to . . . this defense lawyer . . . , we're just going to have to go forward without these photographs. You can make reference to them as to whoever took them or whatever but they're not going to be shown to the jury. That's my ruling.
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> [*Defense Counsel*]: Thank you, your Honor.

> *The Court*: Those photos are suppressed for coming in. You get them in, you can make reference to them about whoever took them and so forth but the pictures won't be displayed to the jury.

During trial, several witnesses testified about the photos. The victim testified that she had had several "nude" photos of herself on her cell phone; a coworker to whom the photos had been sent characterized it as a "graphic picture"; and the officer testified that he was "repulsed" by what he saw in the photos. Defendant was found guilty by the jury.

In the Court of Appeals, defendant raised two issues: first, that the trial court erred (1) "by allowing testimony about the content of alleged texted photographs that were suppressed prior to trial and never admitted into evidence, thus violating MRE 1002, the Best Evidence Rule"; and (2) "by allowing the admission of text messages that were intentionally withheld by the police and/or prosecutor until days before trial and which were never properly authenticated under MRE 901." In her brief, defendant argued that "the Prosecutor's decision to withhold the pictures . . . precluded her from having an opportunity to assess the content and authenticity of the alleged text messages and prevented defense counsel from arguing whether those pictures were sufficient to support the charged offenses." The Court of Appeals agreed, holding in an unpublished opinion that "the trial court abused its discretion by admitting the aforementioned testimony, as it allowed the prosecution to have the content of the excluded photographs admitted into evidence despite MRE 1002 and the trial court's own ruling excluding the photographs." *People v Tucker*, unpublished per curiam opinion of the Court of Appeals, issued January 24, 2019 (Docket No. 338514), p 3. "Where the photographs were neither lost nor destroyed, the prosecution was required to present the actual photographs for their contents . . . to come into evidence." *Id*. The Court thus reversed certain of defendant's convictions and remanded for resentencing on the remaining convictions.

The "best-evidence rule," MRE 1002, provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." However, we have said that the purpose of the rule is that "where some document . . . exists, the contents of which should be proved by an original rather than by other testimony, *which is open to danger of inaccuracy*." *Elliott v Van Buren*, 33 Mich 49, 53 (1875) (emphasis added). Consequently, "[t]he best evidence rule only applies when the contents of a writing are in issue." *People v Alexander*, 112 Mich App 74, 76 (1981). Where "the contents are not in issue, . . . the rule should not . . . be[] invoked." *Id*.

> Th[e] purpose [of the best-evidence rule] is to secure the most reliable information as to the contents of documents, when those terms are disputed. A mystical ideal of seeking "the best evidence" or the "original document" as an end in itself is no longer the goal. Consequently when an attack is made on appeal on the judge's admission of secondary evidence, it seems that the reviewing tribunal should ordinarily make inquiry of the complaining

> counsel, "Does the party whom you represent actually dispute the accuracy of the evidence received as to the material terms of the writing?" If the counsel cannot assure the court that such a good faith dispute exists, it seems clear that any departure from the regulations in respect to secondary evidence is likely to be harmless error, or not error at all. [2 McCormick, Evidence (7th ed), § 243.1, p 173 (as amended by the 2016 pocket part).]

Or, as we have said, "th[e] so-called best evidence rule is generally more nearly a rule of procedure." *Mich Bankers' Ass'n v Ocean Accident & Guarantee Corp*, 274 Mich 470, 481 (1936). Where the party challenging the evidence cannot show that the procedure caused them prejudice, relief is not available. See also 6 Weinstein & Berger, Weinstein's Federal Evidence (2d ed, rel 103-4/2012), § 1002.04[3], p 1002-9 ("The function of the best evidence rule today is not to accord victory to the party who best follows the rules, but to ensure that the trier of fact is presented with the most accurate evidence practicable in those situations where informed legal judgment has concluded that precision is essential."); 31 Wright & Gold, Federal Practice & Procedure: Evidence (1st ed), § 7184, p 394 ("[E]rror under Rule 1002 in the admission . . . of evidence is not ground for reversal if the error is harmless. Thus, reversal will not be granted based on erroneous admission of secondary evidence unless there is a real possibility it was inaccurate and outcome determinative.").

In this case, defendant has *not* placed the contents of these photos at issue, and makes no assertion on appeal that the witnesses who testified about the photos offered inaccurate or unfair characterizations of the photos. In other words, defendant did not challenge whether the photos actually were nude photos, nor did defendant challenge whether the photos actually depicted the victim. Defendant's objection to the introduction of the photos related to being deprived of an opportunity to scrutinize their *authenticity*, but that is a concern under MRE 901, not MRE 1002. Defendant's cross-examination of the witnesses focused on whether those witnesses had good or bad relationships with defendant and thus called into question whether they were potentially fabricating the allegation that defendant had distributed the photographs. That is a perfectly legitimate defense theory, but it is a defense theory that defendant was just as able to pursue without the original photos in evidence as with them. In the absence of any argument that the witnesses were inaccurately characterizing the photographs, "the error complained of has [not] resulted in a miscarriage of justice," which is the standard that must be met before a "judgment or verdict shall be set aside or reversed or a new trial be granted . . . in any criminal case, on the ground of . . . the improper admission . . . of evidence . . . ." MCL 769.26. And, with that testimony having been admitted, the Court of Appeals erred in holding that, "[w]ithout the admission of the contents of the photographs, the prosecution did not have sufficient evidence to support defendant's convictions of unlawful posting of a message . . . ." *Tucker*, unpub op at 3.

Because I believe that the Court of Appeals misapplied the best-evidence rule, I would reverse its judgment and remand to that Court for consideration of defendant's remaining arguments on appeal.

ZAHRA, J., joins the statement of CLEMENT, J.

In re ROGERS/ROBINSON, MINORS, No. 159707; Court of Appeals No. 344755.

In re FISH, MINORS, No. 159714; Court of Appeals No. 346073.

Summary Disposition July 26, 2019:

PEOPLE v LUCKER, No. 158195; Court of Appeals No. 331986. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentence of the Berrien Circuit Court, and remand this case to the circuit court for resentencing. The circuit court's finding that the defendant had approximately 38 different convictions in 10 years, a characterization the Court of Appeals seemingly accepted, is not supported by the record. Accordingly, the circuit court sentenced the defendant on the basis of inaccurate information, and resentencing is required. See *People v Francisco*, 474 Mich 82, 89 (2006).

We further order that sentencing proceedings on remand be conducted before a different judge. We do not retain jurisdiction.

MARKMAN, J. Although I concur in the majority's order of remand, I would not order that the sentencing proceedings on remand be conducted before a different judge.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered July 26, 2019:

HAHN v GEICO INDEMINITY COMPANY, No. 158141; Court of Appeals No. 336583. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether: (1) MCL 500.3012 permits the reformation of a non-Michigan insurance contract to comply with the requirements of the Michigan no-fault act, MCL 500.3101 *et seq*.; and (2) *Farm Bureau Ins Co v Allstate Ins Co,* 233 Mich App 38 (1998), was correctly decided, and if not, whether it should be overruled.

In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). Appellee Hahn shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Insurance Alliance of Michigan and the Coalition Protecting Auto No-Fault are invited to file briefs amicus curiae. Other persons or

groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

CAVANAGH, J., not participating due to her prior relationship with Garan Lucow Miller, P.C.

Leave to Appeal Denied July 26, 2019:

PEOPLE v MULLINS, No. 157116; reported below: 322 Mich App 151.

In re JANSSEN, MINORS, No. 159754; Court of Appeals No. 344614.

Summary Disposition July 29, 2019:

PEOPLE v RONALD SCOTT, No. 159261; Court of Appeals No. 336815. On order of the Court, the motion to remand is granted in part. We vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *People v Washington* (Docket No. 336050). After *Washington* is decided, the Court of Appeals shall reconsider this case in light of *Washington*. We do not retain jurisdiction.

PAUL v FARM BUREAU INSURANCE COMPANY OF MICHIGAN, No. 159408; Court of Appeals No. 345507. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the defendant's Issue II, concerning the Isabella Circuit Court's grant of summary disposition to the plaintiffs. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

In re PAROLE OF CHARLES LEE, No. 159536; Court of Appeals No. 347539. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied July 29, 2019:

PEOPLE v DIXON-BEY, No. 156746; reported below: 321 Mich App 490.

MARKMAN, J. (*dissenting*). I respectfully dissent from this Court's order denying leave to appeal. Because I do not believe the trial court abused its discretion in sentencing defendant, I would reverse the judgment of the Court of Appeals and reinstate the sentence imposed by the trial court for second-degree murder.

Following a jury trial, defendant was acquitted of first-degree murder and convicted of second-degree murder. The trial court sentenced defendant to imprisonment for 35 to 70 years, which was a 15-year departure from the guidelines minimum sentence range. In a published and split decision, the Court of Appeals held that defendant's

sentence was not proportionate and therefore vacated her sentence and remanded for resentencing. *People v Dixon-Bey*, 321 Mich App 490 (2017).

The Court of Appeals held that "most, if not all, of the factors discussed by the trial court to support its departure sentence were contemplated by at least one offense variable (OV) . . . [and] [t]he trial court offered no rationale as to why that scoring was insufficient." *Id*. at 526-527. However, the Court of Appeals misapprehended *why* the trial court relied on those factors. The Court of Appeals held that the trial court erred by taking into account that defendant stabbed the victim twice in the chest, failed to disclose the location of the murder weapon, and murdered the victim in cold blood:

> The trial court emphasized that defendant had stabbed the victim twice in the chest. However, defendant's aggravated use of a lethal weapon is contemplated in the scoring of OV 1 (aggravated use of weapon), MCL 777.31, and OV 2 (lethal potential of weapon possessed or used), MCL 777.32. The trial court offered no rationale as to why that scoring was insufficient to reflect the nature of the stabbing. . . . Further, the trial court's reliance on the fact that defendant apparently failed to disclose the location of the murder weapon would ordinarily trigger the application of OV 19 (interfering with the administration of justice), MCL 777.49, not an upward departure. The trial court also referred to the "cold-blooded" nature of the crime; yet we find it interesting that the trial court and parties apparently agreed that OV 7 (aggravated physical abuse), MCL 777.37, under which points may be assessed for excessive brutality, should not be scored given the facts and circumstances of this case. [*Id*.]

However, the Court of Appeals failed to recognize that the trial court relied on these facts not because it believed the guidelines accorded them inadequate weight, but because it believed they indicated that defendant had actually committed first-degree premeditated murder, something that was not fully taken into consideration by the guidelines.[1] That is, the trial court did not rely on the fact that defendant stabbed the victim in the chest twice simply because it was evidence of

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[1] While the trial court did not specifically state that it found that defendant had committed first-degree premeditated murder, everybody seems to agree that this was what the trial court was getting at when it said that "[a]n intent can be determined by what you did, what you said, both before, during and after the crime"; "frankly, you plunged that knife into Mr. Stack's heart twice and you brutally murdered him in cold blood"; and "I did consider the sentencing guidelines which were 12 years to 20 years but I considered that the additional level of depraved heart and murder and the cold calculated nature of you brutally stabbing him twice in the heart and letting him bleed to death and die in this [manner]."

an "aggravated use of [a] weapon" or because it was evidence that defendant used a weapon that had a "lethal potential." Similarly, it did not rely on the fact that defendant failed to disclose the location of the murder weapon simply because it was evidence that defendant "interfered with the administration of justice." Nor did it rely on the cold-blooded nature of the crime simply because it was evidence of "aggravated physical abuse." Rather, the court relied on each of these facts, as well as others, as evidence that defendant had committed first-degree premeditated murder, and this was altogether proper on its part.[2]

While the Court of Appeals acknowledged in passing that the trial court might have relied on the cold-blooded nature of the crime for this reason, see *id*. at 527 ("The trial court's reference to the 'cold-blooded' nature of the crime may have been based on its belief that the killing was premeditated, which it also emphasized was part of the basis for its sentence."), it failed to appreciate that the court might also have relied on the other factors for the same reason. The Court of Appeals then added that it was "highly skeptical of a trial court's decision to sentence a defendant convicted of second-degree murder as though the murder was premeditated." *Id*. at 528.[3] In so asserting, it relied on the fact that OV 6, which pertains to the offender's intent to kill, must be scored

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[2] That is, on the basis of these facts, as well as on others, the trial court rejected defendant's self-defense theory and instead concluded that she killed the victim with premeditation and deliberation. That she stabbed the victim in the heart twice, disposed of the weapon, and killed the victim in "cold blood" are all relevant in supporting the trial court's finding.

[3] Contrary to what the Court of Appeals asserted, the trial court did *not* sentence defendant as if she had been convicted of first-degree premeditated murder. Rather, it sentenced defendant for the exact crime of which she was convicted (second-degree murder), taking into consideration her premeditated intent. Indeed, if the trial court had sentenced defendant as if she had been convicted of first-degree premeditated murder, it would have been required to sentence defendant to life without parole, instead of 35 to 70 years' imprisonment. See *United States v Watts*, 519 US 148, 154 (1997) ("[S]entencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increase his sentence because of the manner in which he committed the crime of conviction."); *United States v White*, 551 F3d 381, 385 (CA 6, 2008) ("White thus is not being 'sentenced for acquitted conduct' when White's sentencing judge takes that conduct into account in determining a sentence for the crime of which . . . White *was* convicted, as long as the sentence imposed falls within the range prescribed by law for that *convicted* conduct."). And, for the reasons explained by the dissent in *People v Beck*, 504 Mich 605 (2019), there was nothing inappropriate about the trial court's taking defendant's

"consistent with a jury verdict unless the judge has information that was not presented to the jury." MCL 777.36(2)(a). The judge here did not possess information that was not presented to the jury regarding defendant's intent to kill and thus, according to the Court of Appeals, he was prohibited from considering that the killing was premeditated. I disagree.

This Court has consistently held that facts that cannot be considered in scoring the offense variables may nevertheless be considered as reasons to justify a departure from the guidelines. See, for example, *People v Price*, 477 Mich 1, 5 n 3 (2006) ("[A]lthough prior offenses that did not occur within five years of the sentencing offense cannot be considered under OV 13, that does not mean that they cannot give rise to a substantial and compelling reason to justify a departure from the guidelines range consistent with [*People v Babcock*, 469 Mich 247 (2003)]."); *People v McGraw*, 484 Mich 120, 129 (2009) (While transactional conduct generally cannot be scored when scoring the offense variables, "[n]othing precludes the sentencing court from considering transactional conduct when deciding . . . whether to depart from the guidelines recommendation."); *People v Bonilla-Machado*, 489 Mich 412, 439 n 1 (MARKMAN, J., joined by CAVANAGH and MARILYN KELLY, JJ., concurring) ("I do agree with the partial dissent that a 'pattern of felonious criminal activity' that cannot be scored under OV 13 or any other offense variable may well constitute a 'substantial and compelling' reason to justify an upward departure from the recommended minimum sentence range under the sentencing guidelines."); *id*. at 448 n 20 (YOUNG, C.J., joined by ZAHRA, J., concurring in part and dissenting in part) ("I note, however, that if, as the majority opinion now requires, defendant's 'continuing pattern of criminal behavior' could not be scored under OV 13, it would provide a substantial and compelling reason for an upward sentencing departure because it is both 'objective and verifiable' and not already considered in determining the guidelines recommended minimum sentence range.").[4] In accordance with this caselaw,[5] although the trial judge could not score OV 6 on the basis of his finding of premeditation, he could consider it as a reason to justify a departure.

Furthermore, the trial court did not clearly err in finding by a preponderance of the evidence that defendant here committed first-degree premeditated murder. See *People v Gloster*, 499 Mich 199, 204 (2016) ("A trial court's factual determinations are reviewed for clear

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premeditated intent into consideration at sentencing even though defendant was acquitted of first-degree premeditated murder.

[4] The majority opinion in *Bonilla-Machado* did not dispute these statements, but was simply silent in this regard.

[5] Furthermore, MCL 769.34(3)(a) and (b) prohibit the trial court from considering certain matters as reasons to depart from the guidelines, and an offender's intent to kill is not one of those matters.

error and must be supported by a preponderance of the evidence."). In support of its finding, the trial court relied on the following facts: defendant stabbed the victim in the heart twice; defendant had stabbed the victim in the past; she once told somebody that all she needed to do was stab the victim in the chest and then claim self-defense, which indeed is what she did in this case; and the murder weapon was never found. Taken as a whole, these facts are more than sufficient under a "preponderance of the evidence" standard to support a finding that defendant had committed first-degree premeditated murder. And given this finding, and for the reasons explained below, it was not an abuse of discretion to sentence defendant to a minimum of 35 years' imprisonment where the guidelines recommended a minimum sentence range of 12 to 20 years. See *People v Steanhouse*, 500 Mich 453, 471 (2017) ("[T]he standard of review to be applied by appellate courts reviewing a sentence for reasonableness on appeal is abuse of discretion."). If the defendant had been convicted of first-degree murder, she would have been sentenced to life without parole. Moreover, as the Court of Appeals dissent explained:

> [I]f 30 or more additional OV points had been assessed, such as by scoring OV 6 at 50 points rather than 25 and scoring OV 19 at 10 points rather than zero,[6] defendant would have been subject to the highest OV level under the guidelines. See MCL 777.61. An offender with no prior record who is scored at the highest OV level for second-degree murder may be given, under the recommended guidelines, a minimum prison sentence of 162 to 270 months or life. *Id*. Consequently, had certain OVs been scored differently, as I believe the record justified in this case, the trial court could have sentenced defendant to a minimum term of life in prison without even departing from the guidelines. [*Dixon-Bey*, 321 Mich App at 541 (BOONSTRA, J., concurring in part and dissenting in part).]

For these reasons, the trial court's imposition of a 35-year minimum sentence does not fall outside the range of principled outcomes. See *People v Smith*, 482 Mich 292, 300 (2008) ("A trial court abuses its

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[6] As discussed above, OV 6 (offender's intent to kill) could have been scored at 50 points on the basis of defendant's premeditated intent to kill if it did not have to be scored consistently with the jury verdict, but this does not prevent the trial court from considering defendant's intent as a reason to depart from the guidelines. In addition, OV 19 (interference with the administration of justice) could have been scored at 10 points given the fact that defendant lied to the police about who stabbed the victim and where he was when he was stabbed. More specifically, defendant initially told the police that the victim had been stabbed by somebody on his walk home, but she later admitted that she had stabbed the victim at their home. Defendant also arguably interfered with the administration of justice by disposing of the murder weapon.

discretion if the minimum sentence imposed falls outside the range of principled outcomes.").[7] Accordingly, I would reverse the Court of Appeals and reinstate the sentence imposed by the trial court.

ZAHRA, J., joins the statement of MARKMAN, J.

PEOPLE v TANK, No. 157935; Court of Appeals No. 335366.

PEOPLE v BISHOP, No. 158439; Court of Appeals No. 343905.

SANDERSON v UNEMPLOYMENT INSURANCE AGENCY, No. 158503; Court of Appeals No. 338983.

PEOPLE v HENRY SMITH, No. 158508; Court of Appeals No. 342977.

PEOPLE v ROBERT THOMPSON, No. 158551; Court of Appeals No. 343807.

DAVIS v WAYNE COUNTY CLERK, No. 158586; Court of Appeals No. 339200.

PEOPLE v LATRELL WILSON, No. 158593; Court of Appeals No. 339133.

PEOPLE v BARDONI, No. 158609; Court of Appeals No. 336106.

JASMAN v RICHARD A HANDLON CORRECTIONAL FACILITY WARDEN, No. 158624; Court of Appeals No. 344389.

PEOPLE v STAFFORD, No. 158639; Court of Appeals No. 336842.

PEOPLE v PRICHARD, No. 158659; Court of Appeals No. 345042.

PEOPLE v CONRAD SCHULTZ, No. 158660; Court of Appeals No. 343322.

PEOPLE v CONRAD SCHULTZ, No. 158661; Court of Appeals No. 343323.

PEOPLE v ANNA GRAHAM, No. 158691; Court of Appeals No. 344392.

PEOPLE v BELCHER, No. 158747; Court of Appeals No. 344613.

PEOPLE v DILLARD, No. 158801; Court of Appeals No. 345974.

PEOPLE v JOHNNY TAYLOR, No. 158810; Court of Appeals No. 344898.

PEOPLE v DEMARCUS ALLEN, No. 158811; Court of Appeals No. 343728.

SAPPINGTON v SHOEMAKE, No. 158823; Court of Appeals No. 337994.

PEOPLE v JEREMY BURRELL, No. 158827; Court of Appeals No. 343465.

PEOPLE v ERIC THOMAS, No. 158840; Court of Appeals No. 345303.

PEOPLE v VANCALLIS, No. 158858; Court of Appeals No. 332514.

PEOPLE v LONGORIA, No. 158890; Court of Appeals No. 345439.

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[7] Although the sentence imposed constituted a substantial upward departure from the guidelines, the reasons provided, i.e., those in support of the proposition that defendant actually committed first-degree premeditated murder, were equally substantial.

PEOPLE v BISH, No. 158911; Court of Appeals No. 344018.

PEOPLE v SENTRAY WILLIAMS, No. 158912; Court of Appeals No. 344106.

