# Criminal Proceedings Benchbook, Volume 3

*Content formerly part of the original MJI Circuit Court Benchbook and the MJI Criminal Procedure Monograph Series*

- Postjudgment Motions
- Probation Violations
- Postappeal Relief
- Habeas Corpus

## *Michigan Supreme Court*

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**Statements in this benchbook represent the professional judgment of the author and are not intended to be authoritative statements by the justices of the Michigan Supreme Court. In 2018, this benchbook was revised and retitled Criminal Proceedings Benchbook, Vol. 3 based on material that was initially published in the Criminal Proceedings Benchbook, Vol. 2. The text has been revised, reordered, and updated through May 21, 2025.**

# Note on Precedential Value

"A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this court rule." MCR 7.215(J)(1).

Several cases in this book have been reversed, vacated, or overruled in part and/or to the extent that they contained a specific holding on one issue or another. Generally, trial courts are bound by decisions of the Court of Appeals "until another panel of the Court of Appeals or [the Supreme] Court rules otherwise[.]" *In re Hague*, 412 Mich 532, 552 (1982). While a case that has been fully reversed, vacated, or overruled is no longer binding precedent, it is less clear when an opinion is not reversed, vacated, or overruled in its entirety. Some cases state that "an overruled proposition in a case is no reason to ignore all other holdings in the case." *People v Carson*, 220 Mich App 662, 672 (1996). See also *Stein v Home-Owners Ins Co*, 303 Mich App 382, 389 (2013) (distinguishing between reversals in their entirety and reversals in part); *Graham v Foster*, 500 Mich 23, 31 n 4 (2017) (because the Supreme Court vacated a portion of the Court of Appeals decision, "that portion of the Court of Appeals' opinion [had] no precedential effect and the trial court [was] not bound by its reasoning"). But see *Dunn v Detroit Inter-Ins Exch*, 254 Mich App 256, 262 (2002), citing MCR 7.215(J)(1) and stating that "a prior Court of Appeals decision that has been reversed on other grounds has no value. . . . [W]here the Supreme Court reverses a Court of Appeals decision on one issue and does not specifically address a second issue in the case, no rule of law remains from the Court of Appeals decision." See also *People v James*, 326 Mich App 98 (2018) (citing *Dunn* and MCR 7.215(J)(1) and stating that the decision, "*People v Crear*, 242 Mich App 158, 165-166 (2000), overruled in part on other grounds by *People v Miller*, 482 Mich 540 (2008), . . . [was] not binding"). Note that *Stein* specifically distinguished its holding from the *Dunn* holding because the precedent discussed in *Dunn* involved a reversal in its entirety while the precedent discussed in *Stein* involved a reversal in part.

The Michigan Judicial Institute endeavors to present accurate, binding precedent when discussing substantive legal issues. Because it is unclear how subsequent case history may affect the precedential value of a particular opinion, trial courts should proceed with caution when relying on cases that have negative subsequent history. The analysis presented in a case that is not binding may still be persuasive. See generally, *Dunn*, 254 Mich App at 264-266.

# Acknowledgments

The *Criminal Proceedings Benchbook*, *Volume 3*, is part of a three-volume set. The *Criminal Proceedings Benchbook*, *Volume 1*, concerns pretrial and trial matters, the *Criminal Proceedings Benchbook*, *Volume 2*, concerns sentencing, and the *Criminal Proceedings Benchbook*, *Volume 3*, concerns posttrial matters.

This revised edition of the *Criminal Proceedings Benchbook*, *Volume 3*, was authored by MJI Research Attorneys Lisa Schmitz and Kimberly Muschong and was edited by MJI Publications Manager Sarah Roth. The authors of this edition were greatly assisted by an editorial advisory committee whose members reviewed draft text and provided valuable feedback. The members of the editorial advisory committee were:

- Brett DeGroff, State Appellate Defender Office, Assistant Defender
- The Honorable John H. Hallacy, 37th Circuit Court, Calhoun County
- The Honorable Hala Y. Jarbou, 6th Circuit Court, Oakland County
- Anica Letica, Michigan Attorney General's Office, First Assistant Attorney General, Criminal Appellate Division
- The Honorable Sarah S. Lincoln, 37th Circuit Court, Calhoun County
- The Honorable Gerald M. Prill, 52nd Circuit Court, Huron County

The *Criminal Proceedings Benchbooks*, *Volumes 1*, *2*, and *3*, derive from the former MJI *Circuit Court Benchbook: Criminal Proceedings* and MJI *Criminal Procedure Monograph Series*. The information from those publications has been combined and reorganized to better serve MJI's core audience.

