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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v.

THERESA MARIE GAFKEN **No. 161835**
Defendant-Appellant.

L.C. No. 18-001241-FC
COA No. 345854

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN

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Statement of the Questions

I.

Duress is not a defense to murder, nor is diminished capacity (outside of an insanity defense), and so was alleged evidence of duress, and that allegedly PTSD caused defendant not to have "voluntary control" over her actions, properly excluded?

Amicus answers: YES

II.

The third malice alternative has been defined in two ways on numerous occasions by this Court and the Court of Appeals, and M Crim JI 16.5 has, for now, chosen one of them. The trial judge gave the other. Even if this was error because of the requirements of MCR 2.512(D)(2), was it prejudicial, where it correctly stated the law?

Amicus answers: NO

Statement of Facts

Amicus concurs in the facts as stated by the People of the State of Michigan.

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Argument

I.
Duress is not a defense to murder, nor is diminished capacity (outside of an insanity defense), and so alleged evidence of duress, and that allegedly PTSD caused defendant not to have "voluntary control" over her actions, was properly excluded.

Introduction

This Court has directed supplemental briefing on the questions

- whether the trial court erred in excluding evidence that the defendant was threatened and of the defendant's mental state at the time of the offense;
- whether the trial court erred in its instruction to the jury as to the intent element of second-degree murder; and
- whether any error was harmless.

Amicus submits that duress is not a defense to murder, that diminished capacity is not a defense to murder (and no insanity defense was raised) so as allow purported "mental-state" evidence, and that the instruction on malice was identical to the statement of the third-alternative method of proving malice in many appellate decisions, including from this Court, so that if the Court were to hold that the alternative way of stating the third-alternative laid out (now) in the Model Criminal Jury Instructions must be followed, any error is harmless, as the instruction given was not an incorrect statement of the law.

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Discussion

A. Under the common law, embraced by the Michigan murder statute, duress is not a defense to murder

1. Both murder and duress are common-law terms

The power to define crimes and ordain punishments is a legislative function, and all crimes in Michigan are statutory.[1] As Justice Campbell stated long ago, "[w]hatever elasticity there may be in civil matters, it is a safe and necessary rule that criminal law should not be tampered with except by legislation."[2] It is often the case that penal statutes employ terminology with a common-law meaning[3] without elaboration or further definition, and it has long been established that where this is so the "legislature intended no alteration or innovation of the common law not specifically expressed."[4] In this circumstance, once the common-law definition of a term has been determined, then where "the legislature [shows] no disposition to depart from the common-law definition, . . . it remains,"[5] for the use of a common-law term without alteration

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[1] As stated by Justice Campbell in *In re Lamphere*, 61 Mich. 105, 108 (1886): "While we have kept in our statute-books a general statute resorting to the common law for all nonenumerated crimes, there has always been a purpose in our legislation to have the whole ground of criminal law defined, as far as possible, by statute. There is no crime whatever punishable by our laws except by virtue of a statutory provision." While under MCL 750.505 conduct which was criminal at the common law is an offense, it is only because of the statute that this is so.

[2] 61 Mich. at 109-110. For a discussion of this entire area see Baughman, "Michigan's 'Uncommon Law' of Homicide," 7 Cooley L Rev. 1 (1990).

[3] Such as murder, or manslaughter.

[4] *Wales* v. *Lyon*, 2 Mich. 276, 283 (1851).

[5] *People* v. *Schmitt*, 275 Mich. 575 (1936). See also *People* v. *Utter*, 217 Mich. 74 (1921); *People* v. *Potter*, 5 Mich. 1 (1858); *Pitcher v. People*, 16 Mich. 42 (1867).

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is as much an enactment of the meaning of that term into statutory law as if the legislature had spelled out the common-law meaning chapter and verse in the statute.[6]

There is no question that the term embraced by the legislature in the murder statutes—murder—is a common-law term. "[I]n criminalizing second-degree murder in MCL 750.317, the Legislature incorporated the common-law definition of murder, which includes the element of malice. *People v. Couch*, 436 Mich. 414, 419-420, 461 N.W.2d 683 (1990) (recognizing that, in leaving murder undefined, the Legislature imported the common law's definition of murder into our statutes)."[7] The same is true of duress—"duress is a common-law affirmative defense."[8]

2. The common-law term "murder" encompasses three alternative states of mind, including so-called "depraved-heart" malice, which does not require a specific intent to kill or injure

As early as 1858 this Court said that murder occurs when "'a person of sound memory and discretion unlawfully kills any reasonable creature in being, in the peace of the state, with

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[6] *See People* v. *Couch*, 436 Mich. 414 (1990), where the Court noted that in enacting the murder statute with no alteration of the common-law definition the legislature had "adopt(ed) and "embrace(d)" the common-law definition, making it at least "debatable whether this Court still has the authority to change those definitions." 436 Mich. at 420.

See also People v. Riddle, 467 Mich. 116, 125–126 (2002) (emphasis supplied) ("'[W]here [a legislature] borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. In such case, absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them.' The criminal law, as defined at common law and codified by legislation, 'should not be tampered with except by legislation,' and this rule applies with equal force to *common-law terms encompassed in the defenses to common-law crimes*"); *People v. March*, 499 Mich. 389, 398 (2016).

[7] *People v. Wafer*, —Mich.— 2022 WL 481644, at 5 (2022).

[8] *People v. Reichard*, 505 Mich. 81, 88 (2020); *People v. Lemons*, 454 Mich. 234, 245 (1997); *People v. Dupree*, 486 Mich. 693, 703 (2010).

