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No._____

State of Michigan

In the Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ALEXANDER JAMES HAUPT,

Defendant-Appellant.

POST-REMAND APPEAL FROM THE COURT OF APPEALS
Former Supreme Court No. 1633887
Court of Appeals No. 351593
Clare Circuit Case No. 18-266994-FH

APPLICATION FOR LEAVE TO APPEAL

MICHIGAN ATTORNEY GENERAL
Criminal Division
By: Autumn A. Gruss (79267)
Deputy Attorney General
Attorney for Plaintiff-Appellee
525 W Ottawa St,
Lansing, MI 48933-1067
(517) 335-7650

Clare County Prosecutor
Attorney for Plaintiff-Appellee
225 W Main St
Harrison, MI 48625
(989) 539-9831

Stuart G. Friedman (P46039)
Attorney for Defendant-Appellant
Friedman Legal Solutions, PLLC
26777 Central Park Blvd, Suite 300
Southfield, MI 48076
Tel: (248) 228-3322
Fax: (248) 359-8695
e-Mail: stu@crimlaw.biz

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Statement of Questions Involved

I. WAS THE DEFENDANT DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE ASSISANCE OF COUNSEL WHEN THE COURT ALLOWED APPOINTED COUNSEL TO WITHDRAW AND DID NOT APPOINT SUBSTITUTE COUNSEL?

Defendant-Appellant answers "Yes"
Plaintiff-Appellee answers "No"
The Trial Court answered "No"
The Court of Appeals answered "No"
The Supreme Court remanded for reconsideration in light of People v King
The Court of Appeals again answered "No"

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Jurisdiction

Mr. Haupt was charged and convicted of nine counts including: one count of Child Sexually Abusive Activity contrary to MCL 750.145c(2); Computers - Using to Commit a Crime - Maximum Imprisonment of 20 years or more or Life contrary to MCL 750.7673(F); two counts of Child Sexually Abusive Activity — Distributing or Promoting contrary to MCL 750.145(C)(3); three counts of Computers – Using to Commit a crime – Maximum Imprisonment of 4 years or more contrary to 752.7963(D); one count of Child Sexually Abusive Material – Possession contrary to MCL 750.145-C4-A; and Obstruction of Justice contrary to MCL 750.505(A). He was sentenced to a controlling sentence of six years and six months to twenty years on both the distribution count and on the related using a computer to commit a crime count, (Judgment of Sentence).

The Court of Appeals denied relief in an Opinion dated September 23, 2021. Defendant filed a Motion for Reconsideration which was denied on November 2, 2021. This was timely appealed to this Court which on November 28, 2023 remanded to the Court of Appeals in light of *People v Posey* (Docket No. 162373), *People v Stewart* (Docket No. 162497), and *People v King* (Docket No. 162327). The Court of Appeals denied all relief on April 25, 2024. Defendant filed a Motion for Reconsideration which was denied on May 28

2024. This timely application follows. Defendant will confine his application to the *King* issue.

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Statement of Facts

Alexander Haupt was a nineteen year old young man with a girlfriend, who was seventeen. They had a tumultuous relationship and shortly after they broke up, in September of 2017, he was arrested on a misdemeanor stalking charge. At his arrest, a cell phone was taken from him. He told the officer that the cell phone was his and gave the officer his pass code to the phone. After the officer obtained a search warrant to search the phone and after he found naked pictures of Aleesha he obtained a second warrant. All of the charges at issue in this case relate to pictures, audio and text seized from this phone.

Mr. Haupt was charged and convicted of nine counts including: one count of Child Sexually Abusive Activity contrary to MCL 750.145c(2); Computers - Using to Commit a Crime - Maximum Imprisonment of 20 years or more or Life contrary to MCL 750.7673(F); two counts of Child Sexually Abusive Activity — Distributing or Promoting contrary to MCL 750.145(C)(3); three counts of Computers – Using to Commit a crime – Maximum Imprisonment of 4 years or more contrary to 752.7963(D); one count of Child Sexually Abusive Material – Possession contrary to MCL 750.145-C4-A; and Obstruction of Justice contrary to MCL 750.505(A). He was sentenced to a controlling sentence of six years and six months to twenty years on both the distribution count and

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on the related using a computer to commit a crime count, (Judgment of Sentence).

A. Early Proceedings.

He retained Attorney Scott Grable. In April of 2018, Mr. Grable moved to withdraw; Mr. Haupt objected. The Court denied the motion, (Motion 4/9/2018, 6-7). On June 21st, 2018, the Court heard a renewal of the motion. Mr. Haupt very much wanted to keep Mr. Grable as his attorney but Mr. Grable stated that he was uncomfortable because when he had told Mr. Haupt he was insane not to take the plea, Mr. Haupt had said he would have his bar license, (MT, 6/21/2018, 11). The Court then allowed counsel to withdraw and adjourned the proceeding to allow Defendant to get a new attorney, (MT, 6/21/2018, 15).

On August 1, 2018, Mr. Haupt appeared for a status conference without counsel. He told the Court he had not hired new counsel because Mr. Grable had previously been paid $25,000 and money was tight, (MT, 08/01,2018, 3). The Court adjourned the matter without taking further action but did not advise Mr. Haupt of his right to court appointed counsel.

On October 23, 2018 he appeared, again without counsel. At this point the Court both told him of the right to counsel and went over the dangers of self-representation. Mr. Haupt stated he would represent himself and the court found the waiver of counsel voluntary, (MT 10/23/2018, 6-10). Although it is not clear from the

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record, Mr. Haupt obviously changed his mind as he appeared with Court appointed counsel, Scott Moore on November 20th, 2018 where the matter was again adjourned.