PEOPLE v SPICE, No. 158915; Court of Appeals No. 346762.

BUSER v GABRIEL, No. 158925; Court of Appeals No. 343772.

PEOPLE v CHAMBLISS, No. 158928; Court of Appeals No. 345745.

ROBINSON v MT CLARK, INC, No. 158930; Court of Appeals No. 339926.

PEOPLE v PAUL SCOTT, Nos. 158942 and 158943; Court of Appeals Nos. 340750 and 340761.

PEOPLE v HINES, No. 158956; Court of Appeals No. 337435.

PEOPLE v ARNOLD, No. 159011; Court of Appeals No. 342534.

PEOPLE v DUSTIN WALKER, No. 159064; Court of Appeals No. 345628.

PEOPLE v JUAREZ, No. 159068; Court of Appeals No. 344963.

PEOPLE v ELLIS, No. 159074; Court of Appeals No. 345465.

PEOPLE v ZAHRAIE, No. 159075; Court of Appeals No. 344798.

PEOPLE v MACKEY, No. 159082; Court of Appeals No. 344826.

PEOPLE v SIFUENTES, No. 159083; Court of Appeals No. 346339.

PEOPLE v ROBERT REYNOLDS, No. 159089; Court of Appeals No. 346863.

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 159092; Court of Appeals No. 338592.

In re APPLICATION OF DTE ELECTRIC COMPANY TO INCREASE RATES, No. 159096; Court of Appeals No. 338378.

PEOPLE v CARRIER, No. 159104; Court of Appeals No. 344764.

PEOPLE v JAMES BROWN, No. 159108; Court of Appeals No. 345929.

PEOPLE v VENTURA, No. 159110; Court of Appeals No. 346178.

PEOPLE v SHONER, No. 159115; Court of Appeals No. 346910.

PEOPLE v JEFFREY STEVENS, No. 159119; Court of Appeals No. 345342.

PEOPLE v BUSCH, No. 159128; Court of Appeals No. 345570.

PEOPLE v MYERS, No. 159129; Court of Appeals No. 345099.

DAVIS v GENERAL MOTORS CORPORATION, No. 159149; Court of Appeals No. 345137.

PEOPLE v GADDIS, No. 159152; Court of Appeals No. 346796.

PEOPLE v PIGGUE, No. 159158; Court of Appeals No. 346645.

PEOPLE v CURRIE, No. 159167; Court of Appeals No. 346426.

PEOPLE v HAINES, No. 159195; Court of Appeals No. 346423.

PEOPLE v ESPINOZA, No. 159200; Court of Appeals No. 347268.

PEOPLE v HUNTER, No. 159203; Court of Appeals No. 345223.

PEOPLE v STEPHENS, No. 159224; Court of Appeals No. 335754.

PEOPLE v DEVINE, No. 159229; Court of Appeals No. 345387.

PEOPLE v RANIER YOUNG, No. 159233; Court of Appeals No. 346783.

PEOPLE v BERRY, No. 159242; Court of Appeals No. 346494.

PEOPLE v FARNSWORTH, No. 159246; Court of Appeals No. 342225.

PEOPLE v ANTONINE STEWART, No. 159247; Court of Appeals No. 346999.

PEOPLE v COLLIER, No. 159248; Court of Appeals No. 346749.

PEOPLE v CARR, No. 159250; Court of Appeals No. 346691.

PEOPLE v MEDLEN, No. 159267; Court of Appeals No. 334745.

PEOPLE v WIZ, No. 159274; Court of Appeals No. 344935.

PEOPLE v CAHILL, No. 159280; Court of Appeals No. 346500.

PEOPLE v DIXON, No. 159287; Court of Appeals No. 346671.

PEOPLE v LESANE, No. 159289; Court of Appeals No. 345058.

PEOPLE v HUEY, No. 159296; Court of Appeals No. 346226.

KELLY v FLINT BOARD OF EDUCATION, No. 159297; Court of Appeals No. 345258.

PEOPLE v KLEINERT, No. 159304; Court of Appeals No. 345353.

PEOPLE v TERRELL, No. 159307; Court of Appeals No. 345619.

WESTFIELD INSURANCE COMPANY v SECURA INSURANCE, Nos. 159310 and 159311; Court of Appeals Nos. 340622 and 341541.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v KAHLER, No. 159312; Court of Appeals No. 346017.

PEOPLE v DALROIS COLEMAN, No. 159315; Court of Appeals No. 346861.

PEOPLE v BRACY, No. 159319; Court of Appeals No. 346854.

PEOPLE v BOYKIN, No. 159320; Court of Appeals No. 346622.

PEOPLE v FILIPUNAS, No. 159325; Court of Appeals No. 345378.

PEOPLE v JAMES SIMMONS, No. 159328; Court of Appeals No. 346905.

PEOPLE v BUNKLEY, Nos. 159329 and 159330; Court of Appeals Nos. 345732 and 346651.

PEOPLE v CALDWELL, No. 159339; Court of Appeals No. 347230.

PEOPLE v CHELEKIS, No. 159341; Court of Appeals No. 346286.

TAYLOR v OLYMPIA ENTERTAINMENT, INC, No. 159343; Court of Appeals No. 346172.

PEOPLE v MICHAEL TAYLOR, No. 159344; Court of Appeals No. 339721.

PEOPLE v JOSHUA ADAMS, No. 159354; Court of Appeals No. 346414.

PEOPLE v DANIELS, No. 159355; Court of Appeals No. 346936.

PEOPLE v EMERY, No. 159361; Court of Appeals No. 347029.

PEOPLE v MCKOWEN, No. 159365; Court of Appeals No. 346603.

PEOPLE v ROOKS, No. 159366; Court of Appeals No. 347353.

PEOPLE v FREDERICK, No. 159367; Court of Appeals No. 345123.

PEOPLE v SUTTON, No. 159369; Court of Appeals No. 341806.

PEOPLE v KOSHMIDER, No. 159374; Court of Appeals No. 340124.

KARAM v ALTERMATT FARMS, LLC, No. 159377; Court of Appeals No. 341576.

PEOPLE v GLADNEY, No. 159378; Court of Appeals No. 340198.

PEOPLE v HAYMER, No. 159380; Court of Appeals No. 341702.

PEOPLE v CURTIS FERGUSON, No. 159388; Court of Appeals No. 347472.

PEOPLE v DOMINIQUE MILLER, No. 159389; Court of Appeals No. 337460.

PEOPLE v HODGES, No. 159393; Court of Appeals No. 340031.

PEOPLE v RONALD ADAMS, No. 159397; Court of Appeals No. 339920.

PEOPLE v HOLLINGSWORTH, No. 159398; Court of Appeals No. 347324.

PEOPLE v LESTER, No. 159401; Court of Appeals No. 346251.

PEOPLE v DURICO MOSES, No. 159404; Court of Appeals No. 340747.

PEOPLE v DENT, No. 159406; Court of Appeals No. 338683.

MARINUCCI v CHARTER TOWNSHIP OF NORTHVILLE, No. 159407; Court of Appeals No. 340579.

PEOPLE v INWOOD, No. 159409; Court of Appeals No. 340225.

PEOPLE v PRUESNER, No. 159410; Court of Appeals No. 337576.

PEOPLE v SHENOSKEY, No. 159411; Court of Appeals No. 347002.

BARNICK v CITY OF DEARBORN DEPARTMENT OF PUBLIC WORKS, No. 159424; Court of Appeals No. 346425.

PEOPLE v MORRELL, No. 159425; Court of Appeals No. 346171.

PEOPLE v NORRIS, No. 159429; Court of Appeals No. 346019.

PEOPLE v HARMON, No. 159435; Court of Appeals No. 340674.

SABADOS v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 159437; Court of Appeals No. 342088.

PEOPLE v DANNY FOSTER, No. 159438; Court of Appeals No. 347248.

PEOPLE v BRADSHAW, No. 159439; Court of Appeals No. 345754.

PEOPLE v MAURICE WILLIAMS, No. 159444; Court of Appeals No. 342993.

PEOPLE v ROBERT REEVES, No. 159445; Court of Appeals No. 347200.

PEOPLE v WARD, No. 159446; Court of Appeals No. 346951.

PEOPLE v BELKIN, No. 159449; Court of Appeals No. 341915.

PEOPLE v KARIEM, No. 159452; Court of Appeals No. 347327.

PEOPLE v DOBSON-EL, No. 159453; Court of Appeals No. 347329.

PEOPLE v BOYER, No. 159456; Court of Appeals No. 347301.

PEOPLE v BULLOCK, No. 159466; Court of Appeals No. 347591.

PEOPLE v EVERETT GREER, No. 159473; Court of Appeals No. 347585.

PEOPLE v PITTS, No. 159477; Court of Appeals No. 338673.

PEOPLE v JUAN SIMMONS, No. 159483; Court of Appeals No. 346499.

PEOPLE v RANDALL, No. 159484; Court of Appeals No. 346100.

PEOPLE v CHARLESTON, No. 159485; Court of Appeals No. 339923.

FALARSKI v DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, No. 159487; Court of Appeals No. 343494.

BAKER v BEIRD, No. 159490; Court of Appeals No. 341707.

PEOPLE v VYVERMAN, No. 159500; Court of Appeals No. 347608.

PEOPLE v CHILDS, No. 159505; Court of Appeals No. 347506.

PEOPLE v JEFFREY PAYNE, No. 159507; Court of Appeals No. 341398.

BLOOMFIELD MERCHANT SERVICES, LLC v MEGA CARD SOLUTIONS, INC, No. 159518; Court of Appeals No. 345936.

PEOPLE v JORDAN, No. 159519; Court of Appeals No. 342634.

PEOPLE v LEWIS, No. 159528; Court of Appeals No. 346083.

PEOPLE v AVERY, No. 159543; Court of Appeals No. 341039.

PEOPLE v NOOM, No. 159544; Court of Appeals No. 347136.

PEOPLE v SUGGITT, No. 159548; Court of Appeals No. 347373.

PEOPLE v BOND, No. 159550; Court of Appeals No. 345946.

MEEKS v DEPARTMENT OF CORRECTIONS DIRECTOR, No. 159551; Court of Appeals No. 347871.

PEOPLE v SYLVESTER DAVIS, No. 159563; Court of Appeals No. 347464.

PEOPLE v HOBART, No. 159565; Court of Appeals No. 347807.

ANDERSON v SHAKIR, No. 159587; Court of Appeals No. 341019.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v NETTLES, No. 159610; Court of Appeals No. 347462.

PEOPLE v PONDS, No. 159623; Court of Appeals No. 341145.

Superintending Control Denied July 29, 2019:

LAWSON v 3RD CIRCUIT COURT JUDGE, No. 158718.

WALKER v ATTORNEY GRIEVANCE COMMISSION, No. 159375.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

EDWARDS v ATTORNEY GRIEVANCE COMMISSION, No. 159420.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Reconsideration Denied July 29, 2019:

SUNNYBROOK GOLF BOWL & MOTEL, INC v CITY OF STERLING HEIGHTS, No. 157056; Court of Appeals No. 332357. Leave to appeal denied at 503 Mich 1009.

PEOPLE v WADE-BEY, No. 157349; Court of Appeals No. 335045. Leave to appeal denied at 503 Mich 998.

PEOPLE v DEANGELO JONES, No. 158229; Court of Appeals No. 343310. Leave to appeal denied at 503 Mich 1017.

PEOPLE v BARNES, No. 158274; Court of Appeals No. 337113. Leave to appeal denied at 503 Mich 1017.

PEOPLE v HOUSTON, No. 158410; Court of Appeals No. 334744. Leave to appeal denied at 503 Mich 999.

PEOPLE v RAGAN, No. 158491; Court of Appeals No. 343933. Leave to appeal denied at 503 Mich 999.

PEOPLE v WILLIE WRIGHT, No. 158502; Court of Appeals No. 343235. Leave to appeal denied at 503 Mich 1000.

In re CATHERINE ETHINGTON LIVING TRUST and *In re* ESTATE OF CATHERINE ETHINGTON, Nos. 158513, 158514, 158515, 158516, and 158517; Court of Appeals Nos. 335904, 335905, 336370, 337643, and 337644. Leave to appeal denied at 503 Mich 955.

PEOPLE v DRAPER, No. 158523; Court of Appeals No. 343258. Leave to appeal denied at 503 Mich 1000.

PEOPLE v CLIFFORD, No. 158580; Court of Appeals No. 344691. Leave to appeal denied at 503 Mich 1019.

PEOPLE v DEANGELO JONES, No. 158600; Court of Appeals No. 345063. Leave to appeal denied at 503 Mich 1019.

PEOPLE v BAKER, No. 158606; Court of Appeals No. 343321. Leave to appeal denied at 503 Mich 955.

In re BAILEY, No. 158619; Court of Appeals No. 343615. Leave to appeal denied at 503 Mich 1001.

PEOPLE v KOOISTRA, No. 158678; Court of Appeals No. 338963. Leave to appeal denied at 503 Mich 955.

WOODS v RE INVESTMENT, INC, No. 158750; Court of Appeals No. 338139. Leave to appeal denied at 503 Mich 1002.

PEOPLE v ANTHONY BROWN, No. 158861; Court of Appeals No. 337223. Leave to appeal denied at 503 Mich 1020.

STEVENSON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 158873; Court of Appeals No. 344119. Leave to appeal denied at 503 Mich 1003.

PEOPLE v MCCALL, No. 159113; Court of Appeals No. 346485. Leave to appeal denied at 503 Mich 1022.

Summary Disposition July 31, 2019:

PEOPLE v URBAN, No. 156458; reported below: 321 Mich App 198. On March 6, 2019, the Court heard oral argument on the application for leave to appeal the August 31, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals opinion holding that the language used in the laboratory report that " 'it can be concluded to a reasonable degree of scientific certainty that the DNA profile . . . is from the same individual,' " met the requirement from *People v Coy*, 243 Mich App 283, 301 (2000), of "some analytic or interpretive evidence concerning the likelihood or significance of a DNA profile match . . . ." The *Coy* standard requires that when DNA evidence is introduced, it must be accompanied

by some qualitative or quantitative interpretation.[1] *Id*. at 302. The descriptive phrase, "to a reasonable degree of scientific certainty" offers neither. The phrase is a legally created term of art that is unused by scientists outside of courtrooms. Kaye, *The Double Helix and the Law of Evidence* (Cambridge: Harvard University Press, 2010), p 82. Because the phrase is meaningless and potentially misleading, the United States Attorney General has directed United States Department of Justice forensic laboratories to ensure that it is not used in reports or testimony. United States Department of Justice, Memorandum for Heads of Department Components, *Recommendations of the National Commission on Forensic Science; Announcement for NCFS Meeting Eleven* (September 6, 2016), available at <https://www.justice.gov/opa/file/891366/download> (accessed July 18, 2019) [https:// perma.cc/9JLK-ZGH9]; see also National Commission on Forensic Science, *Views on the Commission—Use of the Term "Reasonable Scientific Certainty"* (March 22, 2016), available at <https://www.justice.gov/archives/ncfs/file/839726/download> (accessed July 18, 2019) [https://perma.cc/GK4P-K7J9] (encouraging the Attorney General to abandon the phrase because it has "no place in the judicial process" for many reasons, including that it lacks scientific meaning, is misleading, and is without any real-world significance to the scientific fields represented by expert testimony).

We nonetheless affirm the result reached by the Court of Appeals on this issue because we agree with its conclusion in the alternative that admission of the DNA evidence did not affect the defendant's substantial rights and therefore does not require reversal. The forensic expert performed a quantitative analysis to generate the report she presented as evidence. That analysis revealed that the blood that matched the victim's DNA did so within a frequency of no fewer than 1 in 53.85 octillion (53.85×10^{27}) and the defendant's matched within a frequency of no fewer than 1 in 18.62 nonillion people (18.62×10^{30}). The defendant did not object to the admission of the report summarizing that the match was "to a reasonable degree of scientific certainty," and one reason may have been because that description was less harmful than one showing these quantitative probabilities. But even had he objected to the lack of a supporting foundation for the DNA evidence as required by *Coy*, the defendant could not show he was prejudiced. The purpose of the DNA evidence was to confirm that the defendant and the victim were at the scene of the altercation and that both shed blood. The defendant's theory of the case admitted as much; during closing arguments, the defense described the altercation as a "brawl" with the victim. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

MARKMAN, J. (*concurring*). While I would also affirm the result reached by the Court of Appeals, I would not do so on the basis of the harmlessness of the error asserted by the majority; rather, in my judgment, no error occurred at all. In particular, I do not believe that the report of the prosecutor's expert that the DNA match here was sup-

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[1] Because neither party argues *Coy* should be overruled, we do not address whether it is the appropriate standard and simply apply it here.

ported to a "reasonable degree of scientific certainty" breached *People v Coy*, 243 Mich App 283, 302 (2000), given that the genetic analysis in this case revealed that the blood that matched the victim's DNA did so within a frequency of no fewer than 1 in 53.85 octillion people and the blood that matched defendant's DNA did so within a frequency of no fewer than 1 in 18.62 nonillion people. As concluded by the Court of Appeals, the expert's articulation fully satisfied the requirement of *Coy* that either a "qualitative or quantitative" interpretation of the evidence be provided. *People v Urban*, 321 Mich App 198, 203-205 (2017). Identifying the evidence in this case as possessing a "reasonable degree of scientific certainty" constitutes a fully compliant description as it pertains exactly to the "quality or kind" of the DNA match. See *Merriam-Webster's Collegiate Dictionary* (11th ed) (defining "qualitative" as "of, relating to, or involving quality or kind"). Moreover, as recognized by Maryland's highest court: "When the random match probability is sufficiently minuscule, the DNA profile may be deemed unique. In such circumstances, testimony of a match is admissible without accompanying contextual statistics . . . [, and] the expert may testify that in the absence of identical twins, it can be concluded to a *reasonable scientific certainty* that the evidence sample and the defendant sample came from the same person." *Young v State*, 388 Md 99, 119-120 (2005) (emphasis added).

ZAHRA, J., joins the statement of MARKMAN, J.

Motion to Continue Stay Denied July 31, 2019:

SIMMONS PROPERTIES, LLC v LANSING ENTERTAINMENT AND PUBLIC FACILITIES AUTHORITY, No. 159928; Court of Appeals No. 346657. On order of the Chief Justice, the motion of the plaintiff-appellant to continue stay is denied as moot. Pursuant to MCR 7.305(I), "[w]hen a stay bond has been filed on appeal to the Court of Appeals under MCR 7.209 or a stay has been entered or takes effect pursuant to MCR 7.209(E)(7), it operates to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the Supreme Court or the Court of Appeals." The Court of Appeals entered a stay pending appeal on December 7, 2018, which remains in effect without further order by this Court.

Summary Disposition August 2, 2019:

In re NOFFSINGER, MINOR, No. 154999; Court of Appeals No. 331108. By order of July 5, 2018, the application for leave to appeal the November 29, 2016 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Ferranti, Minor* (Docket Nos. 157907-8). On order of the Court, the case having been decided on June 12, 2019, 504 Mich 1 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Ferranti*. We do not retain jurisdiction.

In re B HADD, MINOR, No. 156604; Court of Appeals No. 337097. By order of July 5, 2018, the application for leave to appeal the September 12, 2017 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Ferranti, Minor* (Docket Nos. 157907-8). On order of the Court, the case having been decided on June 12, 2019, 504 Mich 1 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Ferranti*. We do not retain jurisdiction.

In re BURKHART/ODIL, MINORS, No. 159174; Court of Appeals No. 343111. By order of April 5, 2019, the application for leave to appeal the February 5, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Ferranti, Minor* (Docket Nos. 157907-8). On order of the Court, the case having been decided on June 12, 2019, 504 Mich 1 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Ferranti*. We do not retain jurisdiction.

Leave to Appeal Denied August 2, 2019:

In re JJ GUIDO-SEGER, MINOR, No. 155405; Court of Appeals No. 333529.

PEOPLE V JVION BROWN, No. 159504; Court of Appeals No. 347144.

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal but write separately to note that defendant has raised a claim of actual innocence in this Court that was not raised below. Defendant states he has new evidence in support of this claim, but he has not offered it. I note the denial is without prejudice to defendant's right to file a motion for relief from judgment pursuant to MCR Subchapter 6.500 that may include the issue.

In re PEREZ/DUPREE, MINORS, No. 159739; Court of Appeals No. 345451.

In re DUPREE, MINORS, No. 159741; Court of Appeals No. 345455.

In re COOK, MINORS, No. 159743; Court of Appeals No. 345383.

In re COOK, MINORS, No. 159746; Court of Appeals No. 345384.

Application for Leave to Appeal Dismissed on Stipulation August 2, 2019:

CHAPMAN V MACK, No. 158169; Court of Appeals No. 335678. On order of the Court, the stipulation signed by counsel for the parties agreeing

to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs.

Leave to Appeal Denied August 14, 2019:

In re WILLBUR, MINORS, No. 159899; Court of Appeals No. 346275.

In re PETITION OF CHIPPEWA COUNTY TREASURER FOR FORECLOSURE, No. 160026; Court of Appeals No. 349188.