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malice prepense or aforethought, either express or implied,'" and the Court has said more recently that "the common law definition, is still retained in our statute."[9] And the 1858 *Potter* decision itself cited venerable authority. That opinion "defined murder nearly identically to the definition of murder that Blackstone attributed to Coke":

> "[W]hen 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 Law of England* (2d Cooley ed.), p. 195, quoting 3 Coke, *Institutes of the Laws of England*, p. 47. (This professed quotation of Coke was actually a close paraphrase; Coke defined murder as "when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with *malice fore-thought*, either expressed by the party, or implied by law...." 3 Coke, p. 47.) The malice enshrined in the common law understanding of murder "did not mean deliberate and calculating malice, but only malice existing at any time before the act so as to be its moving cause or concomitant."[10]

Second-degree murder thus has four components: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.[11]

And so, what does "malice" require, under the common-law understanding of murder? The elements of 2nd-degree murder include that the defendant "acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural

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[9] *People v. Reese*, 491 Mich. 127, 142–143 (2012), quoting *People v. Potter*, 5 Mich. 1, 6 (1858).

[10] *Potter*, at 6.

[11] "The elements of second-degree, or common-law, murder are "(1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse, or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." *People v. Bailey*, 451 Mich. 657, 669 (1996).

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tendency of his behavior is to cause death or great bodily harm."[12] The third alternative definition of malice was in earlier times known as "depraved-heart" murder, committed when a person "unintentionally kill[s] another person while conducting himself in an extremely negligent way ('evincing a depraved heart' . . .)—as where A, a workman constructing a tall building, without looking tossed a large stone from the roof onto a busy roadway below, thereby killing B, a pedestrian—the judges held such conduct to be murder . . . Though the stone-thrower did not intend to kill anyone"[13] As Stephen put it, one method of murder is to act with "knowledge that the act or omission which causes death will probably cause the death of, or grievous bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused."[14] This Court and the Court of Appeals have on many occasions defined this third malice alternative in similar terms[15] (to which amicus will return with regard to the instructional issue).

This third form of malice for proof of murder does not requiring a showing of specific intent to kill or injure, or any other specific intent; it is a general-intent offense: "The malice

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[12] *People v. Aaron*, 409 Mich. 672, 733 (1980).

[13] 2 LaFave *Substantive Criminal Law*, § 14.1(a), p. 568.

[14] 3 J. Stephen, *A History of the Criminal Law of England*, 22 (1883).

[15] *People v. Aaron*, supra; *People v. Woods*, 416 Mich. 581, 627 (1982); *People v. Nowack*, 462 Mich. 392, 409–410 (2000) ("While the intent to kill and the intent to cause great bodily harm 'sound suspiciously akin to the traditional language of specific intent' . . . neither intent is a necessary element of second-degree murder. '[A] wanton and willful disregard of the likelihood that the natural tendency of a person's behavior is to cause death or great bodily harm may also satisfy the malice requirement'"); *People v. Reichard*, at 87.

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element for depraved heart murder is general mens rea."[16] This is well-established, and not controversial;[17] indeed, defendant agrees with this proposition.[18] Defendant argues that the evidence he sought to admit—an amalgam of sorts of duress and PTSD—was admissible not for a diminished-capacity defense, which he agrees is not appropriate here, but, though "some of the arguments supporting admissibility veered toward the verboten territory of diminished capacity," the evidence was actually only offered for the defendant's "mens rea" at the time of the offense. Defendant believes that though not admissible to negate specific intent, the evidence *was* admissible to negate general intent.[19] This argument is essentially bifurcated as to alleged evidence of duress, and of PTSD from prior events in the defendant's life. Amicus begins with duress.

3. Duress is a common-law defense, and unavailable for murder

Duress is an excuse from the commission of a crime;[20] it therefore negates no element, including the mens rea, particularly of a general intent crime. As the United States Supreme Court has said, "[t]he duress defense . . . may excuse conduct that would otherwise be

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[16] *People v. Goecke*, 457 Mich. 442, 464 (1998);

[17] *People v. Langworthy*, 416 Mich. 630, 653 (1982) ("we hold that the defense of voluntary intoxication is not available to charges of the crimes of first-degree criminal sexual conduct and second-degree murder. Or, to use the traditional rubric, we hold that the above offenses are crimes of general intent"); *People v. Bailey*, supra, at 669.

[18] Defendant's supplemental brief, at 26 ("depraved-heart murder unquestionably is a 'general intent' crime").

[19] Id., at 26-30.

[20] *People v. Repke*, 103 Mich. 459, 471 (1895); *People v. Merhige*, 212 Mich. 601, 610 (1920); *People v. Luther*, 394 Mich. 619, 622 (1975) (duress "acknowledg[es] the will to do the act complained of but seek[s] to excuse it"); *People v. Lemons*, 454 Mich. 234, 247 (1997); *People v. Henderson*, 306 Mich. App. 1, 6 (2014).