On December 10, 2018, Mr. Moore requested that the case be remanded to the district court for a preliminary examination, (MT 12/10/2018, 4). On February 28, 2019, the preliminary examination was held in front of the district court. The parties stipulated that the misdemeanor and felony charges could be joined for this proceeding only so Aleesha would only have to testify once, (PE, 4). Aleesha McCurry and the Officer in Charge, Clare County Sheriff Detective Donald Von Bonn were the only witnesses. No exhibits were entered by either side. The Court bound over on both original charges and added several, including the obstruction of justice.

B. The Break Down With Mr. Moore and Mr. Haupt's Time Pro Se.

On June 10, 2019 Mr. Moore filed a motion to withdraw as attorney. Mr. Moore stated that in the District Court Mr. Haupt made representations that questioned his efforts to represent him and also questioned his truthfulness. The Defendant then stated that he had evidence that Mr. Moore was working directly with the prosecutor, (MT, 6/10/19, 4). The Court then told Mr. Haupt he would represent himself, but placed Mr. Moore in an advisory capacity, (MT 6/10/19, 14-15).

Defendant, acting in pro per, filed a Motion to Suppress the search warrants and a Motion to Dismiss. The Court hear argument

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on these on July 2, 2020. During the course of this argument Defendant stated that the police did not have probable cause of search through the entirety of his phone and stated that the warrant was "hopelessly overbroad", especially since the explicit pictures were from 9 months prior to the seizure of the phone. (MT 07/2/2019, 5). The Court denied the Motion to Dismiss but stated he would file a written opinion on the suppression after reviewing the preliminary examination testimony of Detective Sheriff Von Bonn, (MT 07/02/2019. 27). He later provided a written ruling denying the Motion to Suppress stating that he had read the preliminary examination and that the search warrants were valid. He found that the first was appropriately specific and that the second specifically identified the photos, (Order, 7/19/2019)

At the same hearing, the Court heard the People's Motion to Allow the Recorded testimony of Aleesha McCurry. According to the Motion filed by the People she was enlisted in the National Guard and was on orders for annual training until July 29, 2019; a week after the scheduled trial date, (People's Motion to Use Recorded Testimony). They asked to use her entire examination transcript including the parts related the misdemeanor charges which were handled in District Court. Defendant strenuously objected stating that he did not need an adjournment but did need her present as she had perjured herself at the preliminary examination. The trial court granted the People's Motion, (MT, 07/02/2019, 32).

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Defendant had filed a witness and exhibit list as required. Subsequent to this the People filed a Motion to Strike these because the Witnesses and Exhibits were related to the other charges and not this case. The People noticed it for July 12th and apparently due to confusion, Defendant did not appear. The motion was granted, (MT, 4). On the scheduled first day of trial Defendant again brought this up; the Court treated it as a motion for reconsideration, but then denied it, (TT I, 4).

C. The Eve of Trial and Mr. Moore's Reentrance Into the Case as Counsel.

Trial was scheduled to begin on July 23rd and Defendant was present, originally in pro per. The People made a Motion in Limine to exclude the fact that Ms. McCurry had sent several of the pictures to Mr. Haupt since consent is not a defense, (TT I, 9). Mr. Haupt responded: "I am going to stand mute. I never said I didn't want an attorney", (TT I, 10). The Court then said, you have one, it's Mr. Moore. Mr. Moore you are reappointed, (TT I, 10). The Court also granted the motion in limine, (TT I, 10)

Mr. Moore discussed his relationship with Mr. Haupt. He stated he had reached out to Mr. Haupt since his withdrawal, but Mr. Haupt had not responded, (TT I, 9). He stated that his letters, texts, and emails had gone unanswered, (TT I, 13). He also said that Mr. Haupt was demanding an adjournment and did not seem to understand that he could not provide one. He stated that they were unprepared, primarily due Mr. Haupt's actions, and so he could not

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represent him to any standard of professional competency, (TT I, 15). The Court stated that Mr. Moore knew the case, that Mr. Haupt was responsible for his own problems, and further stated that he would adjourn only until the next day, (TT I, 16).

D. The Trial.

The following day the actual trial began. The Court had granted the motion in limine and the parties agreed on what would be redacted from Ms. McCurry's preliminary examination testimony, primarily information that she had sent some of the pictures, (TT II). The redacted testimony of Ms. McCurry was read into the record. She stated her birthday was July 11, 1999 making her 17 at the time of the pictures, (TT II, 115). On June 30, 2017 they were no longer dating, but were still in contact and he came to her home, (TT II, 117). There was an altercation in her bedroom. She wanted him to leave and at one point he took her phone and put it in his pocket and began to get violent, (TT II, 117). They dated until just before July, (TT II, 118).

The next day he came over and they discussed the matter in his truck. She stated that he was blaming the situation on her and saying that she would be arrested. She agreed with the prosecutor that the tone and tenor was of him trying to coerce her into not prosecuting, (TT II, 119). At the time she believed him it was her fault and she was scared, (TT II, 119). The audio of this last recording, which was the basis of the witness intimidation charge

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was not played at the preliminary examination, but was played at the trial, (TT III, 31).