The MJI *Michigan Circuit Court Benchbook* was originally authored by Judge J. Richardson Johnson, 9th Circuit Court. In 2009, the *Michigan Circuit Court Benchbook* was revised and broken into three volumes: *Circuit Court Benchbook: Civil Proceedings—Revised Edition*; *Circuit Court Benchbook: Criminal Proceedings—Revised Edition*; and *Evidence Benchbook*. The three volumes were revised by MJI Research Attorneys Sarah Roth and Lisa Schmitz.

The MJI *Criminal Procedure Monograph* series formerly contained the following titles:

- Monograph 1: *Issuance of Complaints & Arrest Warrants—Fourth Edition*
- Monograph 2: *Issuance of Search Warrants—Fourth Edition*
- Monograph 3: *Misdemeanor Arraignments & Pleas—Third Edition*
- Monograph 4: *Felony Arraignments & Pleas—Third Edition*
- Monograph 5: *Preliminary Examinations—Third Edition*
- Monograph 6: *Pretrial Motions—Third Edition*
- Monograph 7: *Probation Revocation—Fourth Edition*
- Monograph 8: *Felony Sentencing—Revised Edition*
- Monograph 9: *Postconviction Proceedings*

Former MJI *Criminal Procedure Monographs 1-7* were originally authored in 1992 by MJI staff members Leonhard J. Kowalski, Dawn F. McCarty, and Margaret Vroman. The 1992 edition was funded in part by a grant from the W.K. Kellogg Foundation. Subsequent editions of these monographs were revised by MJI Research Attorneys with the assistance of an editorial advisory committee.

Former MJI *Criminal Procedure Monograph 8* was originally authored by former MJI Publications Manager Phoenix Hummel. Ms. Hummel and MJI Research Attorney Lisa Schmitz contributed to the revised edition and were assisted by an editorial advisory committee. MJI Publications Manager Sarah Roth served as editor.

Former *MJI Criminal Procedure Monograph 9* was originally authored by MJI Research Attorney Lisa Schmitz. Former MJI Publication Manager, Phoenix Hummel, served as editor. In addition, Ms. Schmitz was assisted by an editorial advisory committee.

# Using This Benchbook

This benchbook is intended for Michigan judges who handle criminal cases. The purpose of this benchbook is to provide a single source to address issues that may arise while the judge is on the bench. The benchbook is designed to be a quick reference, not an academic discussion. In that context, one of the most difficult challenges is organizing the text so that the user can readily find any topic as it arises.

This book has underlying themes that may assist the user to understand the overarching concepts around which the book is organized. This book is based upon the following concepts:

- The focus is on process rather than substantive law although substantive law is discussed when important or necessary to decision-making and the process as a whole.
- The text covers the routine issues that a judge may face and non-routine issues that require particular care when they arise.
- The text is intended to include the authority the judge needs to have at his or her fingertips to make a decision.
- The text is designed to be read aloud or incorporated in a written decision.
- The text attempts to identify whether the court's decision is discretionary.

With these concepts in mind, the text is organized as follows:

- The format generally follows the sequence of the Michigan Court Rules and the Michigan Rules of Evidence.
- The format generally follows the typical sequence in which issues arise during the course of a case.
- At the beginning of each chapter is a table of contents that lists what is covered in the chapter.
- Sections in each chapter are identified by the word or phrase typically used to identify the topic (a keyword concept).

- The discussion of each topic is designed to move from the general to the specific without undue elaboration.

- If the court is required to consider particular factors when making a decision, every effort has been made to identify the necessary elements.

- Every effort has been made to cite the relevant Michigan law using either the seminal case or the best current authority for a body of law. United States Supreme Court decisions are cited when Michigan courts are bound by that authority and they are the original source. There are references to federal decisions or decisions from other states when no applicable Michigan authority could be located.

- Every effort has been made to cite the source for each statement. If no authority is cited for a proposition, then the statement is the committee's opinion.

- If a proceeding or rule of evidence is based upon a statute, reference to that authority is given in the text.