Leave to Appeal Denied September 6, 2019:

In re KENNEDY, MINORS, No. 159944; Court of Appeals No. 346032.

In re BURTIS/CARTER, MINORS, No. 159953; Court of Appeals No. 346517.

Reconsideration Denied September 6, 2019:

In re PEREZ/DUPREE, MINORS, No. 159739; Court of Appeals No. 345451. Leave to appeal denied at 504 Mich 953.

In re DUPREE, MINORS, No. 159741; Court of Appeals No. 345455. Leave to appeal denied at 504 Mich 953.

Summary Disposition September 10, 2019:

PEOPLE V VEEDER, No. 158401; Court of Appeals No. 344260. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the September 22, 2017 judgment of sentence in Midland Circuit Court case 16-006352-FH imposing a $150 fine. MCL 769.1k(1)(b)(i). MCL 750.413 does not authorize a fine. We remand case 16-006327-FH to the Midland Circuit Court for a determination of whether a DNA sample had already been submitted. If the trial court finds that a DNA sample meeting the requirements of MCL 28.176(3) had previously been submitted, the trial court shall vacate that part of the September 22, 2017 judgment of sentence imposing a $60 DNA assessment. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

DEPARTMENT OF TALENT AND ECONOMIC DEVELOPMENT/UNEMPLOYMENT INSURANCE AGENCY V COMET CONTRACTING, No. 158656; Court of Appeals No. 343192. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We note that a similar issue is pending before the Court of Appeals in the consolidated cases of *Dep't of Talent & Economic Development v AMBS Message Ctr, Inc* (Docket No. 343521), *Dep't of*

Talent & Economic Development v Great Oaks Country Club, Inc (Docket No. 343846), and *Dep't of Talent & Economic Development v NBC Truck Equip, Inc* (Docket No. 343989).

PEOPLE v PHAROAH JONES, No. 159258; Court of Appeals No. 346743. By order of May 28, 2019, the prosecuting attorney was directed to answer the application for leave to appeal the February 15, 2019 order of the Court of Appeals. On order of the Court, the answer having been received, we remand this case to the Court of Appeals for consideration as on leave granted.

In re JACKSON, Nos. 159412 and 159436; reported below: 326 Mich App 629. On order of the Court, the motions to file a supplement are granted. The applications for leave to appeal the March 12, 2019 orders of the Court of Appeals are considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand the case of *People v Jackson*, Wayne CC: 09-003770-FC, to the Wayne Circuit Court for reconsideration of whether the defendant's May 24, 2016 motion for relief from judgment is a successive motion, as the circuit court states in the November 21, 2016 order denying relief from judgment, and for further proceedings as set forth in this order.

We first note that the circuit court record is in disarray and possibly incomplete. Based on the record provided to this Court, the defendant filed his first motion for relief from judgment on July 16, 2015. The defendant sought to amend that motion on October 16, 2015. The amended motion for relief from judgment was returned to the defendant by order dated January 21, 2016, because it exceeded the page limit. The defendant was encouraged to resubmit the motion after redacting his issues and arguments to a more manageable length. The defendant refiled the motion on May 24, 2016. This motion was denied by the circuit court on November 21, 2016, in an order that characterized the motion as successive and denied relief under MCR 6.502(G).

In support of its characterization of the motion for relief from judgment as a successive motion, the circuit court's November 21, 2016 order states that an earlier motion for relief from judgment was denied on November 24, 2015. No such order can be found in the record provided to this Court. The Register of Actions states that an order was entered on November 24, 2015, but it does not describe the order and this appears to be a reference to an unrelated order dated November 23, 2015, denying the defendant's request for a copy of the Register of Actions. We further note that the circuit court's description of the procedural history of the case in its January 26, 2016 opinion returning the motion for relief from judgment to the defendant, and in a March 11, 2016 order denying the defendant's request for the appointment of counsel, does not support the conclusion that the defendant's May 24, 2016 motion for relief from judgment is a successive motion.

Under these circumstances, we remand the case of *People v Jackson* to the Wayne Circuit Court for reconsideration of whether the defendant's May 24, 2016 motion for relief from judgment is a successive motion under MCR 6.502(G). On remand, the circuit court shall issue an opinion setting forth its analysis. If the circuit court determines that the

defendant's motion for relief from judgment is not a successive motion, as appears to be the case based on the circuit court record provided to this Court, the circuit court shall decide the motion under the standard set forth in MCR 6.508(D). If, however, the court determines that the motion for relief from judgment was correctly denied under MCR 6.502(G) as a successive motion, it shall then rule on the motion for reconsideration that the defendant filed on December 9, 2016. A date-stamped copy of the motion for reconsideration is contained in the circuit court file, but the motion is not listed in the Register of Actions, and there is no order in the circuit court file deciding the motion. We do not retain jurisdiction.

PEOPLE v ROBERT SIMMONS, No. 159641; Court of Appeals No. 347775. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals as on leave granted.

Leave to Appeal Denied September 10, 2019:

PEOPLE v CHAGNON, No. 156218; Court of Appeals No. 338191.

PEOPLE v ROBERT WILLIAMS, No. 157276; Court of Appeals No. 333904.

PEOPLE v DURHAM, No. 157431; Court of Appeals No. 334256.

PEOPLE v FAULKS, No. 157709; Court of Appeals No. 335607.

PEOPLE v MCLAURIN, No. 157744; Court of Appeals No. 342936.

PEOPLE v WATSON, No. 157825; Court of Appeals No. 335334.

PEOPLE v JAMES BURNS, No. 158016; Court of Appeals No. 342469.

PEOPLE v JAMES BURNS, No. 158029; Court of Appeals No. 342470.

PEOPLE v LEFFLER, No. 158097; Court of Appeals No. 342708.

PEOPLE v WOOTEN, No. 158200; Court of Appeals No. 335860.

PEOPLE v CAMERON WEBB, No. 158204; Court of Appeals No. 343645.

STATE TREASURER v ALLEN, No. 158235; Court of Appeals No. 340165.

PEOPLE v WARE, Nos. 158257 and 158258; Court of Appeals Nos. 337903 and 337904.

PEOPLE v PROPER, No. 158474; Court of Appeals No. 344308.

PEOPLE v KELLER, No. 158483; Court of Appeals No. 343803.

PEOPLE v POWELL, No. 158493; Court of Appeals No. 344523.

PEOPLE v FOLEY, No. 158526; Court of Appeals No. 344466.

PEOPLE v FINLAYSON, No. 158528; Court of Appeals No. 339010.

HARTLAND GLEN DEVELOPMENT, LLC v TOWNSHIP OF HARTLAND, No. 158640; Court of Appeals No. 342218.

CLYDE LAND INVESTMENT v TOWNSHIP OF HARTLAND, No. 158641; Court of Appeals No. 342219.

PEOPLE v KYLE ARMSTRONG, No. 158644; Court of Appeals No. 344976.

PEOPLE v MANNERS, No. 158680; Court of Appeals No. 337319.

PEOPLE v MARTINEZ, No. 158830; Court of Appeals No. 339553.

PEOPLE v DAVID STEWART, No. 158874; Court of Appeals No. 338014.

PEOPLE v MOSS, No. 158875; Court of Appeals No. 344912.

PEOPLE v JAMES GRAHAM, No. 158895; Court of Appeals No. 345550.

PAGE v CITY OF WYANDOTTE, No. 158960; Court of Appeals No. 339008.

PEOPLE v COATES, No. 158966; Court of Appeals No. 340954.

JOE v COMMUNITY EMERGENCY MEDICAL SERVICES, INC, No. 158998; Court of Appeals No. 338510.

SPECTRUM HEALTH HOSPITALS v GEICO GENERAL INSURANCE COMPANY, No. 158999; Court of Appeals No. 341353.

PEOPLE v MOLITOR, No. 159024; Court of Appeals No. 344347.

PEOPLE v RANSANICI, No. 159034; Court of Appeals No. 339650.

PEOPLE v HAMMONDS, No. 159084; Court of Appeals No. 336958.

VANALSTINE v LAND O'LAKES PURINA FEEDS, LLC, No. 159095; reported below: 326 Mich App 641.

PEOPLE v CAMPBELL, No. 159111; Court of Appeals No. 345315.

BARBER v LOMBARDO HOMES OF SE MICHIGAN, LLC, No. 159127; Court of Appeals No. 341193.

PEOPLE v CAVITCH, No. 159132; Court of Appeals No. 346396.

PEOPLE v MEDLOCK, No. 159182; Court of Appeals No. 338641.

PEOPLE v HAGAN, No. 159219; Court of Appeals No. 345644.

PEOPLE v SCHWEIZER, No. 159232; Court of Appeals No. 340511.

PEOPLE v KEYS, No. 159245; Court of Appeals No. 345875.

PEOPLE v ERIN JUSTICE, No. 159249; Court of Appeals No. 346733.

PEOPLE v LACY, No. 159336; Court of Appeals No. 345870.

ESTATE OF DEBORAH A PATTERSON v DEPARTMENT OF TRANSPORTATION, No. 159359; Court of Appeals No. 342514.

PEOPLE v VENSON, No. 159385; Court of Appeals No. 339921.

PEOPLE v GETTER, No. 159395; Court of Appeals No. 340820.

PEOPLE v ASHMON, No. 159396; Court of Appeals No. 339433.

PEOPLE v KIRKLAND, No. 159403; Court of Appeals No. 346806.

PEOPLE v KAPALA, No. 159418; Court of Appeals No. 347098.

COLLIER v DEPARTMENT OF CORRECTIONS, No. 159447; Court of Appeals No. 346323.

PEOPLE v HARBERT, No. 159458; Court of Appeals No. 341471.

PEOPLE OF THE CITY OF LIVONIA v GABRIEL, No. 159459; Court of Appeals No. 345684.

PEOPLE v TREMAINE MOSES, No. 159467; Court of Appeals No. 346210.

NICHOLLS v MILLER, No. 159470; Court of Appeals No. 345612.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

MCKENNETT v KOLAILAT, No. 159471; Court of Appeals No. 345780.

WOODCREEK OF ANN ARBOR ASSOCIATION v CITY OF ANN ARBOR, No. 159479; Court of Appeals No. 342848.

PEOPLE v JALEN HAWKINS, No. 159488; Court of Appeals No. 341725.

PEOPLE v BIELBY, No. 159508; Court of Appeals No. 340556.

RUBBA v AGNONE, No. 159514; Court of Appeals No. 345327.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

PEOPLE v EDWARDIAN DAVIDSON, No. 159515; Court of Appeals No. 336176.

PEOPLE v HARDY, No. 159520; Court of Appeals No. 346177.

PEOPLE v WALLACE, No. 159522; Court of Appeals No. 347479.

PEOPLE v RUIMVELD, No. 159526; Court of Appeals No. 340711.

PEOPLE v SIEBERT, No. 159529; Court of Appeals No. 346338.

PEOPLE v ROBERT WHITE, No. 159530; Court of Appeals No. 346356.

PEOPLE v SINGH, No. 159534; Court of Appeals No. 346672.

PEOPLE v DAVICIA SWIFT, No. 159541; Court of Appeals No. 347592.

PEOPLE v DAVICIA SWIFT, No. 159542; Court of Appeals No. 347593.

PEOPLE v MORALES, No. 159545; Court of Appeals No. 347589.

PEOPLE v LEPPEN, No. 159559; Court of Appeals No. 346012.

PEOPLE v MARK WILLIAMS, No. 159561; Court of Appeals No. 339222.

PEOPLE v MULLEN, No. 159568; Court of Appeals No. 341165.

PEOPLE v CLARENCE JENKINS, No. 159569; Court of Appeals No. 339161.

PEOPLE v ROBINSON-COOPER, No. 159571; Court of Appeals No. 340392.

PEOPLE v LEONARDO JOHNSON, No. 159577; Court of Appeals No. 347423.

PEOPLE v LOWERY, No. 159585; Court of Appeals No. 347477.

REIDENBACH v CITY OF KALAMAZOO, No. 159592; Court of Appeals No. 340863.

PEOPLE v DENARD PETERSON, No. 159600; Court of Appeals No. 347041.

PEOPLE v ALBAYDANY, No. 159602; Court of Appeals No. 347938.

PEOPLE v PEREZ, No. 159611; Court of Appeals No. 340697.

PEOPLE v BAILEY, No. 159613; Court of Appeals No. 347711.

PEOPLE v ANTHONY JACKSON, No. 159625; Court of Appeals No. 339898.

PEOPLE v JERRY MITCHELL, No. 159633; Court of Appeals No. 347096.

WENDLING v WILDCAT CLUB, No. 159647; Court of Appeals No. 342382.

PEOPLE v PALMER, No. 159654; Court of Appeals No. 347904.

PEOPLE v DERRICK SMITH, No. 159656; Court of Appeals No. 348200.

BLOOM v OGILVIE, Nos. 159664 and 159665; Court of Appeals Nos. 342337 and 342354.

PEOPLE v GRAHAM PARKER, No. 159677; Court of Appeals No. 343079.

PEOPLE v JULES THOMAS, No. 159682; Court of Appeals No. 347704.

PEOPLE v FULLER, No. 159688; Court of Appeals No. 347864.

PEOPLE v COWAN, No. 159697; Court of Appeals No. 346731.

PEOPLE v CALHOUN, No. 159710; Court of Appeals No. 348639.

PEOPLE v ARNETT, No. 159721; Court of Appeals No. 347783.

PEOPLE v BIVINS, No. 159727; Court of Appeals No. 340305.

STEWART v HANA, No. 159728; Court of Appeals No. 341812.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

PEOPLE v BILLY HICKS, No. 159730; Court of Appeals No. 347782.

DEFILIPPIS v DEPARTMENT OF CIVIL RIGHTS, No. 159747; Court of Appeals No. 346966.

PEOPLE v MARBLE, No. 159767; Court of Appeals No. 347955.

PEOPLE v BENION, No. 159769; Court of Appeals No. 347759.

PEOPLE v SKIPP, No. 159777; Court of Appeals No. 344349.

PEOPLE v RUNELS, No. 159795; Court of Appeals No. 348156.

PEOPLE v LAMKIN, No. 159796; Court of Appeals No. 347735.

SIMMONS PROPERTIES, LLC v LANSING ENTERTAINMENT AND PUBLIC FACILITIES AUTHORITY, No. 159928; Court of Appeals No. 346657.

Reconsideration Denied September 10, 2019:

In re APPLICATION OF CONSUMERS ENERGY COMPANY TO INCREASE RATES, No. 157012; reported below: 322 Mich App 480. Leave to appeal denied at 503 Mich 1035.

BURKS v INDEPENDENT BANK, No. 157757; Court of Appeals No. 341566. Leave to appeal denied at 503 Mich 1035.

PEOPLE v HENCE, No. 158088; Court of Appeals No. 342023. Leave to appeal denied at 503 Mich 1018.

PEOPLE v MILES, No. 158383; Court of Appeals No. 335731. Leave to appeal denied at 503 Mich 1032.

PEOPLE v INGRAM, No. 158449; Court of Appeals No. 342589. Leave to appeal denied at 503 Mich 1018.

LENTZ v DEPARTMENT OF CORRECTIONS, No. 158519; Court of Appeals No. 342907. Leave to appeal denied at 503 Mich 1036.

FORNER v TOWNSHIP OF SPRING LAKE, No. 158552; Court of Appeals No. 341017. Leave to appeal denied at 503 Mich 1019.

MIC GENERAL INSURANCE CORP v MICHIGAN MUNICIPAL RISK MANAGEMENT AUTHORITY, No. 158676; Court of Appeals No. 341766. Leave to appeal denied at 503 Mich 1036.

PEOPLE v DEVON HAMPTON, No. 158689; Court of Appeals No. 337431. Leave to appeal denied at 503 Mich 1032.

In re ESTATE OF RICHARD T GORDON, *In re* RICHARD T GORDON REVOCABLE TRUST AGREEMENT, *In re* LAUREEN M GORDON REVOCABLE TRUST, and *In re* ESTATE OF LAUREEN M GORDON, Nos. 158843, 158844, 158845, and 158846; Court of Appeals Nos. 339296, 339297, 339299, and 339320. Leave to appeal denied at 503 Mich 1020.

In re RAYMOND L FRICK TRUST, No. 158984; Court of Appeals No. 341498. Leave to appeal denied at 503 Mich 1037.

PEOPLE v MAUTI, No. 159007; Court of Appeals No. 337958. Leave to appeal denied at 503 Mich 1021.

PEOPLE v HACKNEY, No. 159131; Court of Appeals No. 344662. Leave to appeal denied at 503 Mich 1022.

PEOPLE v GOODE, No. 159150; Court of Appeals No. 346497. Leave to appeal denied at 503 Mich 1037.

REID v HURLEY MEDICAL CENTER, No. 159151; Court of Appeals No. 344814. Leave to appeal denied at 503 Mich 1037.

Leave to Appeal Denied September 13, 2019:

In re RE MCLAUGHLIN, MINOR, No. 155638; Court of Appeals No. 332170.

KATO v DEPARTMENT OF CORRECTIONS, No. 158812; Court of Appeals No. 344089.

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal for two reasons. First, plaintiff does not appear to have complied with the requirement in MCR 3.303(A)(2) that his action "be brought in the county in which the prisoner is detained," but instead initiated his action in the Court of Appeals. He may have done so having observed that MCR 7.203(C)(3) allows the Court of Appeals to "entertain an action" for habeas corpus. However, reading the two rules together, it appears the Court of Appeals may only "entertain" an action for habeas corpus if the action was first "brought" in the county in which the prisoner is detained—presumably in circuit court. Second, even if the action for habeas corpus was correctly initiated, plaintiff's argument relies on the factual predicate that he was presented with a certificate of discharge from parole. If that is true, plaintiff may well have been, and may yet be, entitled to relief. The Department of Corrections may not cancel a parole discharge "once the final order of discharge has been entered and the certificate of discharge issued to the prisoner." *People v Holder*, 483 Mich 168, 173 (2009). A discharge from parole is a "remission of the remaining portion of [a] sentence. . . . After delivery it cannot be recalled." *In re Eddinger*, 236 Mich 668, 670 (1926). Plaintiff has requested an evidentiary hearing to establish that he was presented with the certificate, but he has made no offer of proof as to how he would establish this fact at such a hearing.

Summary Disposition September 18, 2019:

PEOPLE v GILLIES, No. 157820; Court of Appeals No. 342182. By order of October 2, 2018, the application for leave to appeal the March 28, 2018 order of the Court of Appeals was held in abeyance pending the decision in *People v Carter* (Docket No. 156606). On order of the Court, the case having been decided on May 7, 2019, 503 Mich 221 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the defendant was properly assigned 25 points under Offense Variable 12 (OV 12),

MCL 777.42. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v RODGERS, No. 158706; Court of Appeals No. 343720. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether: (1) this Court's decision in *People v Comer*, 500 Mich 278 (2017), constituted a retroactive change in the law such that an exception to the ban on successive motions for relief from judgment applies, MCR 6.502(G)(2); (2) the Oakland Circuit Court lacked jurisdiction, under *Comer*, to amend the January 14, 2008 judgment of sentence on its own initiative, after entry, to add lifetime electronic monitoring; and (3) if *Comer* does not constitute a retroactive change in the law, but the trial court lacked jurisdiction to amend the judgment of sentence, the defendant is entitled to relief on his successive motion for relief from judgment or relief is barred by MCR 6.502(G).

PEOPLE v MANDERS, No. 159066; Court of Appeals No. 346020. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v BALLINGER, No. 159426; Court of Appeals No. 345795. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the Wayne Circuit Court's May 8, 2018 opinion and order denying the defendant's motion for relief from judgment, and we remand this case to that court for reconsideration of the motion. The circuit court failed to apply the correct legal standard to the defendant's claim that the prosecution suppressed material and exculpatory evidence in violation of *Brady v Maryland*, 373 US 83 (1963). See *People v Chenault*, 495 Mich 142, 150 (2014). The circuit court also failed to address the defendant's claim that he is entitled to a new trial on grounds of newly discovered evidence. See *People v Johnson*, 502 Mich 541, 565 (2018). The motion for appointment of counsel is denied, without prejudice to the defendant renewing his request in the circuit court. See MCR 6.505(A). The motion to remand is denied as moot. We do not retain jurisdiction.

Leave to Appeal Granted September 18, 2019:

LICHON v MORSE and SMITS v MORSE, Nos. 159492 and 159493; reported below: 327 Mich App 375. The parties shall include among the issues to be briefed whether the claims set forth in the plaintiffs' complaints are subject to arbitration. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 18, 2019:

PEOPLE v TERRANCE, No. 159516; Court of Appeals No. 343154. On order of the Court, the application for leave to appeal the March 5, 2019 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered. We direct the Clerk to schedule oral argument on the plaintiff's application. MCR 7.305(H)(1).

The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the Court of Appeals erred when it concluded that the jury in the defendant's first trial, when it acquitted him of first- and second-degree murder, necessarily decided an issue of ultimate fact such that the issue-preclusion aspect of the Double Jeopardy Clause bars prosecution for the crime of torture arising out of the same criminal incident. In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

The application for leave to appeal as cross-appellant is denied, because we are not persuaded that the additional question presented should be reviewed by this Court.