During the exam, Ms. McCurry stated that while she was still in a relationship with the Defendant, he asked permission to take pictures and videos of her, including some engaged in sexual activity with him. She stated she was uncomfortable, but he went through with it, (TT II, 120). Although the pictures did not show her head or face, she identified herself because of a tattoo on her wrist, (TT II, 120).

Detective Von Bonn was the only other substantive witness (Sergeant Aaron Miller testified as to chain of custody). The People requested that Detective Von Bonn be certified as an expert in mobile device digital forensics, (TT II, 130). The defense objected and the Court then limited the scope of his expert testimony to the use of Cellebrite to analyze data from a cell phone, (TT II, 144).

He stated that Mr. Haupt had said it was his Dad's phone; but not that his Dad used it or took the pictures. Mr. Haupt provided the pass code to the phone, (TT II, 169-171). Although the search warrant was related to a stalking complaint in September and the couple had broken up in late June, the warrant was for a search of the entire phone, (Affidavit and Warrant I). While searching the phone he found pictures of Aleesha performing various sex acts and having intercourse and got a second warrant directly related to this. She was called in and identified herself, (TT II, 160). He was also

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able to identify her by the tattoo on her wrist, (TT III, 13). All pictures and videos were of her.

Most of the pictures were taken around December 19, 2016. On December 18th he received a text, "any luck on BJ pictures?" He responded, "My girl has been sick but planning on tonight". Pictures were taken and sent on the December 19th and confirmation was received on December 20th (TT III, 18). Mr. Haupt then said, "OK, one is paid for already, how about $200 for the last three, (TT III, 18). The phone number was read. The police had called the number and looked it up in the database; but made no further efforts to determine who it was, (TT III, 33).

Defendant was convicted on all counts. The jury had asked the age of the Defendant and the Court had told them it was irrelevant, that because he was charged in this court they could know he was not a juvenile (TT III, 137).

E. The Sentence

Defendant appeared with new counsel for sentencing and the Court then imposed a controlling sentence of 78 months to twenty years (ST, 21). There are no sentencing issues in the current appeal.

F. The Appeal.

Defendant appealed as of right. The Court of Appeals denied any relief on September 23, 2021. One of the issues presented in that appeal was a claim that the Defendant did not properly waive his right to counsel. The Court of Appeals found that the Defendant

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had forfeited his right to representation by counsel and had filed to preserve his objection to being counselless. Defendant filed a timely Motion for Reconsideration which was denied on November 2, 2021.

A timely application to this Court followed. After holding the matter in abeyance, on November 28, 2024 this Court ordered:

> By order of May 3, 2022, the application for leave to appeal the September 23, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in People v Posey (Docket No. 162373), People v Stewart (Docket No. 162497), and People v King (Docket No. 162327). On order of the Court, Posey having been decided on July 31, 2023, 512 Mich ___ (2023), Stewart having been decided on July 31, 2023, 512 Mich ___ (2023), and King having been decided on July 28, 2023, 512 Mich ___ (2023), 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 to the extent that it is inconsistent with our decisions in King and Posey, and REMAND this case to that court for reconsideration in light of King and Posey. 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 matter was returned to the Court of Appeals which, upon application, allowed additional briefing. They denied Defendant all relief on April 25, 2024. Defendant filed a Motion for Reconsideration which was denied on May 28, 2024. This timely application follows.

Defendant will confine his application to the *King* issue.

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Argument

I. DEFENDANT WAS DEPRIVED OF HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL WHEN THE COURT ALLOWED APPOINTED COUNSEL TO WITHDRAW AND DID NOT APPOINT SUBSTITUTE COUNSEL.

Standard of Review. This Court reviews the lower court's "interpretation of the law or the application of a constitutional standard to uncontested facts…de novo." *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004).

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. ... The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. A defendant requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. [1]

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1 *Jacobi v Holbert*, 553 SW3d 246, 251 (Ky, 2018) (cleaned up) (quoting *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963); and, *Powell v State of Ala*, 287 US 45, 68–69; 53 S Ct 55; 77 L Ed 158 (1932))

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This case is about what may be the most important right to in the criminal defense arena – the right to counsel. As part of a fight between a frustrated judge and a twenty year old man with the stubbornness and impulsivity of youth essentially accepted a dare to go without counsel in a fit of rage.[2]

The Defendant was admittedly not advised of the dangers of proceeding without counsel and his opponent did to him what is likely to be expected in such a one-sided match – she wiped the floor with him in pretrial proceedings striking his witness list, allowing the preliminary examination testimony of two critical witnesses in lieu of their attendance because they were very temporarily unavailable the day of trial trial, and easily defeating a search and seizure motion in an area where the law was still developing and a properly prepared attorney could easily have convinced the Court of a contrary result. The Court of Appeals labeled these proceedings non-critical and reaffirmed their decision. Defendant again brings this issue to this Court following denial of any relief by the Court of Appeals.

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[2] See, e.g. *People v Hardin*, 15 Cal 5th 834, 896; 543 P3d 960 (2024) (noting that the youths often lack the "sophistication, exhibited many of the hallmark features of youth: "recklessness, impulsivity, and heedless risk-taking" and "inability to assess consequences."

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A. History of this Issue.