The **Michigan Judicial Institute (MJI)** was created in 1977 by the Michigan Supreme Court. MJI is responsible for providing educational programs and written materials for Michigan judges and court personnel. In addition to formal seminar offerings, MJI is engaged in a broad range of publication activities, services, and projects that are designed to enhance the professional skills of all those serving in the Michigan court system. MJI welcomes comments and suggestions. Please send them to **Michigan Judicial Institute, Hall of Justice, P.O. Box 30048, Lansing, MI 48909. (517) 373–7171.**

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## Glossary

# Chapter 1: Postjudgment Motions

## 1.1 Quick Reference Materials

The Michigan Judicial Institute has created several Quick Reference Materials relevant to postjudgment motions:

- Postjudgment Options for Relief Table
- Motion for Directed Verdict of Acquittal After Jury Verdict Checklist
- Motion for New Trial Checklist
- Motion for Relief From Judgment Flowchart
- Motion for Relief From Judgment Checklist
- Motion to Correct an Invalid Sentence Checklist
- Motion to Correct Mistakes After Judgment Checklist
- Motion to Withdraw Plea After Sentence Checklist

# *Part A: Procedural Issues*

## 1.2 Limitations on Authority of Lower Court or Tribunal

"[A] trial court may not normally set aside or amend a judgment or order appealed from except under limited circumstances[.]" *People v Martin*, 271 Mich App 280, 331 (2006).

"After a claim of appeal is filed or leave to appeal is granted, the trial court or tribunal may not set aside or amend the judgment or order appealed from except

> (1) by order of the Court of Appeals,
>
> (2) by stipulation of the parties,
>
> (3) after a decision on the merits in an action in which a preliminary injunction was granted, or
>
> (4) as otherwise provided by law." MCR 7.208(A).

"In a criminal case, the filing of the claim of appeal does not preclude the trial court from granting a timely motion under [MCR 7.208(B)[1]]." MCR 7.208(A).

# 1.3 Postjudgment Motions in Criminal Cases

"Within the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(*iii*), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or to correct an invalid sentence." MCR 7.208(B)(1). See *People v LaPlaunt*, 217 Mich App 733, 736 (1996) ("[u]nder MCR 7.208(B), defendant had only fifty-six days after the time for the filing of his appellate brief commenced . . . to file his motion for a new trial").

"A copy of the motion must be filed with the Court of Appeals and served on the prosecuting attorney." MCR 7.208(B)(2).

"The trial court must hear and decide the motion within 56 days of filing, unless the court determines that an adjournment is necessary to secure evidence needed for the decision on the motion or that there is other good cause for an adjournment." MCR 7.208(B)(3). In many cases, securing "evidence needed for the decision" necessitates an evidentiary hearing. See *People v Ginther*, 390 Mich 436 (1973); *People v Cress*, 468 Mich 678 (2003); *People v Chenault*, 495 Mich 142 (2014). See also, generally, *People v Franklin*, 500 Mich 92, 109 (2017) (noting that although trial courts generally "possess reasonable discretion regarding whether to hold hearings concerning the range of motions that typically come before them," there are instances "in which trial courts are *obligated* to hold evidentiary hearings").

"Within 28 days of the trial court's decision, the court reporter or recorder must file with the trial court clerk the transcript of any hearing held." MCR 7.208(B)(4).

"If the motion is granted in whole or in part,

> (a) the defendant must file the appellant's brief or a notice of withdrawal of the appeal within 42 days after the trial court's decision or after the filing of the transcript of any hearing held, whichever is later;
>
> (b) the prosecuting attorney may file a cross-appeal in the manner provided by MCR 7.207 within 21 days after the trial court's decision. If the defendant has withdrawn the appeal before the prosecuting attorney has filed a cross-appeal, the prosecuting attorney may file a claim of appeal or an application for leave to appeal within the 21-day period." MCR 7.208(B)(5).

[1]See Section 1.3 for more information on MCR 7.208(B).

"If the motion is denied, defendant-appellant's brief must be filed within 42 days after the decision by the trial court or the filing of the transcript of any trial court hearing, whichever is later." MCR 7.208(B)(6).

The decision in *People v Kennedy*, 502 Mich 206 (2018)—holding that a defendant's entitlement to expert assistance is evaluated under the due process analysis set forth in *Ake v Oklahoma*, 470 US 68 (1985)—is not limited to pretrial motions and trial. *People v Ulp*, 504 Mich 964, 965 (2019).[2] The due process analysis applies whenever "an indigent criminal defendant claims he or she has not been provided the basic tools of an adequate defense and therefore did not have an adequate opportunity to present [his or her] claims fairly within the adversarial system," including on appeal. *Id.* (quotation marks and citations omitted; alteration in original). Accordingly, where the trial court denied the defendant's postjudgment motion for expert assistance and supplemental discovery because it concluded that "*Kennedy* [does] not apply to the defendant's postjudgment motions," the Michigan Supreme Court remanded the case "for reconsideration of the defendant's postjudgment motions on the merits." *Ulp*, 504 Mich at 965.