Leave to Appeal Denied September 18, 2019:

PEOPLE v ROBERT GREEN, No. 157355; reported below: 322 Mich App 676.

PEOPLE v MATTHEW CRUMLEY, No. 158939; Court of Appeals No. 344293.

PEREZ v HENRY FORD HEALTH SYSTEM, No. 159170; Court of Appeals No. 340082.

TURKISH v WILLIAM BEAUMONT HOSPITAL, No. 159272; Court of Appeals No. 339522.

BERNSTEIN, J., did not participate because of his prior representation of a party in an unrelated manner.

PEOPLE v BUSH, No. 159284; Court of Appeals No. 346736.

PEOPLE v WERBIL, No. 159402; Court of Appeals No. 346373.

SAFDAR v AZIZ, No. 159448; reported below: 327 Mich App 252.

LAYMAN v SHAHEEN, No. 159489; Court of Appeals No. 345799.

Reconsideration Denied September 18, 2019:

PEOPLE v KELVIN WILLIS, No. 157465; reported below: 322 Mich App 579. Leave to appeal denied at 504 Mich 905.

Rehearing Denied September 18, 2019:

PEOPLE v TERENCE BRUCE and PEOPLE v STANLEY NICHOLSON, No. 156827 and 156828; opinion at 504 Mich 555.

Summary Disposition September 20, 2019:

PEOPLE v OOM, No. 159338; Court of Appeals No. 346557. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the Emmet Circuit Court erred by assigning 10 points to Offense Variable (OV) 14. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v KIJUAN MILLER, No. 159430; Court of Appeals No. 334807. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part II.A.4. of the Court of Appeals judgment entitled "OFFENSE-VARIABLE SCORING," we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing. The prosecution concedes that the trial court erred by assigning five points to Offense Variable (OV) 16. The Court of Appeals erred by affirming the score of 10 points for OV 4 where the record fails to adequately support a finding that the victim suffered a *serious* psychological injury. MCL 777.34(2). The defendant is thus entitled to resentencing. *People v Kimble*, 470 Mich 305 (2004). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

Summary Disposition September 25, 2019:

PEOPLE v ULP, No. 159080; Court of Appeals No. 335911. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse Part III of the Court of Appeals opinion and vacate the August 10, 2017 and July 27, 2018 orders of the Macomb Circuit Court denying the defendant's postjudgment motions seeking an expert and discovery to aid in her appeal. The lower courts erred in concluding that defendant has failed to cite any authority in support of her claim that she is entitled to

expert assistance at public expense in the context of a postjudgment *Ginther* hearing. See *People v Kennedy*, 502 Mich 206 (2018). Although the Court in *Kennedy* examined a claim in which funding for an expert was denied at the pretrial stage, neither *Kennedy* nor the constitutional rule on which it is based supports the circuit court's analysis. The circuit court concluded that *Kennedy* did not apply to the defendant's postjudgment motions because it applied only if " 'defendant made a sufficient showing that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair *trial*.' " *People v Ulp*, opinion and order of the Macomb Circuit Court, issued July 27, 2018 (Case No. 2015-3612-FC), p 4, quoting *Kennedy*, 502 Mich at 228 (emphasis in *Ulp*). But as explained in *Kennedy* and *Ake v Oklahoma*, 470 US 68 (1985), the due-process principles are not so limited. See *Kennedy*, 502 Mich at 218 (stating that "[o]ne thing about *Ake* is clear: it sets forth the due process analysis that a court must use when an indigent criminal defendant claims he or she has not been provided 'the basic tools of an adequate defense' and therefore did not have 'an adequate opportunity to present [his or her] claims fairly within the adversarial system' "), quoting *Ake*, 470 US at 77; see also *Kennedy*, 502 Mich at 214, quoting *Ake*, 470 US at 77 (stating that " 'fundamental fairness entitles indigent defendants to an adequate opportunity to present their claims fairly within the adversarial system. To implement this principle, we have focused on identifying the basic tools of an adequate defense *or appeal*, and we have required that such tools be provided to those defendants who cannot afford to pay for them' ") (emphasis added); *Ake*, 470 US at 83 (requiring the appointment of an expert to "assist in evaluation, preparation, and presentation of the defense"); *McWilliams v Dunn*, 582 US ___, ___; 137 S Ct 1790, 1799 (2017) (reaffirming that *Ake* "clearly established" this right). We remand this case to the Macomb Circuit Court for reconsideration of the defendant's postjudgment motions on the merits. We do not retain jurisdiction.

In re MJ DAWKINS, MINOR, Nos. 159206 and 159207; Court of Appeals Nos. 344285 and 344316. By order of May 3, 2019, the application for leave to appeal the February 5, 2019 judgment of the Court of Appeals was held in abeyance pending the decision in *In re Ferranti, Minor* (Docket Nos. 157907-8). On order of the Court, the case having been decided on June 12, 2019, 504 Mich 1 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals for reconsideration in light of *Ferranti*. We do not retain jurisdiction.

In re DEMONTIGNY/LAUBE, MINORS, No. 159700; Court of Appeals No. 345760. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *In re Ferranti*, *Minor*, 504 Mich 1 (2019) (Docket Nos. 157907-8). We do not retain jurisdiction.

GROOMS v HUNTZINGER-GILPIN, No. 160236; Court of Appeals No. 350338. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted, and direct that court to decide the case on an expedited basis. The motion to stay proceedings is denied.

Leave to Appeal Granted September 25, 2019:

BISIO v THE CITY OF THE VILLAGE OF CLARKSTON, No. 158240; Court of Appeals No. 335422. The parties shall address: (1) whether the Court of Appeals erred in holding that the documents sought by the plaintiff were not within the definition of "public record" in § 2(i) of the Freedom of Information Act (FOIA), MCL 15.231 *et seq*.; and (2) whether the defendant city's charter-appointed attorney was an agent of the city such that his correspondence with third parties, which were never shared with the city or in the city's possession, were public records subject to the FOIA, see *Breighner v Michigan High Sch Athletic Ass'n*, 471 Mich 217, 233 nn 6 & 7 (2004); *Hoffman v Bay City School Dist*, 137 Mich App 333 (1984). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Michigan Press Association, Detroit Free Press, Michigan Municipal League, and Michigan Townships Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

HART v MICHIGAN, No. 159539; Court of Appeals No. 338171. The parties shall address whether the Court of Appeals erred when it concluded that the plaintiff had failed to allege sufficient facts to state a constitutional-tort claim under the principles outlined in *Canton v Harris*, 489 US 378 (1989), and *Bryan Co Bd of Co Comm'rs v Brown*, 520 US 397, 409 (1997). The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The American Civil Liberties Union of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Order Directing Supplemental Briefing Entered September 25, 2019:

PROGRESS MICHIGAN v ATTORNEY GENERAL, Nos. 158150 and 158151; reported below: 324 Mich App 659. By order of March 20, 2019, we granted leave to appeal the June 19, 2018 judgment of the Court of Appeals, and this case was placed on the October 2019 session calendar for argument and submission. On September 3, 2019, the parties filed a joint motion to vacate the Court of Appeals opinion and remand the case to be dismissed with prejudice. By order of September 16, 2019, oral argument was adjourned. We direct the parties to file supplemental briefs within 21 days of the date of this order addressing: (1) what

standard should govern vacatur of lower court decisions in Michigan, see, e.g., *US Bancorp Mortgage Co v Bonner Mall Partnership*, 513 US 18, 29 (1994); *California ex rel State Lands Comm v Superior Court of Sacramento Co*, 11 Cal 4th 50, 60-62 (1995); and (2) whether, under the appropriate standard, this Court should vacate the judgment of the Court of Appeals reported at 324 Mich App 659 (2018).

Leave to Appeal Denied September 25, 2019:

MARTINEZ v TMF II WATERCHASE, LLC, No. 155197; Court of Appeals No. 329931.

KRISHNA KRUPA, INC v CITY OF FERNDALE, No. 158669; Court of Appeals No. 337224.

PEOPLE v HOLLINS, No. 158829; Court of Appeals No. 338452.

PEOPLE v PENLEY, No. 158972; Court of Appeals No. 336680.

PEOPLE v PRICE, No. 159147; Court of Appeals No. 345722.

PEOPLE v BLAKE, No. 159292; Court of Appeals No. 339786.

PEOPLE v PHILLIPS, No. 159533; Court of Appeals No. 340942.

PEOPLE v STRICKLIN, No. 159574; reported below: 327 Mich App 592.

PEOPLE v JINES, No. 160205; Court of Appeals No. 349675.

Rehearing Denied September 25, 2019:

THIEL v GOYINGS, No. 156708; Court of Appeals No. 333000. Opinion at 504 Mich 484.

Summary Disposition September 27, 2019:

MCMASTER v DTE ELECTRIC COMPANY, No. 159062; Court of Appeals No. 339271. On order of the Court, the application for leave to appeal the November 8, 2018 judgment of the Court of Appeals and the application for leave to appeal as cross-appellant are considered and, pursuant to MCR 7.305(H)(1), in lieu of granting the application for leave to appeal, we vacate Part III of the opinion, titled "Common-Law Duty." The Court of Appeals erred when it applied the open and obvious doctrine to this ordinary negligence case. The open and obvious doctrine is applicable to a claim that sounds in premises liability: "the question is whether *the condition of the premises* at issue was open and obvious . . . ." *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 523 (2001). Here, the cause of action does not sound in premises liability but rather in ordinary negligence. Accordingly, we remand this case to the Court of Appeals for application of the law of ordinary negligence and for consideration of the issues raised by the parties on the question of the defendant's legal duty. The

application for leave to appeal as cross-appellant is denied, because we are not persuaded that the question presented should be reviewed by this Court.

TOWNSHIP OF FRASER v HANEY, No. 159181; reported below: 327 Mich App 1. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals, and we remand this case to the Court of Appeals to address whether the published opinion in this case is consistent with the published opinion in *Baker v Marshall*, 323 Mich App 590 (2018). We do not retain jurisdiction.

PEOPLE v FINNIE, No. 159192; Court of Appeals No. 345271. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 27, 2018 order of the Calhoun Circuit Court denying the defendant's motion for relief from judgment, and we remand this case to the trial court for reconsideration of that motion. The trial court's stated basis for denying the motion was that "the defendant's motion is without merit." However, the order failed to "include a concise statement of the reasons for the denial," as required by MCR 6.504(B)(2). We do not retain jurisdiction.

MARKMAN, J. (*dissenting*). Whereas this Court presumably satisfies its obligation under Const 1963, art 6, § 6 to provide the "reasons for each denial of leave to appeal" by issuing a general statement that "we are not persuaded that the questions presented should be reviewed by this Court," I discern no principled reason why the trial court's statement that "the defendant's motion is without merit" does not similarly satisfy its obligation under MCR 6.504(B)(2) to "include a concise statement of the reasons for the denial." Because I would not hold the trial court to a higher or different standard than that to which we hold ourselves, I respectfully dissent and would instead deny leave to appeal.

ZAHRA, J., joins the statement of MARKMAN, J.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 27, 2019:

GRIFFIN v SWARTZ AMBULANCE SERVICE, No. 159205; Court of Appeals No. 340480. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the operation of the ambulance in this case by the appellee's employee constitutes an "act[] . . . in the treatment of a patient" within the meaning of MCL 333.20965(1). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied September 27, 2019:

In re BURGESS, MINORS, No. 159913; Court of Appeals No. 346272.

Summary Disposition September 30, 2019:

PEOPLE v STEANHOUSE, No. 156900; reported below: 322 Mich App 233. By order of May 4, 2018, the application for leave to appeal the December 5, 2017 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Dixon-Bey* (Docket No. 156746). On order of the Court, leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the Court of Appeals judgment remanding this case to the trial court solely for resentencing. The Court of Appeals determined that only one of three reasons articulated by the trial court for departing from the sentencing guidelines was valid, that it was unclear whether it would have departed solely on that basis, and that its reasoning for the extent of departure was difficult to ascertain. Rather than remanding only for resentencing, the Court of Appeals should have remanded for the trial court to either resentence or to further articulate its reasons for departure. See *People v Babcock*, 469 Mich 247, 258-259 (2003). We remand this case to the Wayne Circuit Court to either issue an order further articulating its reasons for guidelines departure, or to resentence the defendant. We do not retain jurisdiction.

PEOPLE v IBANEZ, No. 158082; Court of Appeals No. 342187. By order of October 30, 2018, the application for leave to appeal the March 28, 2018 order of the Court of Appeals was held in abeyance pending the decision in *People v Ames* (Docket No. 156077). On order of the Court, leave to appeal having been denied in *Ames* on June 26, 2019, 504 Mich 899 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the March 28, 2018 and May 29, 2018 orders of the Court of Appeals, and we remand this case to that court for consideration as on reconsideration granted. The Court of Appeals erred in remanding this case to the Bay Circuit Court to explain the reasons for imposing a departure sentence. The defendant's sentence of 114 to 180 months for unlawful imprisonment was not a departure from the advisory guidelines range of 58 to 114 months. We do not retain jurisdiction.

PEOPLE v PAGE, No. 158549; Court of Appeals No. 344730. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this

case to the Cheboygan Circuit Court to determine if the inclusion of a $60 DNA assessment fee in the defendant's most recent judgment of sentence was a clerical error. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

PEOPLE v LEACH, No. 159711; Court of Appeals No. 348608. By order of July 16, 2019, the prosecuting attorney was directed to answer the application for leave to appeal the May 30, 2019 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. We further order that the stay entered by this Court on July 16, 2019 remains in effect until completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear.

Leave to Appeal Denied September 30, 2019:

PEOPLE v KUZMA, No. 154158; Court of Appeals No. 332838.

PEOPLE v ANTONIO GREEN, No. 154723; Court of Appeals No. 327261.

PEOPLE v JAMON HAMPTON, No. 155095; Court of Appeals No. 329114.

PEOPLE v JAKUBOWSKI, No. 155208; Court of Appeals No. 334155.

PEOPLE v GARDNER, No. 156356; Court of Appeals No. 338522.

PEOPLE v ROE, No. 156541; Court of Appeals No. 337410.

HENDERSON v KING, No. 157003; Court of Appeals No. 334105. CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

HENDERSON v KING, No. 157006; Court of Appeals No. 334105. CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v UNDERWOOD, No. 157154; Court of Appeals No. 339219.

PEOPLE v DAVID JOHNSON, No. 157257; Court of Appeals No. 334145.

PEOPLE v JESSIE, No. 157296; Court of Appeals No. 335255.

PEOPLE v HURSLEY, No. 157422; Court of Appeals No. 335638.

PEOPLE v DEREK ARMSTRONG, No. 157713; Court of Appeals No. 342807.

PEOPLE v RENTSCH, No. 157718; Court of Appeals No. 336371.

PEOPLE v MATTHEW CRUMLEY, No. 157733; Court of Appeals No. 337622.

PEOPLE v TOMPKINS, No. 157741; Court of Appeals No. 334944.

PEOPLE v BRENT PARKER, Nos. 157800, 157801, 157802, and 157803; Court of Appeals Nos. 342815, 342817, 342818, and 342819.

PEOPLE v DOVER, No. 157842; Court of Appeals No. 336239.

PEOPLE v CODY STEWART, No. 157915; Court of Appeals No. 342954.

PEOPLE v BEAMON, No. 158125; Court of Appeals No. 336229.

PEOPLE v DIDLAKE, No. 158138; Court of Appeals No. 343407.

PEOPLE v DEANTE MCCRAY, No. 158325; Court of Appeals No. 344049.

PEOPLE v KYEOLE MITCHELL, No. 158365; Court of Appeals No. 338227.

PEOPLE v GUZMAN, No. 158366; Court of Appeals No. 344127.

PEOPLE v ANSPAUGH, No. 158375; Court of Appeals No. 344153.

PEOPLE v BERGMANN, No. 158476; Court of Appeals No. 344274.

PEOPLE v WILCOX, No. 158558; Court of Appeals No. 344721.

PEOPLE v KAITLYNN STEVENS, No. 158690; Court of Appeals No. 345540.

PEOPLE v BODA, No. 158715; Court of Appeals No. 345121.

PEOPLE v LARSON, No. 158773; Court of Appeals No. 345300.

PEOPLE v MAYES, No. 158790; Court of Appeals No. 344471.

PEOPLE v CARRICK, No. 158855; Court of Appeals No. 336755.

PEOPLE v JUANITO WEBB, No. 158878; Court of Appeals No. 345629.

PEOPLE v GAMBLE, No. 158892; Court of Appeals No. 344070.

PEOPLE v CARDONA-SANCHEZ, No. 158898; Court of Appeals No. 339804.

PEOPLE v KOONCE, No. 158905; Court of Appeals No. 344454.

PEOPLE v EAGER, No. 158950; Court of Appeals No. 345878.

PEOPLE v PATRICK, No. 158954; Court of Appeals No. 338989.

PEOPLE v CHYDON THOMAS, No. 158958; Court of Appeals No. 346054.

PEOPLE v SANTOS, No. 158963; Court of Appeals No. 346372.

PEOPLE v ANTONIO EDWARDS, No. 158976; Court of Appeals No. 346131.

PEOPLE v NELMS, No. 158979; Court of Appeals No. 339789.

PEOPLE v CHELSEA JOHNSON, No. 158980; Court of Appeals No. 345976.

PEOPLE v WISE, No. 159025; Court of Appeals No. 345317.

PEOPLE v GOOD, No. 159026; Court of Appeals No. 346555.

PEOPLE v COLBERT-BRAND, No. 159027; Court of Appeals No. 338483.

PEOPLE v PERCY TAYLOR, No. 159118; Court of Appeals No. 338601.

PEOPLE v MURRAY, No. 159178; Court of Appeals No. 340024.

PEOPLE v EDWARDIAN DAVIDSON, No. 159187; Court of Appeals No. 339550.

PEOPLE v WHATELEY, No. 159189; Court of Appeals No. 339255.

PEOPLE v SHERMAN MCGEE, No. 159218; Court of Appeals No. 345740.

ZIVKU v JAMES, No. 159226; Court of Appeals No. 341106.

PEOPLE v MERIWETHER, No. 159257; Court of Appeals No. 346303.

PEOPLE v CHRISTOPHER WHITE, No. 159286; Court of Appeals No. 345625.

PITSCH v PITSCH HOLDING COMPANY, INC, No. 159305; Court of Appeals No. 340494.

BAILEY & BIDDLE LLC v CITY OF ST JOSEPH, No. 159308; Court of Appeals No. 340989.

PEOPLE v GREGORY TUCKER, No. 159314; Court of Appeals No. 340425.

PEOPLE v GLINISHA BROWN, No. 159360; Court of Appeals No. 347031.

PEOPLE v STARKS, No. 159391; Court of Appeals No. 347053.

PEOPLE v PIKES, No. 159461; Court of Appeals No. 342525.

HOLY TRINITY ROMANIAN ORTHODOX MONASTERY v ROMANIAN ORTHODOX EPISCOPATE OF AMERICA and ROMANIAN ORTHODOX EPISCOPATE OF AMERICA v HOLY ASCENSION ORTHODOX CHRISTIAN MONASTERY, Nos. 159494 and 159495; Court of Appeals Nos. 342844 and 342846.

PEOPLE v MARSMAN, No. 159502; Court of Appeals No. 347334.

PEOPLE v KLINE, No. 159506; Court of Appeals No. 347318.

ABRAHAM v INCORP SERVICES, INC, No. 159535; Court of Appeals No. 342296.

PEOPLE v HU, No. 159537; Court of Appeals No. 340780.

PEOPLE v HERRERA, No. 159554; Court of Appeals No. 343850.

PEOPLE v MADDOX, No. 159555; Court of Appeals No. 346486.

PEOPLE v CARL WARDELL, No. 159560; Court of Appeals No. 343561.

PEOPLE v RICHARDSON, No. 159562; Court of Appeals No. 347725.

PEOPLE v APPLEGATE, No. 159564; Court of Appeals No. 347513

COOK v FARM BUREAU LIFE INSURANCE COMPANY OF MICHIGAN, No. 159580; Court of Appeals No. 341330.

PEOPLE v DEMARGIO GREER, Nos. 159597 and 159598; Court of Appeals Nos. 340335 and 340336.

PEOPLE v LATIMER, No. 159603; Court of Appeals No. 336692.

PEOPLE v MANSOUR, No. 159607; Court of Appeals No. 347474.

PEOPLE v DARRYL STEWART, No. 159614; Court of Appeals No. 342257.

COOPER v TRINITY HEALTH-MICHIGAN, No. 159616; Court of Appeals No. 337702.

PEOPLE v WOODBURN, No. 159618; Court of Appeals No. 346139.

PEOPLE v COOKE, No. 159630; Court of Appeals No. 348073.

PEOPLE v RAY, No. 159634; Court of Appeals No. 341730.

FLYNN v FLYNN, No. 159635; Court of Appeals No. 342553.

PEOPLE v HOOVER, No. 159638; Court of Appeals No. 348143.

PEOPLE v TALBERT, No. 159650; Court of Appeals No. 336843.

PEOPLE v DOEST, No. 159653; Court of Appeals No. 347832.

PEOPLE v TONY FERREE, No. 159655; Court of Appeals No. 340912.