The Court of Appeals was requested to review their decision in light of *People v King*. In their denial the Court stated that the six weeks immediately preceding trial were not critical because the only hearings held without counsel were a search and seizure motion and a pretrial conference. Regarding the search and seizure issue the Court of Appeals held:

> that a search warrant "must state with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant." Hughes, ___ Mich at ___; slip op at 22. Here, the initial search warrant stated with particularity not only the items to be searched and seized, but also the alleged criminal activity justifying the warrant. The initial search warrant described the items to be searched for and seized as the "Apple I-Phone S cell phone described in above paragraph." The search warrant stated with particularity the alleged criminal activity, as it authorized officers to search defendant's cell phone for specific evidence of stalking and for evidence of ownership and control of the phone and described the various locations on the phone where evidence of stalking and of ownership and control of the phone might be found. The warrant satisfied the particularity requirement of the Fourth Amendment. The trial court did not err by denying defendant's motion to suppress.

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The Court of Appeals had originally found that there was a violation of MCR 6.005(D), but found that there was a waiver/forfeiture of counsel by conduct:[3]

> The only period when defendant was without appointed counsel and proceeding *in propria persona* with advisory counsel was from the day appointed counsel was allowed to withdraw on June 10, 2019, until the day trial was to commence on July 23, 2019, when counsel was reappointed to represent defendant at trial. When appointed counsel was allowed to withdraw, defendant did not object to the withdrawal, but he also did not request to represent himself. The record indicates that the trial court failed to comply with the substance of *Anderson* and MCR 6.005(D).

The Court also said that there was no plain error in their original ruling.

A decision that the Court did not err in denying Mr. Haupt's basic pro se motion does not mean that with the guiding hand of counsel, a different argument could not have prevailed. A motion to suppress requires knowledge of pleading requirements, the rules of evidence, and an ever developing doctrine of Fourth Amendment law. While it is entirely possible that an attorney could have lost it, a skilled attorney could have won it. The Court of Appeals effectively

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[3] *People v Haupt*, unpublished opinion of the Court of Appeals, issued September 23, 2021 (Docket No. 351593), 2021 WL 4394973, p *2.

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applied a harmless error analysis even though they nominally called it a "critical stage analysis."

B. *The Court of Appeals Improperly Used a DeFacto Harmless Error and Presumed that a Different Result Would Not Have Occurred if a Skilled Attorney Argued the Issue Rather than a 20 Year Old With No Legal Training.*

Attorney Scott Moore was appointed in November of 2018. On June 10, 2019 he was allowed to withdraw after Mr. Haupt accused him of collaborating with the prosecution. Mr. Haupt agreed and reiterated that he did not trust Mr. Moore. The Court then said:

> Okay? This is your second attorney. You hired an attorney and he withdrew and he filed a motion to withdraw that I denied, and then a few months later again he wanted to withdraw. The Court allowed him. At that time you said you would represent yourself. Several months later you come back in asking for a court appointed attorney. When you asked to represent when you said you were representing yourself, you said you would do a better job than any court appointed attorney could.
>
> So at this point I'm not going to allow Mr. Moore to withdraw totally, but he' s not going to have to represent you. He's going to be there for advisory purposes. So at this point, you are on your own, and you're going to have to represent yourself, and if you have any questions regarding the law, Court Rules or anything, Mr. Moore is the person you're going to have to go to. The Court is not going to

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> adjourn the trial dates. You have a trial date scheduled for January or July 23rd. That is a definite date. So if you go out and hire another attorney, that is the date they have to be prepared -for trial. That is the date you have to be prepared for trial. We are going to trial. This case is old, and your actions have delayed this case; nobody else' s actions but yours. And the Court is not going to allow you to delay this any longer. So whether you're prepared to go to trial on July 23rd or not, you are going to trial. You will be here in the courtroom and we will have a trial. You understand that?, (MT 6/10/19, 14-15).

This Court's ruling in *People v King*,[4] rejected all the propositions previously relied on by this Court; yet the Court of Appeals still found that the time immediately before trial where both the defense and prosecution filed motions was not critical. There, the Supreme Court found that a defendant did not need to object to an improper order stripping him of counsel. The Court first rejected the notion it was a waiver since the Defendant's action wasn't done volitionally. *Id.* at 676. The Court next noted that the *Carines* standard had been modified in *People v Davis*,[5] to create a presumption that a forfeited structural error was plain error. *Id.* "In such instances, the prosecutor must present specific facts that 'affirmatively demonstrate that , despite the error the overall

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[4] *People v King*, 512 Mich 1; 999 NW2d 670 (2023)

[5] *People v Davis*, 509 Mich 52, 67–68; 983 NW2d 325 (2022)

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fairness, integrity, and reputation of the trial court proceedings were preserved."

Can it truly be said that a suppression motion, striking the defendant's witness list in toto, and permitting the state to use the Complainant's pretrial testimony in lieu of live testimony at trial were not critical proceedings?

This waiver of counsel was not the product of rational thought. It was a juvenile response to the Court's fit of anger at the Defendant when the Court told him that he had to represent himself. It is not surprising that an untrained young man did not make a lawyer's objection to this rebuke. Nonetheless, Defendant attempted to represent himself, filing briefs to suppress the search warrant and dismiss the case and filing a witness and exhibit list. But reading the motion hearing on July 2, 2019, it is evident that Defendant is over his head and does not even understand some of the legal terms the Court used.

The Court's opinion suggested that neither proceeding was a critical stage is without consideration of the facts of the case. The question is not the name of a proceeding on the transcript cover

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page, but what actually transpires.[6] As the Indiana Court of Appeals recognized:[7]

> The Sixth Amendment provides that an accused has a right to counsel "at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Jones v. State,* 655 N.E.2d 49, 54 (Ind.1995) (quoting *United States v Wade*, 388 US 218, 226; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)). Such a stage is considered a "critical stage," that is, any stage in a criminal proceeding where incrimination *may occur or where the opportunity for effective defense must be seized or be foregone. Greenlee v State*, 477 NE2d 917, 920 (Ind Ct App, 1985).