## 1.4 Appointment of Appellate Lawyer

### A. Required Advice

After imposing a sentence in a case involving a conviction following a trial, the trial court must immediately inform the defendant on the record that the defendant is entitled to appellate review of the conviction and sentence and that a lawyer will be appointed if the defendant cannot afford one. MCR 6.425(F)(1)(a)-(b). The defendant must file the request for a lawyer within 42 days after entry of the judgment of sentence if the defendant wants to appeal by right. MCR 6.425(F)(1)(c). Similarly, in a case involving a conviction following a plea of guilty or nolo contendere, the trial court must inform the defendant immediately after sentencing that he or she is entitled to file an application for leave to appeal and that a lawyer will be appointed if the defendant cannot afford one. MCR 6.425(F)(2)(a)-(b).[3] "The defendant must file the request for a lawyer within 6 months after the entry of the judgment of sentence." MCR 6.425(F)(2)(c).[4] "The court also must give the defendant a request for counsel form

[2]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook Vol. 1*, Chapter 9 for a discussion of a defendant's right to funding for expert witnesses and the *Kennedy* decision.

[3]See the Michigan Judicial Institute's *Criminal Proceedings Benchbook Vol. 1*, Chapter 6 for a discussion of guilty plea appeals.

[4]"A request for counsel must be deemed filed on the date on which it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier." MCR 6.425(F)(4).

containing the applicable instructions and deadlines under this rule." MCR 6.425(F)(3). "The court must give the defendant an opportunity to tender a completed request for counsel form at sentencing if the defendant wishes to do so." *Id*.

"A request for counsel must be deemed filed on the date on which it is received by the court or the Michigan Appellate Assigned Counsel System (MAACS), whichever is earlier." MCR 6.425(F)(4).

If an out-of-guidelines sentence is imposed, the court must advise the defendant that an appeal can be pursued on the grounds that the sentence "is longer or more severe than the range provided by the sentencing guidelines." MCR 6.425(F)(5). See also MCL 769.34(7) ("If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range.").[5]

**Requirements in district court proceedings.** "Immediately after imposing a sentence of incarceration, even if suspended, the court must advise the defendant, on the record or in writing, that:

> (a) if the defendant wishes to file an appeal and is financially unable to retain a lawyer, the local indigent criminal defense system's appointing authority will appoint a lawyer to represent the defendant on appeal, and
>
> (b) the request for a lawyer must be made within 14 days after sentencing." MCR 6.610(G)(4).

## B. Procedure for Appointment

MCR 6.425(G)(1) governs the appointment of an appellate lawyer and the preparation of transcripts in felony cases, and provides:

> "(a) All requests for the appointment of appellate counsel must be granted or denied on forms approved

[5]Both MCR 6.425 and MCL 769.34 have been amended since the Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." *People v Lockridge*, 498 Mich 358, 391 (2015). However, the text of the specific subrule and subsection of MCR 6.425(F)(5) and MCL 769.34(7) has not been affected by the respective amendments to the court rule and statute. MCL 769.34 was amended to omit language referring to substantial and compelling reasons and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. Accordingly, it is not clear whether the requirement regarding departure sentences in either provision is still relevant. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1, for a detailed discussion of *Lockridge*.

by the State Court Administrative Office and provided by MAACS.[6]

(b) Within 7 days after receiving a defendant's request for a lawyer, or within 7 days after the disposition of a postjudgment motion if one is filed, the trial court must submit the request, the judgment of sentence, the register of actions, and any additional requested information to MAACS under procedures approved by the Appellate Defender Commission for the preparation of an appropriate order granting or denying the request. The court must notify MAACS if it intends to deny the request for counsel.

(c) Within 7 days after receiving a request and related information from the trial court, MAACS must provide the court with a proposed order appointing appellate counsel or denying the appointment of appellate counsel. A proposed appointment order must name the State Appellate Defender Office (SADO) or an approved private attorney who is willing to accept an appointment for the appeal.