JOHNSON v MICHIGAN DEPARTMENT OF CORRECTIONS, No. 159663; Court of Appeals No. 341436.

PEOPLE v SWILLING, No. 159681; Court of Appeals No. 347888.

PEOPLE v ATTARD, No. 159686; Court of Appeals No. 342177.

PEOPLE v BROWN-JOHNSON, No. 159771; Court of Appeals No. 341312.

PEOPLE v DOUBLE, No. 159772; Court of Appeals No. 348166.

PEOPLE v ROGERS, No. 159786; Court of Appeals No. 342006.

ROLFE v BAKER COLLEGE, No. 159787; Court of Appeals No. 340158.

PEOPLE v BEARD, No. 159797; reported below: 327 Mich App 702.

PEOPLE v VALDEZ, No. 159824; Court of Appeals No. 348019.

PEOPLE v KRZEMINSKI, No. 159829; Court of Appeals No. 344671.

PEOPLE v LINDSEY, No. 159831; Court of Appeals No. 343423.

PEOPLE v SEAMON, No. 159840; Court of Appeals No. 344069;

PEOPLE v BOTTOMLEY, No. 159852; Court of Appeals No. 348252.

PEOPLE v SWEET, No. 159853; Court of Appeals No. 341338.

ROSEMAN v WEIGER, No. 159903; Court of Appeals No. 344677.

PEOPLE v GRAVES, No. 159919; Court of Appeals No. 347913.

Superintending Control Denied September 30, 2019:

GREER v ATTORNEY GRIEVANCE COMMISSION, No. 159704.

LYNCH v STATE OF MICHIGAN, No. 160121.

Reconsideration Denied September 30, 2019:

PEOPLE v WILLIE ANDERSON, No. 156906; Court of Appeals No. 331466. Leave to appeal denied at 504 Mich 852.

SCHUSTER v RIVER OAKS GARDEN APARTMENTS, LLC, No. 157328; Court of Appeals No. 335246. Leave to appeal denied at 504 Mich 880.

BRASPENICK v JOHNSON LAW PLC, No. 158003; Court of Appeals No. 338556. Leave to appeal denied at 504 Mich 894.

PEOPLE v GERMIRA CARTER, No. 158386; Court of Appeals No. 343116. Leave to appeal denied at 504 Mich 900.

PEOPLE v NAYMON STEWART, No. 158666; Court of Appeals No. 344724. Leave to appeal denied at 504 Mich 900.

PEOPLE v TONY VANLUVEN, No. 158850; Court of Appeals No. 344206. Leave to appeal denied at 504 Mich 901.

CITY OF ROSEVILLE v MUSTA, No. 158977; Court of Appeals No. 338535. Leave to appeal denied at 504 Mich 901.

HAZEN v PHILLIS, No. 159225; Court of Appeals No. 345880. Leave to appeal denied at 503 Mich 1041.

PEOPLE v CHRISTIAN HILLMAN, No. 159283; Court of Appeals No. 339917. Leave to appeal denied at 504 Mich 903.

AHMED v MOSLIMANI, No. 159454; Court of Appeals No. 346314. Leave to appeal denied at 504 Mich 904.

Leave to Appeal Granted October 3, 2019:

PEOPLE v HAYNIE, No. 159619; Court of Appeals No. 340377. On order of the Court, the application for leave to appeal the April 16, 2019 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether assault and battery is a necessarily included offense of assault with intent to commit murder; and if so (2) whether a rational view of the evidence in this case could support a conviction for assault and battery. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 3, 2019:

PEOPLE v BARSKI, No. 158228; Court of Appeals No. 341942.

PINNACLE GREENBRIAR, LLC v DEPARTMENT OF TREASURY, No. 158754; Court of Appeals No. 340646.

TREES v PFIZER, INC, and BEARUP v PFIZER, INC, Nos. 159054 and 159055; Court of Appeals Nos. 338297 and 340191.

CENTERPOINT OWNER LLC v CITY OF GRAND RAPIDS, No. 159220; Court of Appeals No. 340710.

BAKER v MODERN WASTE SYSTEMS, INC, No. 159269; Court of Appeals No. 338606.

CAVANAGH, J., did not participate because of her prior representation of a party.

Summary Disposition October 4, 2019:

PEOPLE v HICKEY, No. 158392; Court of Appeals No. 343891. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), to determine whether the defendant was: (1) denied the effective assistance of trial counsel due to trial counsel's alleged failure to call the alibi witnesses now identified by the defendant, and (2) denied the effective assistance of appellate counsel on direct appeal due to that attorney's failure to raise the alleged ineffective assistance of trial counsel. We do not retain jurisdiction.

Leave to Appeal Granted October 4, 2019:

PEOPLE v KEITH WOOD, No. 159063; reported below: 326 Mich App 561. The American Civil Liberties Union of Michigan, Fully Informed Jury Association, and the Cato Institute are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v BEAN, No. 159384; Court of Appeals No. 342953. The parties shall address whether second-degree child abuse, MCL 750.136b(3)(b), is an adequate predicate "other felony" to sustain a charge of CSC-I, MCL 750.520b(1)(c), when the alleged act of child abuse is a sexual penetration that is the same sexual penetration that forms the basis of

the CSC-I charge. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 4, 2019:

JEROME v CRUM, No. 159093; Court of Appeals No. 335328. The appellant shall file a supplemental brief within 42 days of the date of this order addressing whether the circuit court erroneously granted summary disposition to the defendants on the ground of collateral estoppel. In addition to the briefs, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellees shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellees shall also electronically file an appendix, or in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellees' brief. The parties should not submit mere restatements of their application papers.

Leave to Appeal Denied October 4, 2019:

PEOPLE v POOLE, No. 159415; Court of Appeals No. 346169.

PEOPLE v MYSLENSKI, No. 159894; Court of Appeals No. 347187.

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal where this defendant seeks interlocutory review of the trial court's denial of his motion to suppress results of a blood test because "[t]o the extent that the passage of time reduces the probative value of the test, the diminution goes to weight, not admissibility, and is for the parties to argue before the finder of fact." *People v Wager*, 460 Mich 118, 126 (1999). However, here, where the passage of time appears to have been more than four hours, for the results to be more probative than prejudicial under MRE 403 the results may need to be accompanied by some explanation of how to infer blood alcohol level at the time of the accident. See *id*. at 124-125

Injunction Entered October 9, 2019:

In re CHARLES W MALETTE, No. 160272. On order of the Court, the petition for injunction pursuant to MCR 9.108(E)(4) is considered, and it is granted. We order that Charles W. Malette (P68928) is enjoined from

practicing law in the state of Michigan until the felony charges pending against him have concluded. If the respondent is acquitted of all felony charges, this injunction shall automatically dissolve.

CAVANAGH, J., did not participate due to her prior service as a member of the Attorney Grievance Commission.

Leave to Appeal Denied October 11, 2019:

PEOPLE v DOWDY, No. 158098; Court of Appeals No. 343551.

CAVANAGH, J. (*concurring*). I concur in the denial of leave to appeal in this case, but write separately to highlight particular circumstances I believe should be considered in future Parole Board decisions.

In 1987 defendant was sentenced for two second-degree murder convictions to terms of 30 to 45 years' imprisonment, to be served concurrently to each other and consecutively to 2-year sentences for two felony-firearm convictions. At that time, conventional thinking was that parole would be achieved earlier from a parolable life sentence than from the effective 32-year minimum term defendant had received. Defendant's attorney filed a motion for resentencing seeking a parolable life sentence. Indeed, defendant had a sentencing agreement to that effect in one of his cases. The trial court granted the motion, converting defendant's sentence to parolable life.

However, the Parole Board's practices changed before it considered defendant's case. See Yantus, *Sentence Creep: Increasing Penalties in Michigan and the Need for Sentencing Reform*, 47 U Mich J L Reform 645, 690 (Spring 2014) (noting that, "[a]lthough many sentencing judges imposed a life sentence before 1992 with the assumption that the inmate would be eligible for parole, and presumptively released on parole after twelve to twenty years, [after 1992] this was no longer the state's practice"). Thirty-two years later, after his original 32-year minimum sentence would have ended, defendant remains in prison. The Parole Board has many factors to weigh in each of its decisions, to be sure. But when the Parole Board next considers this case, it might also consider that the trial court may have intended this defendant to have been paroled already.

In re HM MCCLINTON, MINOR, No. 159987; Court of Appeals No. 346848.

Summary Disposition October 16, 2019:

MEIER v AWAAD, No. 160334; Court of Appeals No. 350700. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Summary Disposition October 17, 2019:

PEOPLE v BLODGETT, No. 158849; Court of Appeals No. 345616. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for reconsideration of the scoring of Offense Variable (OV) 10. The trial court shall determine if OV 10 was properly assigned at 15 points. If not, given the prosecution's concession that OV 13 was incorrectly scored, any reduction in the score of OV 10 would entitle the defendant to resentencing. *People v Francisco*, 474 Mich 82, 88-89 (2006). If the trial court determines OV 10 is correctly scored, the trial court shall articulate on the record the factual findings supporting its legal conclusions to facilitate appellate review. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. We do not retain jurisdiction.

PEOPLE v WINGARD, No. 158941; Court of Appeals No. 344472. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The defendant was entitled to an appeal of right because he sought to appeal an order entered by the trial court following a remand from an appellate court in a prior appeal of right. MCR 7.202(6)(b)(iv); MCR 7.203(A)(1). We do not retain jurisdiction.

PEOPLE v BRYAN, No. 159223; Court of Appeals No. 342998. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals in part, vacate the judgment of the Court of Appeals in part, and remand this case to the Oakland Circuit Court for further proceedings not inconsistent with this order. The Court of Appeals erred in holding that the defendant failed to demonstrate the existence of questions of fact regarding the second and third elements of a § 8 affirmative defense, MCL 333.26428, under the Michigan Medical Marihuana Act (MMMA), MCL 333.26421 *et seq.*, on the basis of the officer's testimony of two text messages suggesting that the defendant was selling marijuana and on the basis of the defendant's testimony that he had on occasion shared marijuana strains with a neighbor. With respect to the second element, we believe it was premature for the Court of Appeals to conclude that factual disputes do not exist concerning whether the amount of marijuana the defendant possessed was reasonably necessary to ensure uninterrupted availability for treating his serious or debilitating medical condition. MCL 333.26428(a)(2). The trial court made no findings regarding that element, and we therefore remand to the circuit court for further proceedings on that issue. With respect to the third element, the prosecution does not dispute that the defendant grew and smoked marijuana to treat his debilitating medical condition, among other reasons. This was sufficient prima facie evidence to create a question of fact as to the third element. See *People v Kolanek*, 491 Mich 382, 416 (2012). The stay of trial court proceedings, ordered by this Court on May 30, 2018, is dissolved.

PEOPLE v TRAPP, No. 159476; Court of Appeals No. 345293. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted to address: (1) whether the constructive-entry doctrine, *United States v Morgan*, 743 F2d 1158 (CA 6, 1984), should be recognized in Michigan and, if so, whether the facts of this case fall within that doctrine; and (2) whether the dispatch report that the police received about an intoxicated man waving a gun around outside a trailer, and the video evidence showing that the police received information when they arrived at the scene about children being present, provided the police with exigent circumstances justifying their action of telling one occupant of the trailer to tell the other occupants to come out. We do not retain jurisdiction.

VIVIANO, J., did not participate due to a familial relationship with the presiding circuit court judge in this case.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 17, 2019:

PEOPLE v MCFARLANE, No. 158259; reported below: 325 Mich App 507. The appellant shall file a supplemental brief within 42 days of the date of this order addressing: (1) whether the prosecution's medical expert invaded the province of the jury by using phrases like "abusive head trauma" and "definite pediatric physical abuse" to label her diagnosis; and (2) if so, whether the defendant has satisfied the plain error standard set forth in *People v Carines*, 460 Mich 750, 763 (1999). In addition to the brief, the appellant shall electronically file an appendix conforming to MCR 7.312(D)(2). In the brief, citations to the record must provide the appendix page numbers as required by MCR 7.312(B)(1). The appellee shall file a supplemental brief within 21 days of being served with the appellant's brief. The appellee shall also electronically file an appendix or, in the alternative, stipulate to the use of the appendix filed by the appellant. A reply, if any, must be filed by the appellant within 14 days of being served with the appellee's brief. The parties should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan, the Innocence Network, and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 17, 2019:

WIMMER v MONTANO, Nos. 159175 and 159176; Court of Appeals Nos. 340339 and 340830.

WIMMER v MONTANO, Nos. 159211, 159212, 159213, and 159214; Court of Appeals Nos. 340339, 340409, 340830, and 340996.

WIMMER v MONTANO, Nos. 159263, 159264, 159265, and 159266; Court of Appeals Nos. 340339, 340409, 340830, and 340996.

GERGER v HART, No. 159552; Court of Appeals No. 345654.

SCHLUSSEL v CITY OF ANN ARBOR, No. 159553; Court of Appeals No. 341202.

PEOPLE v JOSEPH JUSTICE, No. 159604; Court of Appeals No. 347660.

PEOPLE v DOMINOWSKI, No. 159606; Court of Appeals No. 340280.

Summary Disposition October 18, 2019:

PISCHEA v ASSESSMENT AND RELATIONSHIP CENTER, LLC, No. 159405; Court of Appeals No. 342330. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate that part of the judgment of the Court of Appeals affirming the dismissal of the plaintiff's claims against defendant Assessment and Relationship Center, LLC, for breach of contract and unjust enrichment as a discovery sanction. We further vacate the July 26, 2017 Ingham Circuit Court order providing the same, and we remand this case to that court for reconsideration of whether dismissal is an appropriate sanction under the governing legal standards, including consideration of the appropriateness of lesser sanctions and other factors. See *Duray Dev LLC v Perrin*, 288 Mich App 143, 164-166 (2010). We do not retain jurisdiction.

Leave to Appeal Granted October 18, 2019:

SKANSKA USA BUILDING, INC v MAP MECHANICAL CONTRACTORS, INC, Nos. 159510 and 159511; Court of Appeals Nos. 340871 and 341589. The parties shall address whether: (1) the definition of "occurrence" in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369 (1990), remains valid under the terms of the commercial general-liability policy at issue here; and (2) the plaintiff has shown a genuine issue of material fact as to the existence of an "occurrence" under those terms. The time allowed for oral argument shall be 20 minutes for each side. MCR 7.314(B)(1).

Associated General Contractors of America, Associated General Contractors of Michigan, Michigan Infrastructure and Transportation Association, Construction Association of Michigan, Turner Construction Company, and Gilbane Building Company are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied October 18, 2019:

ILIADES v DIEFFENBACHER NORTH AMERICA, INC, No. 158724; Court of Appeals No. 324726.

ZAHRA, J. (*dissenting*). I respectfully dissent. Plaintiff, Steven Iliades,[1] worked at Flexible Products Company, which creates injection molded plastic parts using large press machines manufactured by defendant, Dieffenbacher North America, Inc. Presses were equipped with presence-sensing devices called light curtains, which were meant to automatically halt operation of a press when a beam of light passing in front of the opening of the press was interrupted (for example, by a person passing through the light). Each press also had two modes of operation: automatic and manual. In automatic mode, a press would continuously cycle without operator input. If a light curtain affixed to a press in automatic mode was interrupted, the press would continue cycling on its own once the interrupting presence was removed. Contrastingly, in manual mode, an operator would control cycling of the press. If a light curtain affixed to a press in manual mode was interrupted, the press would not resume cycling until reset by an operator.

Flexible Products' presses did not always eject rubber parts, resulting in parts remaining in the press that needed to be removed manually. Flexible Products' employees were instructed to never remove wayward parts that remained in the press without first ensuring that the machine was operating in manual mode. As an extra safety precaution, employees were also instructed to use "parts grabbers" when performing this task.

Contrary to his training, plaintiff did not use the parts grabber on the day of his injury. In further contravention of his training, plaintiff left the press in automatic mode and climbed partially into Flexible Products' Press Number 25 to remove parts. When plaintiff's positioning placed him entirely behind the attached light curtain, the press, unsurprisingly, resumed cycling and plaintiff sustained serious injuries.

Plaintiff filed suit alleging negligence, gross negligence, and breach of warranty. Under MCL 600.2947(2), however, "[a] manufacturer or seller is not liable in a product liability action for harm caused by misuse of a product unless the misuse was reasonably foreseeable. Whether there was misuse of a product and whether misuse was reasonably foreseeable are legal issues to be resolved by the court." Following discovery, defendant moved for summary disposition under MCR 2.116(C)(10), claiming that plaintiff's climbing into the press while it was in automatic mode constituted misuse that was not reasonably foreseeable. The trial court agreed with defendant and granted summary disposition.

In 2016, the Court of Appeals issued a split, unpublished per curiam opinion reversing and remanding for further proceedings.[2] The panel majority declined to expressly determine whether plaintiff's actions

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[1] Steven Iliades's wife is also a party in this case, seeking derivative relief for loss of consortium. That aside, for purposes of this dissent, use of the singular word "plaintiff" refers solely to Steven.

[2] *Iliades v Dieffenbacher North America Inc*, unpublished per curiam opinion of the Court of Appeals, issued July 19, 2016 (Docket No. 324726) (*Iliades I*), p 5, rev'd 501 Mich 326 (2018).

constituted misuse, instead holding that summary disposition was inappropriate because plaintiff's conduct was "reasonably foreseeable" under the criminal-law standard for distinguishing between ordinary and gross negligence.[3]

Defendant applied for leave to appeal in this Court, which reversed the judgment of the Court of Appeals and remanded the case to that court for further review.[4] Specifically, this Court held that the panel majority erred by failing to decide whether and how plaintiff misused the press and by failing to apply the common-law meaning of the phrase "reasonably foreseeable."[5] Outlining the appropriate standard for assessing reasonable foreseeability in this context, the Court stated:

> Under Michigan common law, foreseeability depends on whether a reasonable person "could anticipate that a given event might occur under certain conditions." When dealing with the foreseeability of a product's misuse in particular, the crucial inquiry is whether, at the time the product was manufactured, the manufacturer was aware, or should have been aware, of that misuse. Whether a manufacturer should have known of a particular misuse may depend on whether that misuse was a common practice, or if foreseeability was inherent in the product.[6]

On remand, a divided panel of the Court of Appeals again reversed the trial court's grant of summary disposition and remanded for further proceedings in an unpublished per curiam opinion.[7] The panel majority, "constrained by the plain and unambiguous language in [MCL

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[3] *Id*. at 3-5. Judge JANSEN, in her dissent, opined that plaintiff's act of partially climbing into a press operating in automatic mode despite clear instructions not to do so constituted misuse. *Id*. at 1-2 (JANSEN, J., dissenting). Turning to the issue of reasonable foreseeability, Judge JANSEN agreed with the majority that "*some* manner of accidental or nonaccidental reaching into a press while the press is in automatic mode was reasonably foreseeable, which is why the light curtain was installed." *Id*. at 2. Nevertheless, given that (1) there was no indication that an accident of this kind had previously occurred and (2) there was no evidence that partially climbing into a press operating in automatic mode was common practice, Judge JANSEN concluded that plaintiff's conduct in this case was not reasonably foreseeable. *Id*. at 2-4.

[4] *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 341 (2018) (*Iliades II*).

[5] *Id*. at 341.

[6] *Id*. at 338-339 (citations omitted).

[7] *Iliades v Dieffenbacher North America Inc (On Remand)*, unpublished per curiam opinion of the Court of Appeals, issued October 16, 2018 (Docket No. 324726) (*Iliades III*), p 4.

600.2945(e)],"[8] held that plaintiff's failure to comply with operating instructions constituted misuse.[9] Even so, the majority determined—relying on its own notions of "common sense"—that plaintiff's conduct was reasonably foreseeable.[10]

There is no question that plaintiff's conduct constituted "misuse" as defined by MCL 600.2954(e). But I cannot agree with the panel majority that plaintiff's act of ignoring his training and partially climbing into Press Number 25 while it was set to automatic mode to retrieve parts was "reasonably foreseeable" as contemplated under MCL 600.2947(2) and the common law. As this Court previously stated in these very proceedings, "[w]hether a manufacturer should have known of a particular misuse may depend on whether that misuse was a common practice, or if foreseeability was inherent in the product."[11]

With regard to common practice: Judge JANSEN, the dissenting jurist in the Court of Appeals, correctly noted that the record below did not demonstrate that defendant was ever made aware of accidents like the one involving plaintiff before the initiation of this case.[12] The record disclosed that James Preston, an employee who had operated Press Number 25 in the past, would occasionally disregard his training and bypass the light curtain to retrieve parts from the press. While doing so, the press started its automatic cycle, apparently because Preston was "so skinny" that he was able to stand *entirely* behind the light curtain such that no part of his body interrupted the beam. Regardless, Preston did not bring this incident to anyone's (let alone defendant's) attention. Thus, even when viewing this evidence in the light most favorable to plaintiff, no reasonable inference can be drawn that defendant had any knowledge that Flexible Products employees were partially climbing into presses while they were in automatic mode to retrieve rubber parts.