In *United States v Wilson*,[8] the Court further noted:[9]

> The "core purpose" of the Sixth Amendment right to counsel is to guarantee effective assistance at trial. *United States v Ash*, 413 US 300, 309; 93 S Ct 2568; 37 L Ed 2d 619 (1973). The Sixth Amendment, however, guarantees more than simply a right to a fair trial. *United States v Blaylock*, 20 F3d 1458, 1466 (CA 9, 1994),

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[6] *See Patterson v Illinois*, 487 US 285, 298; 108 S Ct 2389; 101 L Ed 2d 261 (1988) (defining "the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel.").

[7] *Kochersperger v State*, 725 NE2d 918, 923 (Ind Ct App, 2000) (emphasis supplied).

[8] *United States v Wilson*, 719 F Supp 2d 1260 (D Or, 2010)

[9] *United States v Wilson*, 719 F Supp 2d 1260, 1266–67 (D Or, 2010)

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as amended (May 6, 1994). It "serves to protect the reliability of the entire trial process." *Nunes,* 350 F.3d at 1052. For this reason, the right to effective counsel has been extended to certain pretrial proceedings that "might appropriately be considered parts of the trial itself," such as where the defendant is "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Ash,* 413 U.S. at 310, 93 S.Ct. 2568. There are often "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Wade*, 388 US at 224. Accordingly, the right to the effective assistance of counsel extends to "all critical stages of the criminal process." *Nunes*, 350 F3d at 1052.

A "critical stage" is any "trial-like confrontation, in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice." *United States v Leonti*, 326 F3d 1111, 1117 (CA 9, 2003). It includes all circumstances in which "certain rights might be sacrificed or lost," or where "[a]vailable defenses may be irretrievably lost." *Wade*, 388 US at 225. The essence of a critical stage is "not its formal resemblance to a trial but the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." *Leonti*, 326 F3d at 1117. In determining whether the right to counsel applies, "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in

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> coping with legal problems or assistance in meeting his adversary." *Ash*, 413 US at 313.

This panel's decision subtly transformed critical stage of the proceeding into a harmless error standard. The Court believed that the same result would have endured and therefore the stages weren't "critical." A lawyer at the given proceedings could have done a better job at challenging the warrant and could have secured the testimony of two critical witnesses who conveniently found reasons not to be present a trial.

C. Search and Seizure Issue

The search and seizure in this case could easily have been decided differently with the guiding hand of counsel identifying and developing the issues.

The search in this case mirrored the invalidated search in *People v Carson*.[10] *People v Carson* is a *published* opinion articulating the position which appellate counsel has been pressing — that a cell phone, tablet, or computer is a uniquely personal device which contains massive amounts of personal data. Law enforcement may only seek to review evidence tied to the crime or course of criminality they are investigating. They may not simply assert that criminals often use mobile devices; such an unfocused search of an entire phone based on such generalities cannot be sustained. The

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[10] *People v Carson*, No. 355925, 2024647964 (Mich Ct App, February 15, 2024).

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fact that *Carson* could have been predicted from the law is easily demonstrated by the fact that the undersigned did predict it years before *Carson* was decided.

Under Michigan law, A search warrant must particularly describe the place to be searched and the persons or things to be seized.[11] MCL 780.654 states: "each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized. The warrant shall also state the grounds or the probable or reasonable cause for its issuance, or in lieu thereof, a copy of the affidavit may be attached thereto." The police cannot circumvent this command by include wide open boilerplate in this warrant request. If the search warrant application and warrant is interpreted in this open ended fashion, it annuls the Fourth Amendment's "probable cause" protections.[12]

While boilerplate in a search warrant is not per se meaningless, it must be viewed with a greater degree of skepticism. First, generic assertions about what particularly type of criminal

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[11] US Const Am IV; Const 1963, art 1, § 11.

[12] See *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *Ornelas v United States*, 517 US 690, 696; 116 S Ct 1657; 134 L Ed 2d 911 (1996) ("probable cause to search" exists when "the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found"); *United States v Cortez*, 449 US 411, 417–418; 101 S Ct 690; 66 L Ed 2d 621 (1981) (probable cause exists when there is "a particularized and objective basis" for suspecting the person of criminal activity).

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does what only works if there is evidence that the individual is an offender. Second, one-size fits all pseudo-expert testimony must be carefully scrutinized to insure that rambling claims of experience and expertise are not substituted for cold-hard facts.

> A review of the officer's affidavit makes it clear that he uses the same sweeping generalizations for burglars or person's accused of an assault. "The affidavit must lay a foundation which shows that the person subject to the search is a member of the class."[13] Furthermore, " '[r]ambling boilerplate recitations designed to meet all law enforcement needs' do not produce probable cause." [14]

There will always be a law enforcement desire to search these devices and this Court should not let boilerplate conclusory allegations be allowed to override those privacy interests. The State's formulistic approach to this problem would negate the protections of *Hughes* and *Riley*. Every digital document a person possessed could be searched on the theory that it gives the State additional background facts and further proves ownership. Stated

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[13] *United States v Weber*, 923 F2d 1338, 1345 (CA 9, 1990) (holding that the affidavit did not establish probable cause that the defendant was a child molester when it was "clear that the 'expert' portion of the affidavit was not drafted with the facts of this case or this particular defendant in mind").