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punishable, but the existence of duress normally *does not controvert any of the elements of the offense itself*. . . . the defense of duress does not negate a defendant's criminal state of mind *when the applicable offense requires a defendant to have acted knowingly or willfully*; instead, it allows the defendant to 'avoid liability ... because coercive conditions or necessity negates a conclusion of guilt even though the necessary mens rea was present.'"[21] Defendant argues that the common-law exclusion of the duress defense from murder cases is limited to only the first sort of 2nd-degree murder (and 1st-degree murder), where the killing is intentional, essentially trifurcating the offense with regard to the application of the duress defense. But as set forth previously, at the common law murder includes all three mental states, and the exclusion of the duress defense is as to "*murder*," with no limitation as to one particular form of murder, not, as defendant would have it, only intentional killing. Under the common law, as "[r]educed to a more easily digested analytic form" by Professor Dressler, "D will be acquitted of an offense *other than murder* [not "other than intentional killing] on the basis of duress if he pleads and proves that: (1) C unlawfully threatened imminently to kill or grievously injure him or another person; and (2) he was not at fault in exposing himself to the threat."[22] Professor Dressler continues that "Thankfully, coerced homicides (or, at least, reported prosecutions) have been rare. Nonetheless, there is considerable authority or dictum for the proposition that the defense may not be pleaded in murder prosecutions"[23]; indeed, "[s]temming from antiquity, the nearly

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[21] *Dixon v. United States*, 548 U.S. 1, 6–7, 126 S. Ct. 2437, 2441–42, 165 L. Ed. 2d 299 (2006) (emphasis supplied). See also *People v. Repke*; *People v. Lemons*, supra.

[22] Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1335 (1989) (emphasis suppled).

[23] *Id*., at 1343.

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'unbroken tradition' of Anglo-American common law is that *duress never excuses murder*"[24] [again, not "intentional murder"]. As put by the California Supreme Court, "duress is not a defense to any murder and, in particular, does not negate malice."[25] Michigan decisions have uniformly followed this principle,[26] save for one situation, that of a murder enhanced to 1st-degree murder because committed in the course of an enumerated felony, and even there the defense is not a defense to 2nd-degree murder, but only to 1st-degree, as negating the "aggravator" component of the predicate felony: "a successful [duress] defense would negate the aggravator element (i.e., commission of the underlying crime), by showing that the defendant was justified in committing the underlying felony. With the aggravator element negated, a prosecutor would still be able to proceed against the defendant on the lesser included offense of second-degree murder if the evidence supported that charge. In other words, the defendant's duress defense to the underlying felony *would only prevent the enhancement of second-degree murder to first-degree murder*."[27]

The ancient writers cited by defendant play him false, as they too refer only to "murder" not intentional murder or intentional killing.[28] As the Massachusetts Supreme Court has put it,

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[24] *Id.*, at 1370 (emphasis supplied). Further, "[s]ome courts also state that the defense may not be pleaded in any situation 'where innocent life is taken,' thus apparently disallowing the defense in manslaughter prosecutions." *Id.*, at 1343. In Michigan, *see People v. Moseler*, 202 Mich. App. 296 (1993).

[25] *People v. Hinton*, 126 P.3d 981, 1014 (CA, 2006).

[26] *See, e.g. People v. Young*, 120 Mich. App. 645, 653 (1982) (Beasley, J., dissenting, citing 4 Blackstone, *Commentaries* (1854), and Perkins *On Criminal Law* (2d ed).

[27] *People v. Reichard*, at 95–96.

[28] See 1 Hale, *History of the Pleas of the Crown*, p. 51; 4 Blackstone, *Commentaries on the Laws of England*, p. 30.

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"duress is not a defense to murder. . . . . [the primary concern is] one long embodied in the common law: that '[w]hen the defendant commits murder under duress, the resulting harm — i.e., the death of an innocent person — is at least as great as the threatened harm — i.e., the death of the defendant' . . . . The moral math of trading the defendant's life for the victim's does not add up to a valid defense that the jury may consider."[29] This is just as valid a concern when the defendant allegedly acts under duress in disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm; for example, as in driving over 100 mph through a busy intersection against a traffic light, with death or serious injury approaching certainty. The Court should decline defendant's invitation to trifurcate murder as it relates to the defense of duress, an invitation contrary to the common law,[30] and out of accord with the "law's traditional skepticism regarding the defense of duress."[31]

4. If the affirmative defense of duress is modified to excuse or mitigate 2nd-degree murder, the burden of persuasion should be on the defendant by a preponderance of the evidence, as it should be in all applications of the defense

a. This Court has not addressed the burden of persuasion on duress, and the Court of Appeals cases are wholly unpersuasive

"Duress is a common-law affirmative defense"[32] in the criminal law, and the "criminal law, as defined at common law and codified by legislation, 'should not be tampered with except

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[29] *Commonwealth v. Concepcion*, 164 N.E.3d 842, 860–861 (Mass., 2021).

[30] Although Professor LaFave says that "duress cannot excuse the intentional killing," 2 LaFave, *Substantive Criminal Law* § 9.7(b), he does not say it is *limited* to intentional killing, and provides no discussion on the point.

[31] *State v. Riker*, 869 P.2d 43, 50–51 (Wash., 1994).

[32] *People v. Lemons*, 454 Mich. 234, 245 (1997).

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by legislation,'" a rule that "applies with equal force to common-law terms encompassed in the defenses to common-law crimes." Because the legislature "has not acted to change the law of [duress] since it enacted the first Penal Code in 1846," courts are "proscribed from expanding or contracting the defense as it existed at common law."[33] Where, then, at the common-law did the burden of persuasion lie on a defense of excuse? This Court has not addressed the matter. The question was reserved by this Court in *Lemons* on the Court's finding that defendant's evidence did not suffice even to raise the defense,[34] and reserved again in the *Reichard*[35] case.[36] The Court observed in *Lemons*, however, that "due process is not offended where the state places the burden of persuasion on the defendant with respect to an affirmative defense such as insanity."[37] Then in the *Dupree* case the Court granted leave on the question "whether any of the common law defenses of self-defense, necessity or duress are applicable to the crime of possessing or carrying a firearm while ineligible to do so as a result of a prior felony conviction (felon-in-possession)

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[33] *People v. Riddle*, supra; *People v. Reese*, supra.