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[8] Under MCL 600.2945(e): "Misuse" means use of a product in a materially different manner than the product's intended use. Misuse includes uses inconsistent with the specifications and standards applicable to the product, uses contrary to a warning or instruction provided by the manufacturer, seller, or another person possessing knowledge or training regarding the use or maintenance of the product, and uses other than those for which the product would be considered suitable by a reasonably prudent person in the same or similar circumstances.

[9] *Iliades III*, unpub op at 2, 4.

[10] *Id*. at 2-4. Judge JANSEN dissented for the same reasons expressed in her earlier dissenting opinion. *Id*. at 1 (JANSEN, J., dissenting).

[11] *Iliades II*, 501 Mich at 339. See also *Portelli v I R Constr Prods Co, Inc*, 218 Mich App 591, 599 (1996) ("Foreseeability of misuse may be inherent in the product or may be based on evidence that the manufacturer had knowledge of a particular type of misuse.").

[12] *Iliades I*, unpub op at 2-4 (JANSEN, J., dissenting).

The evidence presented *did* establish that Flexible Products employees often relied on light curtains to temporarily stop presses in order to retrieve finished parts. But as Judge JANSEN pointed out, plaintiff did not put forth any evidence that partially crawling inside a press from the front while it was in automatic mode to retrieve parts—such that an employee would bypass the light curtain altogether—was a routine or common practice at Flexible Products for anyone but himself.[13]

Turning to reasonable foreseeability of misuse inherent to the presses: Defendant went to great lengths to educate plaintiff as to the safe and proper use of the product, but plaintiff ignored *all* of his training related to injury prevention (i.e., he did not ensure that the press was set to manual mode, climbed partially inside the press, and failed to properly utilize a "parts grabber"). While perhaps a failure to observe one safety feature was foreseeable, the complete disregard of *all* safety features and relevant training in this case was not. To hold otherwise would, in situations analogous to the instant matter, thrust an almost insurmountable disadvantage upon manufacturers in assessing reasonable foreseeability. The incentive to maintain multiple layers of protective safety measures is substantially lessened if such efforts have little or no impact on a manufacturer's culpability in a products-liability case.[14]

For these reasons, I believe that plaintiff has failed to raise a genuine issue of material fact that the conduct that resulted in his injuries was "reasonably foreseeable" as contemplated by MCL 600.2947(2). I would therefore peremptorily reverse the judgment of the Court of Appeals.

MARKMAN, J., joins the statement of ZAHRA, J.

BUTLER v REINALT-THOMAS CORPORATION, No. 158795; Court of Appeals No. 337851.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal. I write separately only to note that while I agree with the Court of Appeals that a reversal here is not warranted, I also agree with that court that a number of the comments made by plaintiff's counsel during closing argument were inappropriate, e.g., comments depicting defendant as a "greedy corporation attempting to cheat the helpless plaintiff." *Patel v Reinalt-Thomas Corp*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2018 (Docket No. 337851), p 12. While, in my judgment, these comments do not under the circumstances of this case warrant reversal, it should not go without saying that they were inappropriate. Not only should a corporate defendant not

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[13] Particularly troubling is Iliades's deposition testimony that he had previously ventured even further into presses to retrieve parts than he had on the day of his injury.

[14] The panel majority's decision in this case is made worse by the text of MCL 600.2947(2), which places the duty to resolve the legal issue of reasonable foreseeability on the court. Because the panel majority has held that plaintiff's conduct was reasonably foreseeable, it is up to this Court to take corrective action. Under MCL 600.2947(2), a finder of fact will be unable to do so of its own accord at a later time.

have to go through a rhetorical gauntlet of the sort encountered in this case, but this state should not allow its justice system to be employed in such an exploitive manner.

PEOPLE v SHEENA, No. 159323; Court of Appeals No. 339953.

BERNSTEIN, J. (*dissenting*). I respectfully dissent. I would have granted defendant's application for leave to appeal to determine whether trial counsel was ineffective for failing to pursue an insanity defense. Two doctors performed psychological evaluations of defendant and concluded that defendant was not legally insane. But the doctors disagreed about whether the defendant had a "mental illness," and even the doctor who concluded defendant did not was equivocal. Further, both the doctors recognized that defendant had significant mental health issues and sometimes could not understand the consequences of his actions.

Under Michigan's statute governing the insanity defense, a defendant is considered legally insane if, "as a result of mental illness," he "lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his . . . conduct or to conform his . . . conduct to the requirements of the law." MCL 768.21a(1). In my view, the doctors' conclusions regarding legal insanity were contrary to the plain language of MCL 768.21a(1), and defendant presents a reasonable argument that despite these conclusions, trial counsel should have further investigated whether an insanity defense should have been presented.

MCCORMACK, C.J., and CAVANAGH, J., join the statement of BERNSTEIN, J.

In re KA DAVIDSON, MINOR, No. 160189; Court of Appeals No. 346153.

Summary Disposition October 25, 2019:

W A FOOTE MEMORIAL HOSPITAL v MICHIGAN ASSIGNED CLAIMS PLAN, No. 156622; reported below: 321 Mich App 159. On October 2, 2019, the Court heard oral argument on the application for leave to appeal the August 31, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we affirm the holding of the Court of Appeals that this Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), applies retroactively. Nonetheless, we vacate that part of the judgment of the Court of Appeals stating that this Court's decision in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), "effectively repudiated" the application of the "threshold question" and "three-factor test" set forth in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), in the context of judicial decisions of statutory interpretation. In concluding that the Court was not setting forth a new law, the Court in *Spectrum Health* engaged in an analysis that is consistent with the analysis required by *Pohutski*'s threshold question. *Spectrum Health* did not purport to repudiate *Pohutski*'s framework, and the Court of Appeals erred by concluding to the contrary. Applying *Pohutski* to the instant case, because this Court's decision in *Covenant* did not clearly establish a new principle of law,

Covenant does not satisfy *Pohutski*'s threshold question, and the *Covenant* decision therefore applies retroactively.

PEOPLE v CARL WILSON, No. 159179; Court of Appeals No. 347245. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, we vacate the August 7, 2018 order of the Saginaw Circuit Court, and we remand this case to the circuit court. The defendant's 2004 motion to correct his presentence report expressly disclaimed any request for resentencing and was improperly re-characterized as a motion for relief from judgment. His subsequent filings were not filed as motions for relief from judgment either, and were properly returned to him for that reason. The motion for relief from judgment in this case is the defendant's first such motion, so he is not subject to the successive-motion bar of MCR 6.502(G). On remand, pursuant to MCR 6.502(D), the court shall either return the motion to the defendant or adjudicate it as his first motion for relief from judgment. We do not retain jurisdiction.

MARKMAN, J. (*dissenting*). I respectfully dissent because defendant is simply not entitled, either legally or equitably, to have his 2018 motion for relief from judgment adjudicated as an initial motion, as the majority asserts. In 2005, the trial court denied a motion from defendant to correct his presentence investigation report and treated the motion as an initial motion for relief from judgment despite the motion itself stating that the court should not review it as such. Nevertheless, defendant did not appeal the 2005 order and he waited until 2016 to file his next substantive motion, this time fashioned as a motion for dismissal. The trial court returned that motion for a failure to file in accordance with MCR 6.500 *et seq*. and informed defendant that he could file a proper motion for relief from judgment. Yet, instead of filing such a motion, defendant again filed an improper motion, one to correct his sentence, which the trial court also denied. In 2018, defendant finally filed his motion for relief from judgment and the trial court correctly reviewed it as a successive motion under MCR 6.502(G).

Because defendant failed to appeal the 2005 order and sat on his hands for 13 years before filing a proper motion for relief from judgment, I see no error at all in the decision to treat the latter as a successive motion. Defendant demonstrated as early as 2005 that he was cognizant of the rules underlying subchapter 6.500 by having explicitly instructed the trial court not to review his motion at that time to correct the presentence report as a motion for relief from judgment. A court's errors should be addressed when they manifest rather than many years afterwards, especially where there were no barriers to a timely appeal. And remedial or corrective actions by this Court should best be taken to avoid the inadvertent forfeiture or waiver of rights, not to encourage a defendant to file an improper motion as a "consequence-free" effort to secure judicial relief. Because defendant never challenged the 2005 order and sat on his rights for a generation, he is entitled to neither legal nor equitable relief. In particular, he is not entitled to a remand from this Court to have his motion reviewed as an initial motion for relief from judgment. By doing so, the Court diminishes its own rules.

PEOPLE v JACOB LABELLE, No. 159573; Court of Appeals No. 347421. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of the defendant's application under MCR 7.205 in light of the concern articulated in *People v Yost*, 468 Mich 122, 124 n 2 (2003). The motion to stay filed in this Court is denied without foreclosing the defendant's ability to seek a stay from the Court of Appeals. We do not retain jurisdiction.

MCCORMACK, C.J., did not participate due to her preexisting relationship with a party.

Leave to Appeal Denied October 25, 2019:

SHAH v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 157951; reported below: 324 Mich App 182. On October 2, 2019, the Court heard oral argument on the application for leave to appeal the May 8, 2018 judgment of the Court of Appeals. On order of the Court, the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court.

SCHAUB v SEYLER, No. 158834; Court of Appeals No. 340993.

VIVIANO, J. (*concurring*). I concur in the denial order because I believe the Court of Appeals reached the right result under *Robinson v Detroit*, 462 Mich 439, 457 (2000) and *Helfer v Ctr Line Pub Sch*, 477 Mich 931 (2006). I write separately, however, because, I question whether *Robinson* and *Helfer* correctly interpreted MCL 691.1405.

Plaintiff, Logan Schaub, was injured when he was hit by a motor vehicle while crossing the street to reach his school bus. On the date of the injury, plaintiff was a 14-year-old high school freshman who lived on a county road with a speed limit of 55 m.p.h. He was waiting for the bus at 6:45 a.m., while it was still dark outside. On a typical day, plaintiff did not cross the road to board the bus and, indeed, according to school district rules, plaintiff's road was classified as a "no-cross road." On the day in question, plaintiff's bus was driven by RyAnn Herman, an alternate driver who had never driven plaintiff's route before. When first driving by, Herman missed plaintiff's stop. Then, she turned the bus around and drove 120 feet past plaintiff's stop before pulling off to the opposite side of the road and activating the bus's right turn signal. The bus was partially on the gravel shoulder and partially on the traveled portion of the road. Although Herman turned on the bus's exterior flashing lights for a brief time, she never activated the bus's red lights or stop sign, which would have required traffic to stop. Plaintiff attempted to cross the street to reach the bus, but was hit by a motor vehicle that was passing the school bus from behind. After the accident, Herman said (somewhat inconsistently) that "I had no idea he was gonna cross. I thought that car was gonna go and then he was gonna cross."

Plaintiff filed suit against Herman, the school district, and the driver of the motor vehicle that hit him. The trial court denied the school

district's motion for summary disposition under MCL 691.1405. On appeal, the Court of Appeals reversed, applying *Robinson* to hold that "an injury does not 'result[] from' the negligent operation of a government-owned vehicle under MCL 691.1405 unless the government-owned vehicle makes direct physical contact with the plaintiff in some capacity." *Schaub v Seyler*, unpublished per curiam opinion of the Court of Appeals, issued November 15, 2018 (Docket No. 340993), p 7. Therefore, the school district was immune from suit under MCL 691.1405 because "plaintiff has never offered any evidence to suggest that the bus physically contacted him or [the motor] vehicle." *Id.*[1]

MCL 691.1405 provides, in pertinent part:

> Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is owner . . . .

Thus, for a governmental agency to be liable under the motor vehicle exception to governmental immunity, a plaintiff must prove:

(1) bodily injury or property damage

(2) resulting from

(3) the negligent operation by any governmental officer, agent or employee

(4) of a government-owned motor vehicle.

Only the causal element is at issue at this stage of the case.[2]

In *Robinson*, we interpreted MCL 691.1405 in the context of two consolidated cases involving plaintiffs who were passengers in vehicles involved in police chases. When police began pursuing them, the drivers fled, eventually crashing—one into a house and the other into a nongovernment vehicle. *Robinson*, 462 Mich at 448-449. Interpreting the causal element of MCL 691.1405, the Court concluded "that plain-

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[1] Plaintiff now appeals the Court of Appeals ruling discussed above, as well as the Court of Appeals grant of summary disposition on plaintiff's gross negligence claim against Herman and affirmance of the trial court's finding that plaintiff was more than 50% at fault for the accident in comparison with the driver who hit him. I agree with the denial of leave to appeal on these issues.

[2] Defendant's motion for summary disposition did not address the existence or extent of plaintiff's injuries, and there appears to be no dispute that the bus was owned by the school district. Regarding whether the bus driver was "operating" the bus, I agree with the Court of Appeals majority and our own precedent that "the loading of passengers 'is an action within the "operation" of a . . . bus.' " *Schaub*, unpub op at 7, quoting *Martin v Rapid Inter-Urban Transit Partnership*, 480 Mich 936, 936 (2007).

tiffs cannot satisfy the 'resulting from' language of the statute where the pursuing police vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object." *Robinson*, 462 Mich at 457. Thus, to satisfy the *Robinson* test, the pursuing police vehicle must have (1) hit the fleeing car, or (2) otherwise physically forced it (i) off the road or (ii) into another vehicle or object. The Court of Appeals has held that application of the *Robinson* test is not limited to cases involving police pursuit. See *Curtis v City of Flint*, 253 Mich App 555, 561 (2002) (applying the *Robinson* test to a case involving an emergency medical vehicle, and stating the *Robinson* test more generally as requiring "physical contact between the government-owned vehicle and that of the plaintiff, or [that] the government-owned vehicle physically forced the plaintiff's vehicle off the road or into another vehicle or object").

However, applying this standard in the context of pedestrian accidents has proven challenging. In *McClanahan v Clinton Community Sch Dist*, unpublished per curiam opinion of the Court of Appeals, issued Jan 17, 2006 (Docket No. 256021), the Court of Appeals concluded that the decedent's injuries did not "result from" the defendant's operation of the school bus where it was "undisputed that there was no physical contact between the decedent and the school bus, between the school bus and the cement truck that struck the decedent, or between the decedent and any item placed in motion by the school bus." *Id*. at 3. Although the panel cited *Robinson* and *Curtis*, it did not explain its decision to further limit liability only to cases involving physical contact. As noted, *Robinson* provides that the "resulting from" language is satisfied where the police vehicle hits the fleeing car or otherwise physically forces it off the road or into another vehicle or object. *Robinson*, 462 Mich at 457. Presumably, "physically force" means an action other than physical contact or else it would be subsumed by the first *Robinson* category, which requires that the government vehicle "hit" plaintiff's vehicle.[3]

In *Helfer v Ctr Line Pub Sch*, our Court signaled its approval of a narrower version of the *Robinson* test. In *Helfer*, the Court of Appeals affirmed the denial of the defendant's motion for summary disposition. The facts in that case are somewhat similar to those here—having instructed the plaintiff, a student, to leave the bus, the bus driver turned off the bus's flashing lights.[4] When the student attempted to cross the road to return home, a car attempting to pass the bus struck her. The Court of Appeals majority believed that summary disposition

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[3] The panel may have omitted addressing the "otherwise physically force" prong of the *Robinson* test because it does not appear to make sense to say that the motor vehicle exception applies when "the government-owned vehicle physically forced [the pedestrian-plaintiff] off the road or into another vehicle or object."

[4] *Helfer v Ctr Line Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2006 (Docket No. 265757). The caption of the majority opinion spells the name "Helfner," although the docket

was inappropriate, reasoning that the driver "*did* physically place an object in motion" by turning off the lights. *Helfer v Ctr Line Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued June 20, 2006 (Docket No. 265757), p 4. Therefore, "Defendant's operation of the school bus may be found to have directly caused the accident because it exercised control over the physical movement of another vehicle." *Id*.

However, then Chief Judge WHITBECK dissented, noting that "there was *no* direct physical contact between the bus and the vehicle that hit [the plaintiff], nor was there direct contact between [the plaintiff] and the bus." *Id*. (WHITBECK, C.J., dissenting) at 2. By looking only to "direct physical contact," the Court of Appeals dissent applied only the first part of *Robinson*'s test, but failed to consider whether the plaintiff could meet the second prong, i.e., whether the bus otherwise physically forced the plaintiff (i) off the road, or (ii) into another vehicle or object. Nevertheless, this Court impliedly endorsed the dissent's interpretation in an order reversing *Helfer* for the reasons stated in the dissent. *Helfer*, 477 Mich at 931.

Thus, a narrower version of the *Robinson* test—one limiting liability to cases involving physical contact—has been applied (and continues to be applied) in the context of pedestrian accidents.[5] While our Court has signaled its approval of this new test in its *Helfer* order, neither this Court nor the Court of Appeals has expressly adopted the test in a published opinion.

One reason courts have had difficulty in applying *Robinson*'s "resulting from" test to pedestrian accident cases may be that *Robinson*'s interpretation does not appear to track the plain language of MCL 691.1405. In its analysis, the *Robinson* Court first quoted three definitions of the word "result": "To occur or exist as a consequence of a particular cause[;] To end in a particular way[;] The consequence of a particular action, operation or course; outcome." *Robinson*, 462 Mich at 456, quoting *American Heritage Dictionary* (2d college ed), p 1054 (alterations in original). Although the first two definitions apply when "result" is used as an intransitive verb, and the third applies when it is used as a noun, we made no effort in *Robinson* to distinguish between these definitions or to determine which of them actually applied. Instead the Court took a different tack. Citing the holding in *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567 (1984), that statutory exceptions to government immunity are to be narrowly construed, *Robinson*, 462 Mich at 455, the Court concluded "that plaintiffs cannot satisfy the 'resulting from' language of the statute where the pursuing police

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listing indicates that "Helfer" is correct, as does the dissenting opinion and this Court's subsequent order. See *id*. (WHITBECK, C.J., dissenting); *Helfer*, 477 Mich 931.

[5] See also *Estate of Fisher v Southfield Pub Sch*, unpublished per curiam opinion of the Court of Appeals, issued January 12, 2019 (Docket No. 288106), p 3 ("[B]ecause the school bus was not physically involved in the collision that caused the decedent's injuries, the motor vehicle exception to governmental immunity is inapplicable.").

vehicle did not hit the fleeing car or otherwise physically force it off the road or into another vehicle or object," *id*. at 457.[6]

But this rule appears to be a non sequitur. The Court did not apply the definitions it cited or even refer to them in arriving at this new rule. Instead, the Court summarily announced a new test designed to achieve a "narrow" construction, employing a method of interpretation that has largely fallen out of favor. See, e.g., *Ronnisch Constr Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 553 n 18 (2016) (agreeing that a "provision requiring that a statute be liberally construed 'should be regarded as requiring a fair interpretation as opposed to a strict or crabbed one—which is what courts are supposed to provide anyway.' "), quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St Paul: Thomson/West, 2012), p 233 (quotation marks and citation omitted).[7] Indeed, the connection between *Robinson*'s test and the statutory language is not entirely clear. Why must the meaning of "resulting from" be limited to the three categories *Robinson* sets forth? In particular, why does *Robinson* rely so heavily on physical contact to satisfy the statutory causal requirement? Though *Robinson* provides that a plaintiff can satisfy the "resulting from" language when physically forced off the road, the other two categories—i.e., when the government vehicle "hit[s]" the plaintiff's vehicle or "otherwise physically force[s] it . . . into another vehicle or object"—both require physical contact. Perhaps this unexplained emphasis on physical contact is why later courts have narrowed *Robinson*'s test to require physical contact. While I find *Robinson*'s rule concerning because its connection to the statutory language is unclear, I find these later Court of Appeals interpretations and our order in *Helfer* particularly troubling, since the statute does not require physical contact.

I think that our Court should reexamine both *Robinson*'s and *Helfer*'s interpretations of MCL 691.1405 because I am not convinced that either

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[6] Although the Court stated that "*Ross v Consumers Power Co* . . . held that statutory exceptions to governmental immunity are to be narrowly construed," *Robinson*, 462 Mich at 455, *Ross* only describes the statutory exceptions as "narrowly drawn," *Ross*, 420 Mich at 618. However, we have held elsewhere that exceptions to governmental immunity must be narrowly construed. See *Kerbersky v Northern Mich Univ*, 458 Mich 525, 529 (1998); *Horace v City of Pontiac*, 456 Mich 744, 749 (1998); *Wade v Dep't of Corrections*, 439 Mich 158, 166 (1992).

[7] The authors make the point that, while the Legislature or private parties may "supply the definition of the words, and specify the implication of the words, that go into [the] determination of fair meaning," they may not remove the "duty of the courts . . . to give private and public texts their fair meaning." *Reading Law*, p 233. If drafters do not have this power, then judges—as interpreters of the text—surely lack the power to decree by fiat how broadly or narrowly a statute must be construed.

gives fair meaning to the text of the statute.[8] Giving the term "result" its contextually appropriate ordinary meaning,[9] bodily injury or property damage "result[s] from the negligent operation" of a government-owned motor vehicle if it "occur[s] . . . as a consequence of" the negligent operation of that vehicle. Thus, contrary to *Helfer*'s interpretation, neither the text of the statute nor the contextually appropriate definition of "result" requires physical contact.[10] And, contrary to *Robinson*'s

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[8] As the Court observed elsewhere in *Robinson*, "[I]t is to the words of the statute itself that a citizen first looks for guidance in directing his actions . . . . [I]f the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts." *Robinson*, 462 Mich at 467.