[14] *United States v Zimmerman*, 277 F3d 426, 433 (CA 3, 2002) (quoting *Weber*, 923 F2d at 1345); *United States v Prideaux-Wentz*, 543 F3d 954, 960 (CA 7, 2008)

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another way, the State is seeking a general warrant through the back door.

This point was also emphasized in a Tenth Circuit decision: "The affiant stated, based on his training and experience, that alien smugglers often use electronic communication devices, GPS devices, and electronic banking systems to conduct operations and store records. None of those boilerplate statements, however, are specific to Defendant's crime or circumstances." "Rambling boilerplate recitations designed to meet all law enforcement needs do not produce probable cause.[15] Further, the assumption that a suspect maintains illicit records on a cell phone does "not automatically justify an open-ended warrant to search a home anytime officers seek a person's phone."[16] This includes claims about the need to do a maximum search for purposes of establishing ownership.[17]

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[15] *Zimmerman*, 277 F3d at 433.

[16] *United States v Griffith*, 867 F3d 1265, 1273; 432 US App DC 234 (2017) (reversing a probable cause determination because the general assertion that gang members "maintain regular contact with each other" was not specific enough to justify the search of a defendant's home for a cell phone). *See also "You're Not Gonna Reach My Telephone" – The Resurgence of the Fourth Amendment's Particularity Requirement*, 71 SMU L Rev 57 (2018) (finding that *Riley* made it clear that boilerplate request to search cell phones because crooks regularly leave evidence trails in their phones doesn't satisfy the particularity requirement).

[17] "You're Not Gonna Reach My Telephone," 71 SMU at 576.

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D. Evading Witnesses

The People also filed a motion to allow preliminary examination testimony instead of a very short adjournment. While the Defendant objected, he did not have the legal expertise to cite appropriate cases.

He faced a trial where the two critical witnesses were conveniently unavailable for trial. The Complainant was on military duty in Gaylord and her mother was on a very short trip to Mexico.

If he had the guiding hand of counsel, he could have subpoenaed the mother prior to trial and request the Complainant's presence via the procedure outlined in Issue IV of the Defendant's original brief.[18]

The regulation sets forth three reasons where the military will block a subpoena to testify in private litigation: (a) the testimony involves official information; (b) the witness. would testify as an expert; or, (c) where the appearance would interfere seriously with the accomplishment of a mission. When such a subpoena is issued, the service person should refer the matter to their supervisor who will then forward it to the appropriate Staff Judge Advocate or legal adviser. Under Rule 7-11, these individuals will then decide whether the actions will "interfere seriously with the accomplishment of the military mission." If so, these individuals will contact the requesting

[18] Army Regulation 27-40 Sec. 7-8 et seq The regulation appears in the Appendix.

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party and attempt to make alternate arrangements. If they cannot be reached, they will refer the matter to the Litigation Division of the Army. Additionally, if the issue had been properly developed, counsel could have requested the court to instruct the jury that it should be presumed that their absence would have been favorable to the accused.[19] Because, Mr. Haupt had not properly developed the record, attempted to have the witnesses subpoenaed, or had the skill set to oppose the State's motions, the State was able to effectively shut down his right of both cross-examination and to present a defense. At minimum, counsel could have requested the Court to allow him to take a video deposition to preserve their testimony for trial where they were subject to trial style cross-examination.[20] There the new charges could be addressed, and all the in discovery which had been discovered in the intervening months could have been used to formulate those questions.

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[19] See, e.g. *Bogosian v Woloohojian Realty Corp*, 323 F3d 55, 67 (CA 1, 2003).

[20] See *People v New*, 427 Mich 482, 504; 398 NW2d 358 (1986) (Levin, J.) (noting ability of court to order deposition in criminal case to preserve testimony). See also *People v Weinke*, 50 NE3d 688 (Ill App Ct, 2016) (upholding the taking of such a statement and its use at trial); *State v Zaporta*, 237 Conn 58; 676 A2d 814 (1996); United States v Hough, No. 2:03-CR-00174, 2024 WL 957865, at *7 (WD Pa, March 6, 2024), 888 F Supp 101, 102 (ED Wis, 1995) (noting discretion in federal court to order such a deposition); *United States v Rodriguez-Sifuentes*, 637 Fed Appx 1016, 1017 (CA 9, 2016) (reversing and ordering a new trial because of improper denial of defense motion to depose his common law wife in Mexico for use at his upcoming trial).

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These proceedings were indeed critical.

E. Motion to Compel

Contrary to the implication below, these were not just routine pretrial hearings. Suppression of evidence motions were presented and the People filed and were granted a motion to strike the witness and exhibit list and to compel discovery. A criminal defense attorney would have been far more capable of addressing these arguments than a pro se youth such as Mr. Haupt and this certainly transforms this situation into a situation where the guiding hand of counsel could have altered this case.

As the a Pennsylvania federal judge recently explained: "The Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the proceedings." (internal quotations omitted). Critical stages of a prosecution are "those when a defendant faces significant consequences and the guiding hand of counsel is necessary to assure a meaningful defense."[21] That Court declined to focus on the label attached to the proceeding (there a resentencing proceeding), but instead said that the a critical stage is any place where "significant questions of law and fact with which the guiding hand of counsel would be necessary to adequately address, and because such hearings involve potentially significant

[21] *United States v. Hough*, No. 2:03-CR-00174, 2024 WL 957865, at *7 (W.D. Pa. Mar. 6, 2024). See also *Richardson v Superintendent Coal Twp SCI*, 905 F3d 750, 764–65 (CA 3, 2018).