[34] "Because Ms. Lemons failed to carry her burden of production, we need not address here the issue whether the prosecution must disprove at least an element beyond a reasonable doubt once the defendant satisfies his burden of production, or if the defendant also bears the burden of persuasion on the defense by a preponderance of the evidence." *People v. Lemons*, at 248.

[35] *People v. Reichard*, at 96 (fn 32): "In its amicus brief, the Prosecuting Attorneys Association of Michigan contends that the burden of persuasion for duress should be on the defendant. However, because no party addressed this issue, we decline to reach it."

[36] *Reichard* held that duress could mitigate the degree of the offense from 1st to 2nd-degree murder where duress is a defense to the "aggravator"; that is, the enumerated predicate crime: a "successful defense would negate the aggravator element (i.e., commission of the underlying crime), by showing that the defendant was justified in committing the underlying felony. With the aggravator element negated, a prosecutor would still be able to proceed against the defendant on the lesser included offense of second-degree murder if the evidence supported that charge. In other words, the defendant's duress defense to the underlying felony *would only prevent the enhancement of second-degree murder to first-degree murder*." *Reichard*, at 95-96.

[37] *Lemons* at 248.

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proscribed by MCL 750.224f, and, if so, whether the defendant has the burden of proof to establish the defense."[38] But the Court concluded that "only the common law affirmative defense of self-defense was properly raised before the trial court,"[39] and so again did not address the question of the burden of persuasion for the affirmative common-law defense of duress. And, as indicated, the Court declined to reach the issue in *Reichard*, but, should this Court determine to include depraved-heart murder as an offense excused by duress—a result devoutly to be avoided—an answer should be supplied.[40]

Those cases in the Court of Appeals that have addressed the question and placed the burden of disproving duress beyond a reasonable doubt on the prosecution are entirely unpersuasive—crying out, then, for this Court to speak to the point—and conflate the affirmative common-law defense of justification by self-defense with the affirmative common-law defense of excuse by duress. The first case in Michigan jurisprudence to discuss the burden of persuasion appears to be *People v. Field*.[41] There the court said that "Under settled law of this state, the burden is upon the people to show facts and circumstances as convinced the jury beyond a

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[38] *People v. Dupree*, 485 Mich. 916 (2009) (order granting leave to appeal).

[39] *Dupree*, 486 Mich. at 696.

[40] Though it has been said by this Court that "the issues are controlled by the parties in the case," and that the Court "will not consider new issues raised" in amicus curiae briefs, *Young v. Wierenga*, 314 Mich. 287, 299 (1946); *Union Steam Pump Sales Co. v. Secretary of State*, 216 Mich. 261, 263 (1921), this is not a hard-and-fast rule, and the Court has discretion to consider an argument raised by an amicus, or to request further briefing from the parties on the argument. See *Bisio v. City of Vill. of Clarkston*, 506 Mich. 37, 49 (n.7) (2020); *People v. Hermiz*, 607 N.W.2d 367 (2000) (" Defendants are directed to respond to the argument raised by amicus curiae"). Where the burden of persuasion lies on the defense of duress is a necessary part of and fundamental to resolution of the issue here, should the Court extend the excuse of duress to murder charges. And the People *have* raised the question of burden of persuasion in this Court.

[41] *People v. Field*, 28 Mich. App. 476 (1970).

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reasonable doubt that his escape was not under duress."[42] But as to its claimed "settled law," the court made no reference to the common law, and cited only the 1932 case from this Court of *People v. Asbury*[43] and the 1968 case of the Court of Appeals of *People v. Johnson*.[44] Both, however, are self-defense cases, not involving the defense of excuse by duress in any way.[45] Cases discussing the burden of persuasion since that time have gone no further, simply relying, for the most part, on *Field*.[46]

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[42] *Id.,* at 478.

[43] *People v. Asbury*, 257 Mich. 297 (1932).

[44] *People v. Johnson*, 13 Mich. App. 69 (1968).

[45] In *Asbury* the Court held that "Under settled law of this state the burden was upon the people to show such facts and circumstances as convinced the jury beyond a reasonable doubt that the killing was not done in self-defense," *Asbury* at 298, and in *Johnson* the Court held that the prosecutor had erroneously placed the burden of persuasion on self-defense on the defendant, *Johnson* at 74 (and this Court reversed the Court of Appeals on this point, *People v. Johnson*, 382 Mich. 632 (1969), a year before *Field* was decided).

[46] *People v. Roupe*, 150 Mich. App. 469, 479 (1986) ("The trial judge also complied with the requirement of *People v. Field* . . . and informed the jury that the people bore the burden to show that the elements of duress were not present"); *People v. Blair*, 157 Mich. App. 43, 50 (1987) ("the prosecutor [must] . . . rebut this defense beyond a reasonable doubt. See *People v. Field*"); *People v. Terry*, 224 Mich. App. 447, 453–454, (1997) ("Once a defendant successfully raises the defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress. *People v. Field*)"; *People v. Dupree*, 284 Mich. App. 89, 115 (2009), aff'd, 486 Mich. 693 (2010) ("When a defendant raises the duress defense, the prosecution has the burden of showing, beyond a reasonable doubt, that the defendant did not act under duress. *People v. Field*"). And see unpublished cases, such as *People v. Plair*, 1999 WL 33433559, at 1 (No. 210566, 1999) ("A defendant must present some evidence on each element of the affirmative defenses of duress and necessity before the prosecutor has a burden of disproving the defenses beyond a reasonable doubt. . . . *People v. Field*"); *People v. Geoghegan*, 1998 WL 1990511, at 3 (No. 210652, 1998) ("the prosecution has the burden of proving beyond a reasonable doubt that the defendant did not act under duress. See *People v. Field*)"; *People v. Zavalnitskiy*, 2011 WL 475192, at 9 (No. 296013, 2011) "(We agree with Zavalnitskiy that . . . the prosecution has the burden of proving beyond a reasonable doubt that Zavalnitskiy was not acting under duress. See *Terry*, 224 Mich. App at 453; *People v. Field*").