[9] See *In re Erwin*, 503 Mich 1, 33 (2018) (VIVIANO, J., dissenting) ("[W]hen a word has more than one definition, the context determines the sense in which the Legislature used the word.").

[10] See *Fiser v Ann Arbor*, 417 Mich 461, 479 (1983) (RYAN, J., concurring) ("Neither the statute which excepts the City of Ann Arbor, and consequently the individual defendant officers, from the protection of the immunity statute for motor vehicle-related negligence, nor the common law, requires that to establish liability it must be shown that the police cars made actual contact with the plaintiff's vehicle or were directly involved in the collision."), overruled by *Robinson*, 462 Mich at 445. Ironically, the *Robinson* Court declined to import a proximate cause analysis into the statute because the Legislature "did not utilize proximate cause language . . . ." *Robinson*, 462 Mich at 457 n 14. Leaving aside, for now, whether this conclusion was correct, I think two additional things are worth noting regarding *Helfer*'s physical contact requirement. First, this Court has not imposed a physical contact requirement when interpreting MCL 500.3105(1), a statute with similar language in the no-fault act. See, e.g., *Thornton v Allstate Ins Co*, 425 Mich 643, 659-660 (1986) (interpreting "injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle" in MCL 500.3105(1) as "provid[ing] coverage only where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or 'but for.' The involvement of the car in the injury should be 'directly related to its character as a motor vehicle.' ") (citation omitted). Second, and perhaps even more significantly, the Legislature has shown itself quite capable of explicitly requiring physical contact when it wishes to do so. See, e.g., MCL 500.3106(1) ("Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur: (b) . . . the injury was *a direct result of physical contact* with equipment permanently mounted on the vehicle, while the equipment was being operated or used, or

interpretation, I see no reason why the only scenario not involving physical contact that can satisfy the "resulting from" language is when the government vehicle forces the plaintiff's vehicle off the road.

I would revisit *Robinson*'s and *Helfer*'s interpretations of MCL 691.1405 in an appropriate future case because they do not appear to be based on the plain language of the statute. But since no party here has asked us to reconsider *Robinson* or *Helfer*, I concur with the Court's denial order in this case.

MCCORMACK, C.J., joins the statement of VIVIANO, J.

BERNSTEIN, J. (*dissenting*). I respectfully dissent. I agree with Justice VIVIANO's analysis regarding *Robinson v Detroit*, 462 Mich 439, 457 (2000), and *Helfer v Ctr Line Pub Sch*, 477 Mich 931 (2006). However, I would have granted the application for leave to appeal on plaintiff's issues regarding gross negligence and apportionment of fault.

CAVANAGH, J., did not participate because of her prior representation of a party.

Summary Disposition October 29, 2019:

PEOPLE v FARLEY, No. 156843; Court of Appeals No. 331302. By order of May 29, 2018, the application for leave to appeal the October 31, 2017 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Beck* (Docket No. 152934) and *People v Dixon-Bey* (Docket No. 156746). On order of the Court, *Beck* having been decided on July 29, 2019, 504 Mich 605 (2019), and leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Beck*.

PEOPLE v COLE, No. 156922; Court of Appeals No. 338837. By order of July 3, 2018, the application for leave to appeal the October 25, 2017 order of the Court of Appeals was held in abeyance pending the decision in *People v Harbison* (Docket No. 157404). On order of the Court, the case having been decided on July 11, 2019, 504 Mich 230 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, whether the prosecution's expert impermissibly vouched for the credibility of the alleged victim. See *People v Thorpe*, 504 Mich 230 (2019) (Docket No. 156777); *People v Smith*, 425 Mich 98, 109 (1986). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to suppress statement is denied. We do not retain jurisdiction.

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property being lifted onto or lowered from the vehicle in the loading or unloading process.") (emphasis added).

PEOPLE v PEETE, No. 157051; Court of Appeals No. 331568. By order of July 27, 2018, the application for leave to appeal the October 12, 2017 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Beck* (Docket No. 152934) and *People v Dixon-Bey* (Docket No. 156746). On order of the Court, *Beck* having been decided on July 29, 2019, 504 Mich 605 (2019), and leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Beck*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

ALANI v GEICO INDEMNITY COMPANY, No. 157368; Court of Appeals No. 334061. By order of September 12, 2018, the application for leave to appeal the January 30, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *Dye v Esurance Prop & Cas Ins Co* (Docket No. 155784). On order of the Court, the case having been decided on July 11, 2019, 504 Mich 167 (2019), the application is again considered. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in *Dye*. We remand this case to the Wayne Circuit Court for further proceedings not inconsistent with this order.

BERNSTEIN, J., did not participate because he has a family member with an interest that could be affected by the proceeding.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

SADLER v CITY OF DETROIT, No. 157488; Court of Appeals No. 336117. By order of July 3, 2018, the application for leave to appeal the March 6, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit* (Docket No. 157097). On order of the Court, the cases having been decided on July 16, 2019, 504 Mich 330 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for further proceedings not inconsistent with our decision in *Wigfall*.

PEOPLE v NOAH PARKER, No. 157830; Court of Appeals No. 335165. By order of October 2, 2018, the application for leave to appeal the March 27, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *People v Beck* (Docket No. 152934) and *People v Dixon-Bey* (Docket No. 156746). On order of the Court, *Beck* having been decided on July 29, 2019, 504 Mich 605 (2019), and leave to appeal having been denied in *Dixon-Bey* on July 29, 2019, 504 Mich 939 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II of the Court of Appeals judgment and remand this case to that court for reconsidera-

tion in light of *Beck*. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v KEVIN SMITH, No. 158525; Court of Appeals No. 334692. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Harbison*, 504 Mich 230 (2019). We do not retain jurisdiction.

SYKES v CITY OF DETROIT, No. 158588; Court of Appeals No. 339722. By order of February 4, 2019, the application for leave to appeal the September 11, 2018 judgment of the Court of Appeals was held in abeyance pending the decisions in *Wigfall v City of Detroit* (Docket No. 156793) and *West v City of Detroit* (Docket No. 157097). On order of the Court, the cases having been decided on July 16, 2019, 504 Mich 330 (2019), the application is again considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we remand this case to the Wayne Circuit Court for further proceedings not inconsistent with our decision in *Wigfall*.

PEOPLE v ROBERTS, No. 159105; Court of Appeals No. 339424. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate Part II(B) and II(C) of the Court of Appeals judgment and remand this case to that court for reconsideration in light of *People v Beck*, 504 Mich 605 (2019). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

PEOPLE v DUFF, No. 159591; Court of Appeals No. 347603. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for reconsideration of the defendant's motion to suppress. On remand, the circuit court shall determine when the defendant was first seized for Fourth Amendment purposes. See *People v Jenkins*, 472 Mich 26, 32 (2005) ("A 'seizure' within the meaning of the Fourth Amendment occurs only if, in view of all the circumstances, a reasonable person would have believed that he was not free to leave."). This is the relevant point in time for assessing whether the deputies had probable cause to justify an arrest or a reasonable suspicion of criminal activity to justify a stop under *Terry v Ohio*, 392 US 1 (1968). We do not retain jurisdiction.

PEOPLE v CROSKEY, No. 159687; Court of Appeals No. 347087. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v CID, No. 159848; Court of Appeals No. 342402. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate, in part, the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *People v Harbison*, 504 Mich 230 (2019). In all other respects, leave to appeal is denied, because

we are not persuaded that the remaining question presented should be reviewed by this Court. The motion to remand is denied. We do not retain jurisdiction.

PEOPLE v MCCLINTON, No. 160106; Court of Appeals No. 348817. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for amendment of the Presentence Investigation Report. The defendant challenged a juvenile adjudication in the Presentence Investigation Report at sentencing and in a motion to correct her sentence. At the motion hearing, the sentencing judge stated on the record that he did not take the challenged information into account in sentencing, but he did not direct the probation officer to correct or delete the information from the Presentence Investigation Report as required by MCR 6.425(E)(2)(a). We further order the circuit court to ensure that the amended Presentence Investigation Report is transmitted to the Department of Corrections. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court.

Leave to Appeal Denied October 29, 2019:

PEOPLE v ZARN, Nos. 157643 and 157644; Court of Appeals Nos. 323279 and 323280.

PEOPLE v SCHWANDER, No. 158041; Court of Appeals No. 320768.

PEOPLE v GAILEY, No. 158046; Court of Appeals No. 333811.

PEOPLE v EARTHA HARRIS, No. 158215; Court of Appeals No. 335831.

MITCHELL v DORE & ASSOCIATES CONTRACTING, INC, No. 159598; Court of Appeals No. 338701.

PEOPLE v BIGHAM, No. 158721; Court of Appeals No. 345711.

PEOPLE v SHEPHERD, No. 158919; Court of Appeals No. 345463.

In re ANTWINE, No. 158975; Court of Appeals No. 345176.

PEOPLE v JUSTIN THOMAS, No. 158993; Court of Appeals No. 338648.

PEOPLE v HAMAS, No. 158994; Court of Appeals No. 338198.

PEOPLE v KEVIN HICKS, No. 159020; Court of Appeals No. 336702.

PEOPLE v OWENS, No. 159050; Court of Appeals No. 333155.

PEOPLE v ERNST, No. 159091; Court of Appeals No. 340861.

PEOPLE v RIDGELL, No. 159193; Court of Appeals No. 347004.

PEOPLE v GARRETT, No. 159196; Court of Appeals No. 338311.

HOLMAN v MOSSA-BASHA and HOLMAN v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, Nos. 159197 and 159198; Court of Appeals Nos. 338210 and 338232.

CAVANAGH, J., did not participate due to her prior relationship with Garan Lucow Miller, P.C.

PEOPLE v VOELZKE, No. 159204; Court of Appeals No. 346763.

PEOPLE v TONIA SMITH, No. 159243; Court of Appeals No. 345663.

MICHIGAN SPINE & BRAIN SURGEONS, PLLC v AUTO-OWNERS INSURANCE COMPANY, No. 159260; Court of Appeals No. 340800.

PEOPLE v THEODORE WOOD, No. 159288; Court of Appeals No. 347300.

MAKENZIE WHITNEY CORPORATION, INC v YOUNG, No. 159321; Court of Appeals No. 345481.

PEOPLE v CHARLSON, No. 159379; Court of Appeals No. 346917.

PEOPLE v BANION, No. 159399; Court of Appeals No. 346231.

PEOPLE v OLAJOS, No. 159417; Court of Appeals No. 342713.

PEOPLE v SHONDREA PARKER, No. 159463; Court of Appeals No. 346585.

PEOPLE v FATIMAH MCGEE, No. 159468; Court of Appeals No. 346918.

PEOPLE v RANDALL BALL, No. 159474; Court of Appeals No. 340019.

PEOPLE v WIGGINS, No. 159501; Court of Appeals No. 347568.

MURPHY v PROGRESSIVE MARATHON INSURANCE COMPANY, No. 159517; Court of Appeals No. 347673.

PEOPLE v DELVON CARTER, No. 159521; Court of Appeals No. 347433.

HC INVESTMENT HOLDINGS LLC v TOWNSHIP OF SCIO, No. 159532; Court of Appeals No. 342324.

PEOPLE v TAMBLING, No. 159540; Court of Appeals No. 347484.

PEOPLE OF THE CITY OF STERLING HEIGHTS v CONNOLLY, No. 159556; Court of Appeals No. 347397.

PEOPLE v ANTONIO WATKINS, No. 159578; Court of Appeals No. 346767.

PEOPLE v BRUCE SMITH, No. 159582; Court of Appeals No. 342889.

PEOPLE v BRIAN PETERSON, No. 159583; Court of Appeals No. 348692.

PEOPLE v WILLETT, No. 159584; Court of Appeals No. 347146.

PEOPLE v BRYANT MCGEE, No. 159595; Court of Appeals No. 341363.

PEOPLE v CHARLES WEBB, No. 159596; Court of Appeals No. 346655.

PEOPLE v NOBLE, No. 159601; Court of Appeals No. 347016.

HARBI v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 159608; Court of Appeals No. 345924.

PEOPLE v STONE, No. 159615; Court of Appeals No. 347641.

PEOPLE v PADO, No. 159628; Court of Appeals No. 342883.

PEOPLE v SCHUG, No. 159637; Court of Appeals No. 347032.

PEOPLE v LAWS, No. 159639; Court of Appeals No. 341739.

PEOPLE v RAAR, No. 159648; Court of Appeals No. 347492.

PEOPLE v DARBY, No. 159649; Court of Appeals No. 347278.

PEOPLE v JAYLEN REYNOLDS, No. 159657; Court of Appeals No. 340698.

PEOPLE v SHAWNTA ANDERSON, No. 159670; Court of Appeals No. 347393.

PEOPLE v CLUESMAN, No. 159673; Court of Appeals No. 347951.

BURTON v CITY OF DETROIT, No. 159674; Court of Appeals No. 340592.

PEOPLE v KEWAUNTAE JONES, No. 159680; Court of Appeals No. 346639.

PEOPLE v JOSEPH BURRELL, No. 159683; Court of Appeals No. 347107.

PEOPLE v PERRYMAN, No. 159685; Court of Appeals No. 347578.

PEOPLE v DUNBAR, No. 159696; Court of Appeals No. 342640.

PEOPLE v MILON BROWN, No. 159698; Court of Appeals No. 340767.

PEOPLE v COURNAYA, No. 159701; Court of Appeals No. 341616.

PEOPLE v GRIFFITH, No. 159723; Court of Appeals No. 347969.

PEOPLE v SHELTON, No. 159726; Court of Appeals No. 346759.

NELSON v CHIPPEWA CORRECTIONAL FACILITY WARDEN, No. 159731; Court of Appeals No. 348107.

PEOPLE v TONY CLARK, No. 159732; Court of Appeals No. 336656.

PEOPLE v NEAL, No. 159735; Court of Appeals No. 347693.

PEOPLE v JACOBS, No. 159737; Court of Appeals No. 348056.

PEOPLE v EDANIEL SMITH, No. 159738; Court of Appeals No. 347485.

PEOPLE v NIEMAN, No. 159740; Court of Appeals No. 339517.

GLINSKI v CARDIOVASCULAR CLINICAL ASSOCIATES, PC, No. 159742; Court of Appeals No. 342046.

FIELDS v METRO MAN II, INC, No. 159750; Court of Appeals No. 341626.

PEOPLE v WEBER, No. 159752; Court of Appeals No. 341452.

PEOPLE v COTTRELL, No. 159753; Court of Appeals No. 347351.

PEOPLE v CRUZ, No. 159761; Court of Appeals No. 346800.

PEOPLE v KENNY, No. 159762; Court of Appeals No. 342242.

PEOPLE v LAROUE, No. 159770; Court of Appeals No. 343149.

PEOPLE v JAMES WEBB, No. 159773; Court of Appeals No. 340907.

PEOPLE v MYRON DAVIS, No. 159782; Court of Appeals No. 338112.

KRUSE v ALBRING, No. 159784; Court of Appeals No. 343705.

PEOPLE v CUNNINGHAM, No. 159792; Court of Appeals No. 346943.

PEOPLE v FINLEY, No. 159793; Court of Appeals No. 348374.

PEOPLE v BOCK, No. 159800; Court of Appeals No. 348181.

PEOPLE v DANSKI, No. 159801; Court of Appeals No. 340762.

PEOPLE v FLETCHER, No. 159803; Court of Appeals No. 348490.

PEOPLE v BUTTS, Nos. 159806 and 159807; Court of Appeals Nos. 348077 and 348080.

PEOPLE v BRANDON ROBINSON, No. 159810; Court of Appeals No. 342261.

PEOPLE v ESTERS, No. 159812; Court of Appeals No. 340391.

PEOPLE v COREY HAWKINS, No. 159816; Court of Appeals No. 347884.

In re GOLDMAN, No. 159817; Court of Appeals No. 348483.

PEOPLE v CLYDE MCCRAY, No. 159825; Court of Appeals No. 348400.

PEOPLE v MAXWELL, No. 159828; Court of Appeals No. 348061.

PEOPLE v GIBSON, No. 159832; Court of Appeals No. 348260.

PEOPLE v DAVE HARRIS, No. 159836; Court of Appeals No. 346812.

PEOPLE v DEWOLF, No. 159842; Court of Appeals No. 348174.

BELL v DEPARTMENT OF CORRECTIONS, No. 159847; Court of Appeals No. 347945.

PEOPLE v SAKJAS, No. 159849; Court of Appeals No. 348112.

JOHNSON v ZIYADEH, No. 159850; Court of Appeals No. 340866.

PEOPLE v TORREY COTTON, No. 159851; Court of Appeals No. 347336.

PEOPLE v DOWNS, No. 159855; Court of Appeals No. 348204.

RUFFINO v BARTON, No. 159859; Court of Appeals No. 343153.

LUECK v LUECK, No. 159864; reported below: 328 Mich App 399.

PEOPLE v TYRONE DESHAZER, No. 159868; Court of Appeals No. 347697.

PEOPLE v TYRONE DESHAZER, No. 159870; Court of Appeals No. 347701.

PEOPLE v HOANG, No. 159873; reported below: 328 Mich App 45.

PEOPLE v PENDLETON, No. 159877; Court of Appeals No. 342590.

PEOPLE v WILKERSON, No. 159879; Court of Appeals No. 344162.

PEOPLE v GHOLSTON, No. 159880; Court of Appeals No. 347892.

PEOPLE v COOPER, No. 159882; Court of Appeals No. 344399.

SHANNON v RALSTON, No. 159884, 159885, 159886, 159887, 159888, and 159889; Court of Appeals No. 339944, 343213, 343886, 344356, 344418, and 346344.

PEOPLE v KOBASIC, No. 159902; Court of Appeals No. 346410.

WHITE v CONSOLIDATED RAIL CORPORATION, No. 159906; Court of Appeals No. 347995.

PEOPLE v DOMINIC FERREE, No. 159907; Court of Appeals No. 342246.

PEOPLE v ROOP, No. 159908; Court of Appeals No. 342262.

PEOPLE v MCKENNEY, No. 159911; Court of Appeals No. 348110.

PEOPLE v DOUGLAS BALL, No. 159921; Court of Appeals No. 339131.

PEOPLE v SENCHUK, No. 159922; Court of Appeals No. 348316.

PEOPLE v GLOVER, No. 159927; Court of Appeals No. 348903.

PEOPLE v MICHAEL THOMPSON, No. 159930; Court of Appeals No. 347469.

PEOPLE v TIBBS, No. 159931; Court of Appeals No. 347255.

PEOPLE v HUDSON, No. 159933; Court of Appeals No. 348843.

PEOPLE v GARY MITCHELL, No. 159935; Court of Appeals No. 339937.

PEOPLE v GRANT, No. 159937; Court of Appeals No. 348456.

BOSMA v ACE AMERICAN INSURANCE COMPANY, No. 159939; Court of Appeals No. 344732.

PEOPLE v NANCY SPENCER, No. 159940; Court of Appeals No. 348266.

SAY v BUSH, No. 159941; Court of Appeals No. 348594.

PEOPLE v BACKUS, No. 159943; Court of Appeals No. 339726.

PEOPLE v JOHN LAWSON, No. 159945; Court of Appeals No. 347890.

HEUSCHNEIDER v WOLVERINE SUPERIOR HOSPITALITY, INC, No. 159947; Court of Appeals No. 341053.

PEOPLE v LINDEN, No. 159954; Court of Appeals No. 348267.

PEOPLE v MAGEE, No. 159955; Court of Appeals No. 340421.

PEOPLE v BRITO, No. 159957; Court of Appeals No. 348906.

PEOPLE v HITTLE, No. 159967; Court of Appeals No. 348448.

PEOPLE v ADRIANSON, No. 159970; Court of Appeals No. 348585.

PEOPLE v LANIER, No. 159971; Court of Appeals No. 348356.

PEOPLE v JAYMOND LAWSON, No. 159975; Court of Appeals No. 345960.

PEOPLE v MARTEZ REYNOLDS, No. 159977; Court of Appeals No. 347861.

PEOPLE v MENEFEE, No. 159978; Court of Appeals No. 349249.

PEOPLE v KATT, No. 159980; Court of Appeals No. 347137.

PEOPLE v RANDOLPH, No. 159984; Court of Appeals No. 340167.

PEOPLE v HAIDAR, No. 159986; Court of Appeals No. 347767.

JACKSON v DEPARTMENT OF CORRECTIONS, No. 159992; Court of Appeals No. 346941.

GOFF v NIVER, No. 160001; Court of Appeals No. 343315.

PEOPLE v COFELL, No. 160007; Court of Appeals No. 342121.

SHANNON v RALSTON, No. 160016; Court of Appeals No. 348481.

PEOPLE v OSWALD, No. 160017; Court of Appeals No. 349267.

PEOPLE v RAFFLER, No. 160024; Court of Appeals No. 348337.

VIVIANO, J., did not participate because he presided over this case in the circuit court.

PEOPLE v KOZA, No. 160059; Court of Appeals No. 349039.