(d) Within 7 days after receiving a proposed order from MAACS, the trial court must rule on the request for a lawyer. If the defendant is indigent, the court must enter an order appointing a lawyer if the request for a lawyer is filed within 6 months after entry of the judgment of sentence or, if applicable, within the time for filing an appeal of right. An order denying a request for the appointment of appellate counsel must include a statement of reasons and must inform the defendant that the order denying the request may be appealed by filing an application for leave to appeal in the Court of Appeals in accordance with MCR 7.205.

(e) In a case involving a conviction following a trial, if the defendant's request for a lawyer was filed within the time for filing a claim of appeal, the order must be entered on an approved form entitled 'Claim of Appeal and Appointment of Counsel.'[7] Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204.

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[6] MAACS is an acronym for the Michigan Appellate Assigned Counsel System.

[7] See SCAO Form CC 403.

> (f) An appointment order must direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, the full transcript of all proceedings, and provide for the payment of the reporter's fees.
>
> (g) The trial court must serve MAACS with a copy of its order granting or denying a request for a lawyer. Unless MAACS has agreed to provide the order to any of the following, the trial court must also serve a copy of its order on the defendant, defense counsel, the prosecutor, and, if the order includes transcripts, the court reporter(s)/recorder(s). If the order is in the form of a Claim of Appeal and Appointment of Counsel, the court must also serve the Court of Appeals with a copy of the order and the judgment being appealed."

MCR 6.625 governs appeals and the appointment of appellate counsel in district court cases[8] and provides:

> "(A) An appeal from a misdemeanor case is governed by subchapter 7.100.
>
> (B) If the court imposed a sentence of incarceration, even if suspended, and the defendant is indigent, the local indigent criminal defense system's appointing authority must appoint a lawyer if, within 14 days after sentencing, the defendant files a request for a lawyer or makes a request on the record. If the defendant makes a request on the record, the court shall inform the appointing authority of the request that same day. Unless there is a postjudgment motion pending, the appointing authority must act on a defendant's request for a lawyer within 14 days after receiving it. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition. If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day of the appointment.
>
> (C) If indigency was not previously determined or there is a request for a redetermination of indigency, the court shall make an indigency determination unless the court's local funding unit has designated this duty to its appointing authority in its compliance plan with the

[8] For information on appeals from district court to circuit court, see the Michigan Judicial Institute's *Appeals & Opinions Benchbook*.

> Michigan Indigent Defense Commission. The determination of indigency and, if indigency is found, the appointment of counsel must occur with[in] 14 days of the request unless a postjudgment motion is pending. If there is a postjudgment motion pending, the appointing authority must act on the request after the court's disposition of the pending motion and within 14 days after that disposition.
>
> (D) If a lawyer is appointed, the 21 days for taking an appeal pursuant to MCR 7.104(A)(3) and MCR 7.105(A)(3) shall commence on the day the notice of appointment is filled with the court."

### C. Scope of Appellate Lawyer's Responsibilities

"The responsibilities of the appellate lawyer appointed to represent the defendant include representing the defendant

> (a) in available postconviction proceedings in the trial court the lawyer deems appropriate,
>
> (b) in postconviction proceedings in the Court of Appeals,
>
> (c) in available proceedings in the trial court the lawyer deems appropriate under MCR 7.208(B) or [MCR] 7.211(C)(1), and
>
> (d) as appellee in relation to any postconviction appeal taken by the prosecutor." MCR 6.425(G)(2).

## 1.5 Restoration of Appellate Rights

"If the defendant, whether convicted by plea or at trial, was denied the right to appellate review or the appointment of appellate counsel due to errors by the defendant's prior attorney or the court, or other factors outside the defendant's control, the trial court shall issue an order restarting the time in which to file an appeal or request counsel." MCR 6.428.

An error within the purview of MCR 6.428 was committed where "defendant's previous appellate counsel moved to dismiss his appeal in [the Court of Appeals] and then took no actions of record on defendant's previously filed motion for a new trial for over two years," and the "actions and inactions by prior counsel resulted in the trial court ruling that defendant had abandoned his motion for a new trial." *People v Byars*, 346 Mich App 554, 570 (2023). "Because of the errors of defendant's prior

appellate counsel, defendant was denied the right to appellate review"; "[a]ccordingly, defendant was and is entitled to have his appellate rights restored." *Id*. at 573. "Defendant's *in propria persona* motion under MCR 6.428 brought prior appellate counsel's errors to the trial court's attention, appropriately invoked MCR 6.428, and requested restoration of defendant's appellate rights." *Byars*, 346 Mich App at 573 (holding the trial court abused its discretion when it denied defendant's motion under MCR 6.428 and refused to restore his appellate rights).