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Several cases rely on this Court's decision in *People v. Luther*.[47] But these cases read the burden-of-proof requirement into *Luther*,[48] as the case does not discuss it. In *Luther* the issue was the defense of duress where offered to excuse the offense of prison escape; specifically, the difficulty was that the trial judge instructed the jurors that "it is not a defense to escaping prison that the defendant fled to avoid homosexual attacks by other prisoners."[49] This Court found this to be error, but there is no discussion or holding on the burden of persuasion, which likely explains this Court's considering taking up the issue in *Lemons* and *Dupree*. Again, should this Court extend the excuse of duress, the question of where lies the burden of persuasion should be answered.

b. At common law, the burden of persuasion on the affirmative defense of the excuse of duress rests with the accused

In the federal system the burden of persuasion on duress is squarely placed on the defendant by a preponderance of the evidence. And this is not a matter of statutory interpretation, but of exegesis of the common law. In *Dixon v. United States*[50] the defendant purchased firearms, and falsely declared that she was not at the time under indictment. She admitted the crime at trial, but argued that she acted under duress because her boyfriend

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[47] *People v. Luther*, 394 Mich. 619 (1975).

[48] *People v. Mendoza*, 108 Mich. App. 733, 739 (1981) ("In *People v. Luther* . . . the Michigan Supreme Court held that a defendant successfully raises the duress defense, requiring the prosecution to disprove duress beyond a reasonable doubt, when the defendant presents evidence from which a jury could conclude . . . ."); *People v. Stephens*, 103 Mich. App. 640, 644 (1981) ("A defendant must first produce evidence from which the jury could find the elements of duress were present. Once a defendant produces such evidence the burden of proof is on the prosecution to prove beyond a reasonable doubt that the defendant's escape was not under duress. *People v. Luther*").

[49] *People v. Luther,* at 621.

[50] *Dixon v. United States*, 548 U.S. 1, 126 S. Ct. 2437, 165 L. Ed. 2d 299 (2006).

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threatened to kill her or hurt her daughters if she did not buy the guns for him.[51] The jury was instructed that the burden of persuasion on duress was with the defendant by a preponderance of the evidence, and the propriety of this instruction was the issue before the Supreme Court. The Supreme Court held that:

> Although undisputed in this case, it bears repeating that, at common law, the burden of proving "affirmative defenses-indeed, 'all circumstances ... of justification, excuse or alleviation'-rested on the defendant.". . . . This common-law rule accords with the general evidentiary rule that "the burdens of producing evidence and of persuasion with regard to any given issue are both generally allocated to the same party.". . . And, in the context of the defense of duress, it accords with the doctrine that "where the facts with regard to an issue *lie peculiarly in the knowledge of a party, that party has the burden of proving the issue*.". . . *the common law long required the defendant to bear the burden of proving the existence of duress*.[52]

The Court also noted that "Congress can, if it chooses, enact a duress defense that places the burden on the Government to disprove duress beyond a reasonable doubt," but Congress had not done so.[53]

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[51] *Id*., at 2440.

[52] *Id*., at 2445 - 2446.

[53] *Id*., at 2447-2448 (emphasis supplied).

Concurring, Justice Kennedy said that "The claim of duress in most instances depends upon conduct that takes place before the criminal act; and, as the person who allegedly coerced the defendant is often unwilling to come forward and testify, the prosecution may be without any practical means of disproving the defendant's allegations. There is good reason, then, to maintain the usual rule of placing the burden of production and persuasion together on the party raising the issue." *Id*., at 2448-2449 (Kennedy, J., concurring). And Justice Alito, joined by Justice Scalia, observed that "Duress was an established defense at common law. See 4 W. Blackstone, *Commentaries on the Laws of England* 30 (1769). When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to this defense. Moreover, Congress presumptively intended for the burdens of production and persuasion to be placed, as they were at common law, on the defendant. Although Congress is certainly free to alter this pattern and place one or both burdens on the prosecution, either for all or selected federal crimes, Congress has not done so but instead has continued to revise the federal criminal laws and to create new federal crimes without addressing the issue of duress." *Id*., at 2449 (Alito, J., concurring).

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It is clear, then, as *Dixon* spells out, that at the common law the burden of persuasion rests with the defendant.

> "all . . . circumstances of justification, excuse or alleviation" rested on the defendant. 4 W. Blackstone, *Commentaries* 201; M. Foster, Crown Law 255 (1762); *Mullaney v. Wilbur*, supra, 421 U.S., at 693-694, 95 S.Ct., at 1886-1887. This was the rule when the Fifth Amendment was adopted, and it was the American rule when the Fourteenth Amendment was ratified. *Commonwealth v. York,* 50 Mass. 93 (1845).