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changes to a defendant's sentence." Here, the prosecution used these hearings to block defense witnesses and to read hearsay testimony from a preliminary examination, even when a new charge (the obstruction of justice charge) was added after the examination and *has never been* subject to cross-examination.

Here, the problem was compounded by the fact that the Defendant was not afforded the liberality typically associated with pro se litigants. Criminal defendants appearing in propria persona are held to "less stringent standards than formal pleadings drafted by lawyers." [22] In fact, the Canadian Judicial Council and Supreme Court have both said it is unethical conduct for a lawyer to "out lawyer" a self-represented litigant.[23] "Judges, the courts and other participants in the justice system have a responsibility to promote access to the justice system for all persons on an equal basis,

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[22] *Haines v Kerner*, 404 US 519, 520; 92 S Ct 594; 30 L Ed 2d 652 (1972); see also *People v Herrera*, 204 Mich App 333, 338–339; 514 NW2d 543 (1994).

[23]See Canadian Judicial Council "Statement of Principles on Self-represented Litigants and Accused Persons" available at https://cjc-ccm.ca/sites/default/files/documents/2020/Final-Statement-of-Principles-SRL.pdf; *Pintea v. Johns*, 2017 SCC 23, para 4; [2017] 1 S.C.R. 470, 472 ("we endorse the Statement of Principles on Self-Represented Litigants and Accused Persons (2006) established by the Canadian Judicial Council").

Canadian decisions are freely available for review and cite-checking at htts://www.canlii.org.

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regardless of representation."[24] For an extended discussion about why American courts should adopt these principles, the Appellant refers this Court this Court to Professor Goldschmidt's article.[25] The two legal systems of the two countries are sufficiently similar that this Court should not simply dismissed the principle "because it is Canada."[26] American Courts have generally noted the similarity between our legal systems.[27] Canadian Courts have frequently turned to American ethics rules and decisions to formulate their counterparts or the correct interpretation thereof.[28]

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[24] *Statement, Part B ("Promoting Justice")*

[25] Jona Goldschmidt, Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience, 17 Mich. St. J. Int'l L. 601 (2009)

[26] For a discussion of why Canadian precedent and American precedent are sufficiently similar as to have advisory value, *See* Gerard v La Forest, *The Use of American Precedents in Canadian Courts*, 46 Maine L Rev 212 (1994).

[27] *Aristech Chem Intern Ltd v Acrylic Fabricators Ltd*, 138 F3d 624, 629 (CA 6, 1998); *S Sys, Inc v Torrid Oven Ltd*, 58 F Supp 2d 843, 852 (WD Tenn, 1999) (the court concurs with the Sixth Circuit observation concerning the similarity of the Canadian legal system and that of the United States); *Hayes v Segue Software, Inc*, No. CIV.A. 301CV1490D, 2001 WL 1464708, at *8 (ND Tex, November 14, 2001)(noting similarity of the legal systems); *Podium Corp. Inc. v. Chekkit Geolocation Servs., Inc.*, No. 2:20-CV-352-JNP-DAO, 2021 5772269, at *5 (D. Utah Dec. 6, 2021) (same).

[28] *Law Society of Upper Canada v Curtis*, [1993] LSDD No 216 (relying on ABA Code of Professional Responsibility for Matrimonial Lawyers); *Rocket v Royal College of Dental Surgeons of Ontario,* [1988] OJ No 383 (following US Supreme Court precedent allowing licensed professionals to advertise).

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Running roughshod over an unrepresented litigant is bad enough in a civil case, but it is totally unacceptable in a criminal case. The prosecution has a higher duty to the administration of justice.[29] The prosecution's motions designed to shut down the Defendant's case were filed after he was pro se and filed right around the same time that two of the State's main witnesses became unavailable.

F. The Judicial Warnings of the Dangers of Pro Se Representation Were Particularly Important in this Case.

The right to counsel is one of the most important rights in a criminal proceeding. In order to waive the right to counsel, the trial court must determine that the defendant's request to represent himself is unequivocal.[30] Second, the trial court must determine that the defendant is asserting his right "knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation…"[31]

While the right to self-representation is also a constitution right, ambiguities in any waiver must be resolved in favor of a non-waiver. As this Court noted twenty years ago: "In sum, although

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[29]See, e.g. *Davis v Zant*, 36 F3d 1538, 1548 (CA 11, 1994) (noting special duty of fairness imposed on a public prosecutor).

[30] *King at 677*. See also *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976).

[31] MCL 763.1.

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the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, "is the standard, not the exception,"[21] in the absence of a proper waiver."[32]

A warning of the dangers of the dangers and disabilities is essential to an effective waiver. Warnings of the pitfalls of proceeding to trial without counsel must be "rigorously conveyed."[33] Finally, the trial court must determine that the defendant's self-representation will not unduly burden the administration of the court's business.[34]

Mr. Haupt did not unequivocally waive his right to counsel and agree to represent himself, and his conviction should be reversed because of the structural error that he was not represented by a lawyer at trial.[35] Because the trial court failed to make the express findings in support of a waiver as required under *Anderson*, we are left with post-hoc rationalizations.

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[32] *Russell*, 471 Mich at 189–90

[33] *Iowa v Tovar*, 541 US 77, 89; 124 S Ct 1379; 158 L Ed 2d 209 (2004).

[34] *Russell*, 471 Mich at 188, 190.