PEOPLE v MCEWEN-ROSS, No. 160103; Court of Appeals No. 348569.

Summary Disposition October 30, 2019:

PEOPLE v MOORE, No. 159234; Court of Appeals No. 346874. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we remand this case to the Eaton Circuit Court. Sentencing courts must "consult the applicable guidelines range and take it into account when imposing a sentence" and shall "justify the sentence imposed in order to facilitate appellate review." *People v Lockridge*, 498 Mich 358, 392 (2015). See also *People v Smith*, 482 Mich 292 (2008). On remand, the court shall either issue an order that articulates why the 49-month departure is warranted, or resentence the defendant. We do not retain jurisdiction.

BURNETT v AHOLA, Nos. 160164 and 160166; Court of Appeals Nos. 349497 and 349484. Pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we vacate the June 3, 2019 order of the Genesee Circuit Court denying the defendants' motions to lift the stay of discovery, we vacate that part of the December 15, 2016 order of the circuit court staying discovery, and we remand this case to that court for further consideration. We direct the Genesee Circuit Court to assign a different judge to preside over further proceedings in this case.

On remand, the circuit court shall: (1) conduct an evidentiary hearing in open court and on the record and determine whether the plaintiff committed intrinsic fraud or fraud on the court during the proceedings under the Revocation of Paternity Act (ROPA), MCL 722.1431 *et seq*., considering all relevant evidence that has been or may be discovered after entry of the ROPA judgment; and (2) if so, determine to what, if any, remedy the defendants are entitled. We direct the circuit court to expedite its consideration and resolution of this case. We do not retain jurisdiction.

Leave to Appeal Denied October 30, 2019:

PEOPLE v JERRON DAVIS, No. 158658; Court of Appeals No. 343964.

PEOPLE v GERMAN, No. 158766; Court of Appeals No. 345340.

LILLY v GRAND TRUNK WESTERN RAILROAD COMPANY, No. 159155; Court of Appeals No. 338677.

PEOPLE v BELKIEWICZ, No. 159609; Court of Appeals No. 347842.

PEOPLE v CARL WARDELL, No. 159679; Court of Appeals No. 343245.

PEOPLE v ZABAVSKI, No. 159783; Court of Appeals No. 338317.

Motion to Deem a Late-Filed Application Timely Denied October 30, 2019:

PEOPLE v FISHER, No. 157934; Court of Appeals No. 336902. On order of the Court, the motion to deem the late-filed application for leave to appeal timely is denied. Under some circumstances, the Court may "enter an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful transmission." Administrative Order 2014-23, 497 Mich cxxviii (2014). But such relief is warranted only where the moving party proves "to the court's satisfaction that . . . the transmission failed because of the failure of the TrueFiling system to process the electronic document or because of the court's computer system's failure to receive the document." *Id*. at cxxix. A contemporaneous review of the TrueFiling system and the Court's computer system showed that both were operational at the time of the defendant's transmission. The defendant's assertions and speculations to the contrary do not prove to the Court's satisfaction that either the TrueFiling system or the Court's computer system caused an unsuccessful trans-

mission. Accordingly, the defendant is not entitled to the relief requested.

Motion to Deem Application Filed Nunc Pro Tunc *on the Date of Transmission Denied October 30, 2019:*

SCHEUNEMAN v KENT POWER INC, No. 159860; Court of Appeals No. 344109. On order of the Court, the motion for an order permitting the defendant's application for leave to appeal to be deemed filed *nunc pro tunc* on the date of the electronic transmission to the Court of Appeals is denied. Under some circumstances, the Court may "enter an order permitting a document to be deemed filed *nunc pro tunc* on the date of the unsuccessful transmission." Administrative Order 2014-23, 497 Mich cxxviii (2014). But such relief is warranted only where the moving party proves that "the transmission failed because of the failure of the TrueFiling system to process the electronic document or because of the court's computer system's failure to receive the document." *Id*. at cxxix. Here, there was no transmission failure. It is undisputed that the TrueFiling system transmitted the electronic document to the selected court and the selected court's computer system received the document. To the extent that the defendant alleges that transmission to this Court failed because of an apparent default setting in the TrueFiling system, the defendant must also prove that "the transmission failure was not caused, in whole or in part, by the action or inaction of the party." *Id*. Here, the defendant cannot make this showing because the TrueFiling system provided clear notice to the defendant before and after transmission that it had selected the wrong court in which to file its application. Accordingly, the defendant is not entitled to the relief requested.

VIVIANO, J., would accept the application as timely filed.

Motion to Accept Application for Leave to Appeal Denied October 30, 2019:

MAPLES v STATE OF MICHIGAN, No. 159863; Court of Appeals No. 343394. On order of the Court, the motion to accept the application for leave to appeal is denied. See MCR 7.316(B) ("The Court will not accept for filing a motion to file a late application for leave to appeal under MCR 7.305(C)[.]"). Further, because late applications will not be accepted absent circumstances not present in this case, the plaintiff's late application for leave to appeal is dismissed. MCR 7.305(C)(5).

VIVIANO, J., would accept the application as timely filed.

Late Application Dismissed October 30, 2019:

In re DILLON, MINORS, Nos. 159994 and 159995; Court of Appeals Nos. 346295 and 346324. On order of the Court, the application for leave to appeal the June 25, 2019 judgment of the Court of Appeals is dismissed,

because late applications will not be accepted absent circumstances not present in this case. MCR 7.305(C)(5).

VIVIANO, J., would accept the application as timely filed.

In re DILLON, MINORS, Nos. 159997 and 159998; Court of Appeals Nos. 346302 and 346325. On order of the Court, the application for leave to appeal the June 25, 2019 judgment of the Court of Appeals is dismissed, because late applications will not be accepted absent circumstances not present in this case. MCR 7.305(C)(5).

VIVIANO, J., would accept the application as timely filed.

Leave to Appeal Denied October 31, 2019:

PEOPLE v JACOB LABELLE, No. 160447; Court of Appeals No. 347421.

MCCORMACK, C.J., did not participate due to her preexisting relationship with a party.

Special Orders

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Order Entered June 5, 2019:

PROPOSED ALTERNATIVE AMENDMENTS OF MCR 6.610.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.610 of the Michigan Court Rules. Before determining whether either proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of either proposal in its present form.

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

ALTERNATIVE A

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

(E) Discovery in Misdemeanor Proceedings.

(1) The provisions of MCR 6.201, except for MCR 6.201(A), apply in all misdemeanor proceedings.

(2) MCR 6.201(A) only applies in misdemeanor proceedings, as set forth in this subrule, if a defendant elects to request discovery pursuant to MCR 6.201(A). If a defendant requests discovery pursuant to MCR 6.201(A) and the prosecuting attorney complies, then the defendant must also comply with MCR 6.201(A).

(E)-(H) [Relettered (F)-(I) but otherwise unchanged.]

ALTERNATIVE B

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(E) [Unchanged.]

(F) Discovery

(1) At any time before trial the prosecutor must, on request:

(a) permit the defendant or defense counsel to inspect the police investigatory reports; and

(b) provide the defendant or defense counsel any exculpatory information or evidence known to the prosecuting attorney.

(2) Once a case is set for trial, the prosecutor must, on request, provide to defendant or defense counsel:

(a) a copy of the police investigatory reports, as well as copies of any dashcam, bodycam, or other video the prosecution intends to use at trial;

(b) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial; and

(c) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case.

(3) Each party must, on request, provide the names and addresses of all lay and expert witnesses whom the party may call at trial; in the alternative, a party may provide the name of the witness and make the witness available to the other party for interview.

(4) Any other discovery must be by consent of the parties or by motion to the court on good cause shown.

(5) This rule is applicable only to proceedings under this subchapter.

(F)-(H) [Relettered (G)-(I) but otherwise unchanged.]

Staff Comment: The proposed alternative amendments of MCR 6.610 would allow discovery in misdemeanor proceedings in the district court. Alternative A would create a structure similar to the federal rules (FR Crim P 16[b]) in which a defendant's duty to provide certain discovery would be triggered only if defense counsel first requested discovery from the prosecution, and the prosecution complied. Alternative B is a proposal recommended by the Prosecuting Attorneys Association of Michigan in its comment on the original proposal published for comment in this file.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-23. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered June 5, 2019:

PROPOSED AMENDMENT OF RULE 2 OF THE RULES CONCERNING THE STATE BAR OF MICHIGAN.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2 of the Rules Concerning the State Bar of Michigan. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 2. MEMBERSHIP.

Subject to the provisions of these rules,~~Those persons who are licensed to practice law in this state shall constitute~~ the membership of the State Bar of Michigan shall include active, inactive, law student, affiliate, and emeritus members as defined by Rule 3~~, subject to the provisions of these rules. Law students may become law student section members of the State Bar.~~ None other than a member's correct name shall be entered upon the official register of attorneys of this state. Each attorney member, upon admission to the State Bar and in the annual dues notice~~statement~~, must provide the State Bar with the member's correct name, physical address, and email address(es), that can be used, among other things, for the annual dues notice and to effectuate electronic service as authorized by court rule, and such additional information as may be required. If the physical address provided is a mailing address only, the attorney member also must provide a street or building address for the member's business or residence. No attorney member shall practice law in this state until the~~such~~ information required in this Rule has been provided. Members shall ~~notify the State Bar~~ promptly update the State Bar with~~in writing of~~ any change of name, physical address, or email address. The State Bar shall be entitled to due notice of, and to intervene and be heard in, any proceeding by a member to alter or change the member's name. The name and address on file with the State Bar at the time shall control in any matter arising under these rules involving the sufficiency of notice to a member or the propriety of the name used by the member in the practice of law or in a judicial election or in an election for any other public office. Every active member shall annually provide a certification as to whether the member or the member's law firm has a policy to maintain interest-bearing trust accounts for deposit of client and

third-party funds. The certification shall be included~~placed~~ on ~~the face of~~ the annual dues notice and shall require the member's signature or electronic signature.

Staff Comment: The proposed amendment of Rule 2 of the Rules Concerning the State Bar of Michigan would update and expand the rule slightly to include reference to a member's email address.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-31.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered June 19, 2019:

PROPOSED AMENDMENT OF MCR 3.802.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.802 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A) Service of Documents.

(1) [Unchanged.]

(2) Notice of a petition to identify a putative father and to determine or terminate his rights, or a petition to terminate the rights of a ~~noncustodial~~ parent under MCL 710.51(6), must be served on the individual or the individual's attorney in the manner provided in:

(a)-(b) [Unchanged.]

(3)-(4) [Unchanged.]

(B) Service When Identity or Whereabouts of Father are~~is~~ Unascertainable

(1)-(2) [Unchanged.]

(C) Service When Whereabouts of ~~Noncustodial~~ Parent are~~is~~ Unascertainable. If service of a petition to terminate the parental rights of a ~~noncustodial~~ parent pursuant to MCL 710.51(6) cannot be made under subrule (A)(2) because the whereabouts of that~~the noncustodial~~ parent have~~has~~ not been ascertained after diligent inquiry, the petitioner must file proof of the efforts made to locate that~~the noncustodial~~ parent in a statement made under MCR 1.109(D)(3). If the court finds, on reviewing the statement, that service cannot be made because the whereabouts of the person have~~has~~ not been determined after reasonable efforts, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

(D) [Unchanged.]

Staff comment: The proposed amendment of MCR 3.802 would eliminate references to the "noncustodial parent" to make the rule consistent with the statute (MCL 710.51) allowing stepparent adoption when the petitioning stepparent's spouse has custody according to a court order, rather than requiring sole legal custody.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-36. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered June 19, 2019:

PROPOSED AMENDMENT OF MCR 9.123.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 9.123 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 9.123. ELIGIBILITY FOR REINSTATEMENT.

(A) Suspension, 179 Days or Less. An attorney whose license has been suspended for 179 days or less pursuant to disciplinary proceedings may be~~is automatically~~ reinstated in accordance with this rule. The attorney may file, not sooner than 7 days before the last day of the suspension, with the board and serve on the administrator ~~by filing with the Supreme Court clerk, the board, and the administrator~~ an affidavit showing that the attorney has fully complied with all requirements~~the terms and conditions~~ of the suspension order. The affidavit must contain a statement that the attorney will continue to comply with the suspension order until the attorney is reinstated. A materially false statement contained in the affidavit is ~~ground for disbarment~~a basis for an action by the administrator and additional discipline. Within 7 days after the filing of the affidavit, the administrator may file with the board and serve on the attorney an objection to reinstatement based on the attorney's failure to demonstrate compliance with the suspension order. If the administrator files an objection, an order of reinstatement will be issued only after the board makes a determination that the attorney has complied with the suspension order. If the administrator does not file an objection and the board is not otherwise apprised of a basis to conclude that the attorney has failed to comply with the suspension order, the board must promptly issue an order of reinstatement. The order must be filed and served under MCR 9.118(F).

(B)-(D) [Unchanged.]

(E) Abatement or Modification of Conditions of Discipline or Reinstatement. When a condition has been imposed in an order of discipline or in an order of reinstatement, the attorney may request an order of abatement discharging the lawyer from the obligation to comply with the condition, or an order modifying the condition. The attorney may so request either before or with the attorney's affidavit of compliance under MCR 9.123(A) or petition for reinstatement under MCR 9.123(B). The request may be granted only if the attorney shows by clear and convincing evidence that a timely, good-faith effort has been made to meet the condition but it is impractical to fulfill the condition.

Staff Comment: The proposed amendment of MCR 9.123 would update the attorney discipline process for reinstatement of short-term suspensions and allow for abatement or modification of a condition in certain circumstances. The Attorney Discipline Board and Attorney Grievance Commission submitted the proposal jointly.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-02. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered June 19, 2019:

PROPOSED AMENDMENT OF MCR 5.117.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 5.117 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 5.117. APPEARANCE BY ATTORNEYS.

(A) [Unchanged.]

(B) Appearance.

(1) In General. An attorney may <u>generally</u> appear by an act indicating that the attorney represents an interested person in the proceeding. <u>A limited appearance may be made by an attorney for an interested person in a civil action or a proceeding as provided in MCR 2.117(B)(2)(c), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons.</u> An appearance by an attorney for an interested person is deemed an appearance by the interested person. Unless a particular rule indicates otherwise, any act required to be performed by an interested person may be performed by the attorney representing the interested person.

(2) [Unchanged.]

(3) Appearance by Law Firm.

(a) [Unchanged.]

(b) The appearance of an attorney is deemed to be the appearance of every member of the law firm. Any attorney in the firm may be required by the court to conduct a court-ordered conference or trial if it is within the scope of the appearance.

(C) Duration of Appearance by Attorney.

(1)-(4) [Unchanged.]

(5) Limited Scope Appearances. Notwithstanding other provisions in this section, limited appearances under MCR 2.117(B)(2)(c) may be terminated in accordance with MCR 2.117(C)(3), except that any reference to parties of record in MCR 2.117(B)(2)(c) shall instead refer to interested persons.

(~~5~~6) [Renumbered but otherwise unchanged.]

(D) [Unchanged.]

Staff Comment: The proposed amendment of MCR 5.117, submitted by the State Bar of Michigan, would clarify that the rules authorizing limited scope representation are explicitly applicable to civil cases that proceed in probate court.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2019, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2019-04.Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigan supremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 11, 2019:

PROPOSED AMENDMENT OF MCR 8.301.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.301 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigan supremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.301. POWERS OF REGISTER OF PROBATE, DEPUTY REGISTERS, AND CLERKS.

(A) [Unchanged.]

(B) Entry of Order Specifying Authority.

(1) To the extent authorized by the chief judge of a probate court by a general order, the probate register, and the deputy probate register, ~~the clerks of the probate court, and other court employees designated in the order,~~ have the authority, until the further order of the court, to do all acts required of the probate judge except judicial acts in a contested matter and acts forbidden by law to be performed by the probate register.

(2) [Unchanged.]

(C) [Unchanged.]

Staff Comment: The proposed amendment of MCR 8.301 would make the rule consistent with the statute (MCL 600.834) allowing only the probate registers and deputy probate registers to perform certain administrative tasks that would otherwise be performed by the probate judge.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-24. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 11, 2019:

PROPOSED AMENDMENTS OF MCR 6.302 AND 6.610.

On order of the Court, this is to advise that the Court is considering amendments of Rule 6.302 and Rule 6.610 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(C) [Unchanged.]

(D) An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(2) If the defendant pleads nolo contendere, the court may not question the defendant about participation in the crime. The court must:

(a) [Unchanged.]

(b) hold a hearing, unless there has been one, that establishes support for a finding that the defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading.

(E)-(F) [Unchanged.]

RULE 6.610. CRIMINAL PROCEDURE GENERALLY.

(A)-(D) [Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a please of guilty or nolo contendere, the court shall in all cases comply with this rule.

(1) The court shall determine that the plea is understanding, voluntary, and accurate. In determining the accuracy of the plea,

(a) if the defendant pleads guilty, the court, by questioning the defendant, shall establish support for a finding that defendant is guilty of ~~the offense charged or~~ the offense to which the defendant is pleading, or

(b) [Unchanged.]

(2)-(9) [Unchanged.]

(F)-(H) [Unchanged.]

Staff Comment: The proposed amendments of MCR 6.302 and MCR 6.610 would eliminate the requirement for a court to establish support for a finding that defendant is guilty of the offense charged as opposed to an offense to which defendant is pleading guilty or nolo contendere. The sentencing guidelines make clear that offense variables are to be scored on the basis of the "sentencing offense alone," not the charged offense. Further, an "offense to which defendant is pleading" would include the charged offense (if defendant is pleading to the charged offense) as well as any other offense that may have been offered by the prosecutor, so the "charged offense" clause may well be unnecessary.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-29. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigan supremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered September 18, 2019:

PROPOSED ALTERNATIVE AMENDMENTS OF MCR 6.508.

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.508 of the Michigan Court Rules. Before determining whether either proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov /courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

ALTERNATIVE A

RULE 6.508. PROCEDURE; EVIDENTIARY HEARING; DETERMINATION.

(A)-(C) [Unchanged.]

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) [Unchanged.]

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial;

(3) [Unchanged.]

(E) [Unchanged.]

ALTERNATIVE B

RULE 6.508. PROCEDURE; EVIDENTIARY HEARING; DETERMINATION.

(A)-(C) [Unchanged.]

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

(1) [Unchanged.]

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision, or if the previously-decided claims, when considered together, create a strong likelihood of actual innocence;

(3) [Unchanged.]

(E) [Unchanged.]

Staff Comment: The proposed alternative amendments of MCR 6.508 would allow a court to consider previously-decided claims in the context of a new claim for relief, consistent with footnote 17 in *People v Johnson*, 502 Mich 541 (2018), as expressed in Alternative A, or under a slightly different formulation in Alternative B.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2014-46. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 23, 2019:

PROPOSED AMENDMENT OF MCR 6.425.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.425 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposals or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 6.425. SENTENCING; APPOINTMENT OF APPELLATE COUNSEL.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer and Preparation of Transcript; Scope of Appellate Lawyer's Responsibilities.

(1) Appointment of Lawyer and Preparation of Transcript.

(a)-(c) [Unchanged.]

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 42 days after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right. The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal. A denial of counsel must include a statement of reasons and must inform the defendant of the right to seek appellate review.

(e)-(g) [Unchanged.]

(2) [Unchanged.]

Staff Comment: The proposed amendment of MCR 6.425 would clarify that criminal defendants whose request for counsel due to indigency are denied are entitled to appeal that denial.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-34. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].

Order Entered October 23, 2019:

PROPOSED AMENDMENT OF MCR 8.108.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.108 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before

adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [http://courts.mi.gov/courts/michigansupremecourt/rules/pages/default.aspx].

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

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

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)-(D) [Unchanged.]

(E) Preparing~~Furnishing~~ Transcript. The court reporter or recorder shall prepare~~furnish~~ without delay, in legible English, a transcript of the records taken by him or her (or any part thereof):

(1) to any party on request. The reporter or recorder is entitled to receive the compensation prescribed in the statute on fees from the person who makes the request.

(2) on order of the trial court. The court may order the transcript prepared without expense to either party. Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court.

(F) Filing Transcript.

(1) After preparing a transcript upon request of a party or interested person to a case or ~~O~~on order of the trial court, the court reporter or recorder shall promptly file the~~make and file in the clerk's office a~~ transcript of the proceedings~~his or her records, in legible English, of any civil or criminal case~~ (or any part thereof)~~ without expense to either party; the transcript is a part of the records in the case~~.

(2) After an official transcript is filed, copies shall be made only from the official transcript filed with the court~~Except when otherwise provided by contract, the court reporter or recorder shall receive from the appropriate governmental unit the compensation specified in the statute on fees for a transcript ordered by a court~~.

(G) [Unchanged.]

Staff comment: The proposed amendment of MCR 8.108 would clarify the rule regarding preparation and filing of transcripts including that a court reporter or court recorder shall file their transcripts with a court when produced for a party or for the court.

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

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the

Supreme Court Clerk in writing or electronically by February 1, 2020, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2018-35. Your comments and the comments of others will be posted under the chapter affected by this proposal at [http://courts.mi.gov/courts/michigansupremecourt/rules/court-rules-admin-matters/pages/default.aspx].