The Court rejected the defendant's argument that "he was denied the right to appellate review because his appellate counsel failed to timely file a motion to withdraw his plea pursuant to MCR 6.310." *People v Tardy*, ___ Mich App ___, ___ (2023). While "an appellate attorney's failure to move to withdraw a defendant's plea under MCR 6.310(C) falls within MCR 6.428's purview because it could ostensibly result in the loss of the right to appellate review of plea-based claims under MCR 6.310(D)," "[t]his is not a case where appellate review of defendant's plea-based claims was never pursued." *Tardy*, ___ Mich App at ___. "Instead, in defendant's delayed application for leave, defendant not only challenged the circuit court's dismissal of his motion to withdraw his plea as untimely, but raised each of the substantive issues challenging his plea that he raised in his motion to withdraw"; "[t]hus, despite the untimely motion, he raised those issues before [the Court of Appeals], which denied the application for lack of merit in the grounds presented." *Id*. at ___ (quotation marks omitted). Accordingly, "[a]lthough the amended version of MCR 6.428 retroactively applies here, defendant has not demonstrated that he was denied his right to appellate review and is not entitled to the restoration of his appellate rights." *Tardy*, ___ Mich App at ___ (holding "the trial court did not err in denying relief under MCR 6.428").

# *Part B: Substantive Issues*

## 1.6 Motion for New Trial

In addition to the following discussion, see the Michigan Judicial Institute's Motion for New Trial Checklist.

### A. Time for Making Motion

"A motion for a new trial may be filed before the filing of a timely claim of appeal." MCR 6.431(A)(1).

"If a claim of appeal has been filed, a motion for a new trial may only be filed in accordance with the procedure set forth in MCR 7.208(B)[9] or the remand procedure set forth in MCR 7.211(C)(1)[10]." MCR 6.431(A)(2). See *People v LaPlaunt*, 217 Mich App 733, 735-736 (1996) ("[w]here a claim of appeal has been filed, MCR 6.431(A)(2) governs a criminal defendant's motion for a new trial").

"If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion for a new trial may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and [MCR 7.205(A)(2)(b)(*i*)-(*iii*)]." MCR 6.431(A)(3).

MCR 7.205(A)(2) provides, in relevant part:

> "In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:
>
> (a) 6 months after entry of the judgment or order; or
>
> (b) 42 days after:
>
> (*i*) an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;
>
> (*ii*) the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;
>
> (*iii*) the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed[.]"

Where "defendant argue[d] that the trial court delayed in appointing appellate counsel [and that] led to further delays that prejudiced his appeal," the Court did not find "any legitimate problem or deficiency caused by proceeding by leave granted[.]" *People v Jones*, ___ Mich App ___, ___ (2024). The Court explained that "MCR 7.205(A)(2)(b)(*i*) specifically provides for an appellate deadline that takes account of when appellate counsel is actually appointed, and everything the trial court did was in line with [that]." *Jones*, ___ Mich App at ___.

[9] See Section 1.3 for more information on MCR 7.208(B).

[10] See MCR 7.211(C)(1) for more information on motions to remand in the Court of Appeals.

"Defendant [did] not identify any instance when the trial court used, or even announced, an incorrect deadline." *Id*. at ___ (noting that "even if there had been an error made, the issue [was] moot" because "[d]efendant moved for leave to appeal, and [the] Court granted the motion").

"If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in [MCR 6.500 *et seq*[11]]." MCR 6.431(A)(4).

"If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." MCR 1.112.

## B. Reasons for Granting

"No . . . new trial [shall] be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26. See also MCR 6.431(B) ("On the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.");[12] *People v Terrell*, 289 Mich App 553, 559 (2010). "MCR 6.431(B) allows the trial court to order a new trial in a criminal case only when a motion has been brought by the defendant." *People v Torres*, 222 Mich App 411, 415 (1997). "The court must state its reasons for granting or denying a new trial orally on the record or in a written ruling made a part of the record." MCR 6.431(B). "A trial court abuses its discretion if it grants a new trial without providing a legally recognized basis for relief or if

[11]See Chapter 3 for more information on motions for relief from judgment under MCR 6.500 *et seq*.