[35] US Const, Ams V, VI, XIV; Const 1963, art 1, §§17, 20; MCR 6.005(D); *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); *Anderson*, 398 Mich 361.

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The trial court further erred by failing to warn, discuss, or mention the dangers and risks of proceeding *pro per*.[36] The trial court fell far short of the substantial compliance requirement, neither discussing the substance of *Anderson* or MCR 6.005(D), nor making any express findings in support of the alleged waiver of counsel. *Russell*, 471 Mich at 191. Having done so eight months earlier, is clearly insufficient when Mr. Haupt almost immediately decided he wanted an attorney and where he never again said that he wished to represent himself. Here, the trial court should either have appointed new counsel to represent Mr. Haupt or simply kept Mr. Moore as the lawyer.

The Court noted that the presence of standby counsel does not obviate the error.[37] It is also worth noting that *King* was not a trial. In *King*, the defendant was experienced with the criminal justice system.[38] He discharged counsel because counsel would not file his motions. *Id.* The Court discharged counsel, but that counsel was appointed as standby counsel. The Defendant started the trial *pro se* but ultimately pled guilty pursuant to a *Cobbs* agreement,[39] which was negotiated by standby counsel. The Defendant was ultimately sentenced in accordance with the agreement and appealed. This

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[36] *Russell*, 471 Mich at 190

[37] *King*, 999 NW2d at 680

[38] *Id.* at 673.

[39] *People v Cobbs*, 443 Mich 276, 383; 505 NW2d 208 (1993).

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Court affirmed the Defendant's conviction but the Supreme Court finding that the defective waiver of counsel was valid. The Court remanded the matter to the trial court (not the Court for further proceedings). On remand, the Defendant went to trial (receiving a conviction).[40]

Allowing Mr. Haupt to represent himself in light of the above errors by the trial court deprived Mr. Haupt of his right to counsel and constitutes structural error that entitles Mr. Haupt to a new trial. Although partial failure to comply with *Anderson* and MCR 6.005(D) may not always require reversal,[41] when a defendant is left unrepresented during his only opportunity to present a defense and object to the admission of evidence, the effects of that deprivation pervade the entire proceeding and require reversal.[42]

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[40] *People v King*, 2017-000895-FH (available at https://courtpa.macombgov.org/eservices/searchresults.page?x=eDCWGhVwA0OSHZIcq7ksCM70lYNAcDoy3LZOJqFUusl-5oszGsaClZ9kYRASNXz4SWrQwQGeTbqhRf8KOcphCw).

[41] *People v Dennany*, 445 Mich 412, 439; 519 NW2d 128 (1994).

[42] *People v Willing*, 267 Mich App 208; 704 NW2d 472 (2005); see also *Glasser v United States*, 315 US 60, 76; 62 S Ct 457; 86 L Ed 680 (1942) ("The right to have the assistance of counsel [at trial] is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); *People v Grove*, 455 Mich 439, 446; 566 NW2d 547 (1997).

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The error here is of the type that is "so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the particular case.[43] As this Court has stated:[44]

> Structural errors ... are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. ... Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. ... [S]tructural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.

Many constitutional errors can be harmless, but deprivation of counsel at a critical stage of the proceedings such as trial is structural, requiring automatic reversal without regard to normal standards of prejudice or harmless error. [45]

Like *King*, this case must be remanded for a new trial.

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[43] *Delaware v Van Arsdall*, 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

[44] *People v Duncan*, 462 Mich 47, 51–52; 610 NW2d 551 (2000) (citations omitted).

[45] *E.g., Gideon*, 372 US 335;*Johnson v Zerbst*, 304 US 458, 463; 58 S Ct 1019; 82 L Ed 1461 (1938); *United States v Cronic*, 466 US 648, 658–659; 104 S Ct 2039; 80 L Ed 2d 657 (1984)); *Satterwhite v Texas*, 486 US 249, 256–257; 108 S Ct 1792; 100 L Ed 2d 284 (1988)).

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Relief

This Court should remand this matter for a new trial where Defendant can be properly represented by counsel.

Respectfully submitted,

/s/Stuart G. Friedman

Stuart G. Friedman (P46039)
Suzanne Carol Schuelke (P31330)
Attorneys for Defendant-Appellant
Friedman Legal Solutions, PLLC
26777 Central Park Blvd, #300
Southfield, MI 48076
(248) 228-3322
Fax: (248) 359-8695
e-Mail: stuart@crimlaw.biz

Dated July 15, 24

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Certification

The attached Brief contains 4753 words. The cover page, table of contents, statement of questions, table of authorities, this certification, request for oral arguments, and proof of service are excluded. This brief was produced using Microsoft Office 365 (2023 Edition for Macintosh).

Respectfully submitted,

FRIEDMAN LEGAL SOLUTIONS, PLLC

/s/Stuart G. Friedman

STUART G. FRIEDMAN (P46039)
Attorney for Defendant-Appellant
26777 Central Park Blvd, Suite 300
Southfield, MI 48076
(248) 228-3322

Dated July 15, 24

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Proof of Service

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

The undersigned declarant being first duly sworn, deposes and says that on February 16, 2024, (s)he did e-Serve a copy of the attached SUPPLEMENTAL BRIEF on opposing counsel via the Court's electronic filing system.

Declaration in Lieu of Notarization. I declare that the foregoing is true and correct to the best of my information, knowledge, and belief.

Respectfully submitted,

/s/Stuart G. Friedman

Declarant

DATED: February 16, 2024