Should it be necessary to reach the question—that is, if the Court extends the affirmative defense of the excuse of duress as an exculpatory or mitigating defense to murder—it should hold that the burden of persuasion rests on the defendant by a preponderance of the evidence. To paraphrase this Court in *Riddle*, "because our Legislature has not acted to change the law of [duress] since it enacted the first Penal Code in 1846, we are proscribed from expanding or contracting the defense as it existed at common law."

c. Jurisdictions which have codified the defense of duress place the burden of persuasion on the defendant

Though the defense of duress remains a common-law defense in Michigan, it is interesting to note that in many states where the legislature has codified the defense the statutory scheme places the burden of persuasion on the defendant. Of course, legislatures, including the Michigan legislature, to which policy arguments regarding the defense can be made, are free to apply the defense to whatever offenses they choose, and that some legislatures have chosen to

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In Michigan the legislature has spoken to the affirmative defense of the excuse of duress only in the context of prison escape, MCL 768.21b, requiring notice of the defense and witnesses, and corresponding rebuttal notice, and listing factors to be considered. The statute does not alter the common law as to the burden of persuasion, and is suggestive that under the statute itself the burden lies with the defendant ("In determining *whether or not the defendant broke prison while under duress* the jury or court may consider the following conditions if supported by competent evidence"). MCL 768.21b(4).

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expand the defense beyond the defense as understood by the common law does not change the defense in jurisdictions where the defense remains a common-law defense.

In Delaware duress is defined as an affirmative defense.[54] The burden of persuasion on affirmative defenses in Delaware rests on the defendant by a preponderance of the evidence.[55] In Alaska, the defense of excuse is an affirmative defense, [56] and the burden of persuasion rests on defendant by a preponderance of the evidence.[57] Placement of the burden of persuasion of the excuse of defense is common in states that have codified the defense.[58]

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[54] "(a) In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the conduct charged to constitute the offense because the defendant was coerced to do so by the use of, or a threat to use, force against the defendant's person or the person of another, which a reasonable person in the defendant's situation would have been unable to resist.
(b) The defense provided by subsection (a) of this section is unavailable if the defendant intentionally or recklessly placed himself or herself in a situation in which it was probable that the defendant would be subjected to duress." Del. Code Ann. tit. 11, § 431.

[55] "(a) When a defense declared by this Criminal Code or by another statute to be an affirmative defense is raised at trial, the defendant has the burden of establishing it by a preponderance of the evidence.
(b) Unless the court determines that no reasonable juror could find an affirmative defense established by a preponderance of the evidence presented by the defendant, the defendant is entitled to a jury instruction that the jury must acquit the defendant if they find the affirmative defense established by a preponderance of the evidence.
(c) An affirmative defense is established by a preponderance of the evidence when the jury is persuaded that the evidence makes it more likely than not that each element of the affirmative defense existed at the required time." Del. Code Ann. tit. 11, § 304.

[56] "(a) In any prosecution for an offense, it is an affirmative defense that the defendant engaged in the proscribed conduct because the defendant was coerced to do so by the use of unlawful force upon the defendant or a third person, which force a reasonable person in the defendant's situation would have been unable to resist.
(b) The defense of duress is not available when one recklessly places oneself in a situation in which it is probable that one will be subject to duress." Alaska Stat. Ann. § 11.81.440.

[57] "[A]affirmative defense" means that (A) some evidence must be admitted which places in issue the defense; and (B) the defendant has the burden of establishing the defense by a preponderance of the evidence." Alaska Stat. Ann. § 11.81.900(b)(2).

[58] *See e.g.* Tex. Penal Code Ann. § 2.04; N.Y. Penal Law § 25.00(b) (McKinney); Haw. Rev. Stat. Ann. § 701-115(5). And in some states where the defense is statutory the burden of persuasion is on the defendant by a preponderance as a matter of case decision. *See e.g. State v. Frost*, 161 P.3d 361, 366 (WA,

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d. Conclusion: the burden of persuasion on the common-law affirmative defense of the excuse of duress rests with defendant

If the Court determines that the affirmative defense of the excuse of duress will exculpate or mitigate murder, at least in some circumstances, then the question of the burden of persuasion must be answered. That defense remains a common-law defense in Michigan, and because our Legislature has not acted to change it since it enacted the first Penal Code in 1846, the Court is "proscribed from expanding or contracting the defense as it existed at common law." At common law, the burden of persuasion was on the defendant. This makes sense, as generally, affirmative defenses of excuse are uniquely within the defendant's knowledge and ability to establish. As the United States Solicitor General put it in the *Dixon* case, "[g]iven *the traditional distrust of the duress defense* — proof of which often consisted of little more than the accused's self-serving assertions [as in the present case] — it is not surprising that the common law placed the burden of proof on the defendant."[59] This Court should thus overrule Court of Appeals cases to the contrary, which do not rest on an exegesis of the common law, but a conflation of duress and self-defense, and hold that the burden of persuasion on duress rests with the defendant by a preponderance of the evidence, should the defense be held available in this case—and it should not.

2007) ("Duress is an affirmative defense, which the defendant must prove by a preponderance of the evidence. . . . As an affirmative defense, duress does not function to negate an element of the charged offense. . . .Rather, a finding of duress excuses the defendant's otherwise unlawful conduct. . . Washington law specifically provides for the defense of duress at RCW 9A.16.060").

[59] Brief of the Solicitor General, https://www.justice.gov/osg/brief/dixon-v-united-states-brief-merits.

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B. Diminished capacity is not a defense to a general-intent offense, and defendant's evidence is not relevant for any other issue

As noted previously,[60] 2nd-degree murder is a general intent crime, to which diminished capacity is no defense, a point with which defendant agrees and agreed below. Defendant argues that both the evidence of alleged duress and that of PTSD are admissible on "mens rea" of this general-intent offense, not being evidence of diminished capacity at all, though admitting that some arguments for admissibility below "veered toward the verboten territory of diminished capacity." Indeed, the argument of counsel to the trial court was that defendant suffered a "PTSD episode" and such persons are "acting not consciously what they're doing. They're acting — they do — in other words, they have no longer have a voluntary control over the way they're going to conduct their, their behavior because they're responding to the PSD (sic) trigger word."[61] This seems to amicus inescapably to constitute a diminished-capacity claim, and defendant was free to file notice of insanity and follow the statutory procedures for the defense (including carrying the burden of persuasion).