[12]See also MCL 770.1, which states that "[t]he judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." MCL 770.1 "previously provided the standards for governing motions for new trials in criminal cases[;] [h]owever, with the adoption of MCR 6.431, the statutory standards have been superseded." *People v McEwan*, 214 Mich App 690, 693 n 1 (1995). See also *People v Rogers*, 335 Mich App 172, 192-193 (2020) (noting MCR 6.431 superseded MCL 770.1 and that "the proper inquiry is whether the trial court abused its discretion when it denied defendant's motion for a new trial under MCR 6.431(B), premised on newly discovered evidence" where defendant moved for a new trial under MCL 770.1, MCR 6.431, or MCR 6.502).

its basis for relief rests on an unreasonable interpretation of the record." *People v Loew*, ___ Mich ___, ___ (2024).

MCL 769.26 "creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 493 (1999). The statute does not apply to preserved, *constitutional* error. *Id.* at 495 n 3. "[MCL 769.26] presumes that a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496. "[T]he appropriate inquiry 'focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence.'" *Id.* at 495, quoting *People v Mateo*, 453 Mich 203, 215 (1996). See *People v Snyder*, 462 Mich 38, 45-46 (2000) (the conclusion that "exclusion of . . . impeachment evidence was error" "[wa]s based upon 'an examination of the entire cause,' as required by MCL 769.26[;]" "[t]herefore, [] the evidentiary error . . . was not harmless under the *Lukity* standard for assessing preserved, nonconstitutional error" and remand for a new trial was warranted). Even where "[t]he trial judge's actions fell short of the high ethical standards that Michigan jurists are expected to uphold," defendant was not entitled to a new trial under MCR 6.431(B) because "the trial judge's failure to recuse herself did not result in a miscarriage of justice at defendant's trial or deprive defendant of any constitutional right." *Loew*, ___ Mich at ___.[13]

Defendant was wrongly prevented from fully presenting a defense of self-defense when the trial court refused to admit evidence at defendant's trial of the threats defendant's former boyfriend made before defendant retrieved a firearm she kept under her bed and defendant's former boyfriend ultimately left defendant's home. *People v Nelson*, ___ Mich ___, ___ (2025). The Michigan Supreme Court held "that the Court of Appeals majority erred by holding that the trial court's ruling was not outcome-determinative under [*People v Lukity*, 460 Mich 484 (1999)]." *Nelson*, ___ Mich at ___. "[T]he trial court erroneously excluded defendant's testimony on direct examination and this error deprived defendant of the opportunity to sufficiently present her theory of self-defense." *Id.* at ___. In *Nelson*, "the only opportunity that defendant had to establish the heart of her defense occurred during a nonresponsive exchange with the party seeking her conviction." *Id.* at ___. "As a direct result, defense counsel did not refer to the threat in closing arguments to demonstrate that defendant was actually in fear for her life and that she was holding onto the firearm for protection." *Id.* at ___. The trial court expressly ruled that

[13] See Section 1.6(F)(2)(j) for more information on Grounds for a New Trial (Judicial Misconduct).

neither party was to refer to defendant's then-boyfriend's threats. *Id.* at ___. "Had defense counsel attempted to work the threat into closing arguments, defense counsel would have been disobeying the trial court's multiple admonishments not to present evidence of [the] threat." *Id.* at ___. Consequently, "during closing arguments, the prosecution had the opportunity to paint the picture that defendant was not in fear at all but instead wanted to intimidate defendant." *Id.* at ___. "Without defendant's testimony, the evidence presented at trial was inadequate to demonstrate to the jury that defendant was confronted with a deadly threat that would justify her possession of the firearm." *Id.* at ___. Thus, the Court concluded "that the trial court's failure to allow defendant to present this testimony about her self-defense theory, coupled with the jury's likely confusion regarding whether it could consider the statement at all, amount[ed] to errors that more probably than not were outcome-determinative under *Lukity* that require reversal." *Nelson*, ___ Mich at ___.

## C. Trial Without Jury

"If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment." MCR 6.431(C). The language of MCR 6.431(C) has been "construe[d] . . . to mean that where a defendant has been convicted in a bench trial, after the defendant's motion for a new trial has been granted and if the defendant consents, the trial court may take additional testimony instead of commencing another trial from the beginning." *People v McEwan*, 214 Mich App 690, 694-695 (1995).