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[60] See notes 16-18 and accompanying text.

[61] Defendant's appendix, p. 49.

Amicus submits that the offer below with regard to how the alleged PTSD affected mens rea, and indeed its existence with regard to the defendant, was so ill-defined as to not properly present this issue, and so the Court should not reach it in this case. Counsel presented no medical proof that the defendant suffered from PTSD from sexual assault by a relative when she was 7-14 years of age, if she did when and how she suffered "episodes" and what they might have been, or how it would have affected defendant's driving under the circumstances of this case. The claim was that the alleged threat—the alleged duress— "triggered" PTSD. Defendant's appendix, p. 48. But to what end? As the court said, it struggled with a "nexus between these events," and defense counsel provided no help in that regard. Defendant's appendix, p. 51. As the trial court said, the defense was saying the defendant "drove in the manner that she did because she believed someone at that particular point had a gun to her back and she had no choice but to do that. That sounds like duress to me." Defendant's appendix, p. 52. And the court said later that "Mr. Marshall, PTSD is a medical diagnosis and you claim that your client has received that diagnosis. Well that's something that has to be established by medical opinion and adequate foundation. We have nothing. Have seen nothing, heard nothing that would establish any of that." Defendant's appendix, p.105.

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Amicus would note that whether the third malice alternative, "depraved heart" for convenience, requires subjective awareness of the risk caused by his or her conduct has never been resolved by this Court for this state, and, for the reasons stated previously, should not be resolved here.[62] In the *Goecke* case the Court decided to "reject the invitation to reach the issue and instead hold that, under either a subjective or an objective standard, sufficient proofs were presented" in the cases before it.[63] This is because it is only the "unusual case which raises the issue—where the defendant is more absent-minded, stupid or intoxicated [where voluntary intoxication is allowed as a defense] than the reasonable man."[64] And authorities are divided on the question; Justice Holmes, for example, took the view that the test at the common law—which is incorporated into our statute—is objective:

> If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. *The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen.*[65]

Some jurisdictions follow that view. In Massachusetts, for example, the third malice alternative is defined as "to do an act which, in the circumstances known to the defendant, a reasonable person would have known created a plain and strong likelihood that death would follow."[66]

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[62] See footnote 61.

[63] See e.g. *People v. Treadwell*, 2014 WL 783818, at 3 (No. 312549, 2014).

[64] 2 LaFave, *Substantive Criminal Law* § 14.4(b) (3d ed.).

[65] Oliver Wendell Holmes, *The Common Law*, p. 53-54 (emphasis supplied).

[66] See *Commonwealth v. Riley*, 7 N.E.3d 1060, 1079 (Mass., 2014); *Commonwealth v. West*, 169 N.E.3d 1169, 1191 (Mass., 2021).

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Maryland says that for malice with unintentional killings, "the defendant need not actually know that his conduct will result in the victim's death. The requisite mens rea is measured by an objective standard, i.e., could or should a reasonable person, under the circumstances, have foreseen that death would likely ensue as a result of his or her conduct. Thus, the likelihood requirement is no more than an objective, not a subjective, standard used to circumscribe and clarify the elements of intent and malice."[67] Other jurisdictions take a different view.[68] Amicus believes that Justice Holmes's view has the better of the common-law understanding, but again, for the reasons stated previously, as in *Goecke* the Court should not reach the question, defendant not having presented it properly below.[69]

Defendant argues that "Courts around the country have determined the diminished-capacity defense does not preclude otherwise-admissible mens rea evidence solely because it touches on limited intellectual functioning,"[70] but his cited authorities play him false, as they refer to *specific intent* and this evidence. In *State v Christensen*[71] evidence of a character trait of "impulsivity" was rejected as diminished-capacity evidence, a defense not allowed in the

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[67] *Thornton v. State*, 919 A.2d 678, 683 (Md., 2007).

[68] See e.g. *Williams v. United States*, 858 A.2d 984, 997–98 (D.C. 2004) ("For second-degree murder and manslaughter, where the element of malice is based on 'a wanton and willful disregard of an unreasonable human risk,' the accused's knowledge of the risk is to be judged under a subjective standard"); *Comber v. United States*, 584 A.2d 26, 39 & n. 12 (D.C.1990) (same); *State v. Brunell*, 615 A.2d 127, 131, (Vt., 1992) ("To be convicted of second-degree murder, the defendant must subjectively be aware of the deadly risk to the victim"); *People v. Watson*, 637 P.2d 279, 283 (Cal., 1981) ("a finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved, i. e., a subjective standard").

[69] If the Court nonetheless chooses to address the matter, amicus suggests it grant leave and call for further briefing on the point.

[70] Defendant's supplemental brief, p. 26 (fn 7).

[71] *State v Christensen*, 628 P2d 580 (Ariz.,1981).

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state. The Arizona Supreme Court held this error because the evidence went to *premeditation*; "[t]he establishment of the character trait of acting without reflection tends to establish that appellant acted impulsively. From such a fact, the jury could have concluded that he did not premeditate the homicide."[72] In *State v Mizell*[73] the PTSD evidence was held relevant to self-defense, going to whether the defendant, as required by Florida law at the time, "actually believed that the danger was real."[74] And to the contrary is the unpublished Fifth Circuit case of *United States v. Morazan-Alvarez*.[75] The defendant argued that the trial court improperly excluded PTSD testimony which would show she did not commit the offense voluntarily and did not have the requisite mental state for the charged offense.[76] Similar to the present case, she argued that sexual assault and domestic violence from six years prior were relevant to voluntariness of her action. The Court of Appeals agreed with the trial court that the PTSD was not relevant to a duress defense, nor to show that the defendant did not voluntarily commit the offense, saying that "[i]t would be anomalous to bar such evidence to establish duress and then allow it in the back door to negate the voluntariness component of general intent."[77]

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[72] Id., at 583.

[73] *State v Mizell*, 773 So. 2d 618 (Fla. App., 2000).

[74] Id., at 621.

[75] *United States v. Morazan-Alvarez*, 535 F. App'x 363, 364 (CA5, 2013).

[76] Id.

[77] Id., 368-369.

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C. Conclusion

The evidence was not admissible for duress, nor for a claim that defendant acted involuntarily in accelerating to over 100 mph, speeding down the middle lane, and into an intersection in disregard of a traffic signal. The Court of Appeals should be affirmed, or leave denied.

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II.

The third malice alternative has been defined in two ways on numerous occasions by this Court and the Court of Appeals, and M Crim JI 16.5 has, for now, chosen one of them. The trial judge gave the other. Even if this was error because of the requirements of MCR 2.512(D)(2), it was not prejudicial, as defendant cannot have been denied a fair trial by an instruction that correctly states the law.

There is a certain irony in defendant's claim that the trial court erred reversibly by giving an instruction that is a correct statement of the law. The claim is that it was error—and reversible error, meaning it denied defendant a fair trial—to instruct the jury consistently with the third-alternative malice definition set out by this Court in *Aaron*, and in other cases since that decision, rather than giving M Crim JI 16.5. Twenty-five years ago the opposite claim of error was made by the defendant in *People v. Flint*.[78] Defendant argued that "the third possible state of mind should have been defined as the wanton and willful disregard of the likelihood that the natural tendency of defendant's behavior was to cause great bodily harm, pursuant to *People v. Aaron*" rather than as defined in then CJI 2d 16.04 that the "defendant knowingly created a very high risk of death or great bodily harm knowing that death or great bodily harm was the likely result of his actions."[79] The answer of the Court of Appeals applies here as well: the two definitions are interchangeable,[80] and have been so used by this Court.

M Crim JI 16.5 defines the malice requirement for depraved-heart murder as "knowingly created a very high risk of death or great bodily harm knowing that death or such harm would be

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[78] *People v. Flint*, 1996 WL 33348796 (No. 185201,1996).

[79] Id., at 1.

[80] Id.

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the likely result of [his / her] actions," as CJI 2d 16.04 did. The jury instructions have been back-and-forth on the matter. In *People v. Dykehouse*[81] the Court noted that at the time of the crime there CJI 2d 16:2:01(10) provided that the defendant "must have knowingly created a very high risk of death with the knowledge that it probably would cause death," but had been amended at the time of the decision to provide that the defendant must have "committed a wanton and wilful act the natural tendency of which was to cause death or great bodily harm."[82] And now the instruction has returned to the language used in the instruction given the jury in *Dykehouse*. But the "wanton and wilful act" language is not incorrect; as indicated previously, it is exactly what this Court held in *Aaron*, and the language has been used numerous times by this Court and the Court of Appeals since then.[83] Sometimes, an opinion uses both definitions.[84]

Though formerly optional, the model instructions are now to be given if they accurately state the applicable law.[85] The trial judge appears to have viewed the two formulations as somewhat different, and that, when murder charges are brought predicated on vehicular operation, the instruction on wanton and wilful disregard is better suited.[86] In this he was mistaken, as the two formulations are different ways of stating the same thing. As the Court of Appeals correctly observed:

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[81] *People v. Dykhouse*, 418 Mich. 488 (1984).

[82] Id., at 497 (fn 4). See also *People v. Woods*, at 629 (fn 16).

[83] See fn 15, supra. And see *People v. Baskerville*, 333 Mich. App. 276, 284 (2020); *People v. Bailey*, 330 Mich. App. 41, 48 (2019); *People v. McMullan*, 488 Mich. 922 (2010).

[84] See, e.g., *People v. Abraham*, 256 Mich. App. 265, 270 (2003).

[85] MCR 2.512(D)(2)(b).

[86] Defendant's appendix, p. 89.

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> In *Reichard*, ___ Mich. at ____; slip op. at 5, our Supreme Court recently stated that "[a]s in every murder case, ... it must be shown that [the defendant] acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior is to cause death or great bodily harm." (Quotation marks and citation omitted.) Again, the *Reichard* Court also recognized the language in M. Crim. JI 16.5 as being accurate. Id. at ____; slip op. at 5 n. 11. We can only surmise that the Michigan Supreme Court is of the view that both provisions are legally sound, accurate, and applicable and are essentially interchangeable with no relevant difference. There is no indication in the caselaw that particular circumstances justify using one provision over the other.[87]

It was only because of the mandatory language in MCR 2.512(D)(2) that the Court of Appeals found error at all, but it found also that because "there is no meaningful difference between the two versions, the error was harmless."[88] It can hardly be said that a correct instruction on the law—even if a different, also correct instruction, on the point should have been given—is an error without which it is "more probable than not that a different outcome would have resulted."[89] No manifest injustice—required under MCL 769.26 for reversal—can be said to have been occasioned by the instruction given. To hold otherwise approaches embracing a doctrine of errorless harm.

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[87] *People v. Gafken*, 2020 WL 3399564, at 8 (No. 345954, 2020).

[88] Id.

[89] *People v. Lukity*, 460 Mich. 484, 495 (1999).

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Relief

Wherefore, amicus submits that the Court of Appeals should be affirmed.

Respectfully submitted,

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