## D. Inclusion of Motion for Judgment of Acquittal

"The court must consider a motion for a new trial challenging the weight or sufficiency of the evidence as including a motion for a directed verdict of acquittal." MCR 6.431(D).[14]

"When making findings pursuant to [MCR 6.431] the trial court should clearly distinguish on the record and in its order its disposition of the two motions [(motion for new trial and motion for directed verdict of acquittal)]." 1989 Staff Comment to MCR 6.431.[15]

See *Order Vacating Conviction and Entering New Disposition*, CC 387.

[14]See Section 1.7 for more information on Motion for Judgment of Acquittal (Directed Verdict).

[15]"[A] staff comment to the Michigan Court Rules is not binding authority." *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

## E. Standard of Review

Appellate courts "review for an abuse of discretion a trial court's decision to grant or deny a new trial." *People v Terrell*, 289 Mich App 553, 558 (2010). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id.* at 559. "Underlying questions of law are reviewed de novo, while a trial court's factual findings are reviewed for clear error[.]" *Id.* (citations omitted).

## F. Grounds for a New Trial

The following subsections address several common grounds on which a motion for a new trial may be based. For discussion of additional substantive bases for new trial motions, such as double jeopardy violations and prosecutorial error, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*.

### 1. Newly Discovered Evidence

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6 (1996). **.**"[T]he defendant carries the burden of making the requisite showing regarding each of the four parts of the *Cress* test." *People v Rao*, 491 Mich 271, 274 (2012). See also *People v Lemons*, ___ Mich ___, ___ (2024) (holding that "the trial court abused its discretion by deeming defendant's proposed expert testimony inadmissible," and defendant overcame "the procedural threshold of MCR 6.502(G) and . . . established 'good cause' and 'actual prejudice' as required by MCR 6.508(D)(3) by demonstrating all four factors of *Cress*").

"'[N]ewly discovered evidence' for purposes of a motion for new trial is evidence about some purported thing or event that existed or took place prior to the original trial's conclusion." *People v Rogers*, 335 Mich App 172, 201 (2020). For example, recantation evidence is newly discovered evidence "because it is evidence of false testimony given during the trial," and "new, previously unknown eyewitness testimony" is newly discovered evidence "because it is evidence about an event (i.e., the crime) that occurred before the trial." *Id.*

**Third prong of *Cress* test.** "[U]nder *Cress*, when a defendant is *aware* of evidence before trial, he or she is charged with the burden of using *reasonable diligence* to make that evidence available and produce it at trial[;] [a] defendant who fails to do so cannot satisfy the first and third parts of the *Cress* test." *Rao*, 491 Mich at 283. "When evidence is known to the defendant at the time of trial, but is claimed to have been unavailable, the third part of the *Cress* test is necessarily implicated because it requires a showing that the defendant 'could not, using reasonable diligence, have discovered and produced the evidence at trial[.]'" *Id*., quoting *Cress*, 468 Mich at 692. "[W]hat constitutes reasonable diligence in producing evidence at trial depends on the circumstances of the case." *Rao*, 491 Mich at 283-284. "[T]he law affords a defendant procedural avenues to secure and produce evidence and, under *Cress*, a defendant must employ these avenues in a timely manner because evidence that is known to the defendant, yet not produced until after trial, will not be considered grounds for a new trial." *Id*. at 284.

**Fourth prong of *Cress* test.** "In order to determine whether newly discovered evidence makes a different result probable on retrial, a trial court must first determine whether the evidence is credible," and "[i]n making this assessment, the trial court should consider all relevant factors tending to either bolster or diminish the veracity of the witness's testimony." *People v Johnson*, 502 Mich 541, 566-567 (2018). See also *People v Lemons*, ___ Mich ___, ___ (2024) (noting that the defendant satisfied all four prongs of *Cress* "in light of the conclusion that most of defendant's proffered expert testimony would be admissible and because *all* evidence that would be presented at a new trial must be considered when deciding whether new evidence would make a different result probable[.]") "A trial court's function is limited when reviewing newly discovered evidence, as it is not the ultimate fact-finder; should a trial court grant a motion for relief from judgment, the case would be remanded for *retrial*, not dismissal." *Johnson*, 502 Mich at 567. "In other words, a trial court's credibility determination is concerned with whether a *reasonable juror* could find the testimony credible on retrial." *Id*. (holding defendants are entitled to a new trial where the trial court focused only on the "questionable aspects" of the newly-discovered testimony and failed to acknowledge the "reliable aspects" and when the testimony is considered "in its entirety," "a reasonable juror could find [the witness's] testimony worthy of belief on retrial"). See also *Rogers*, 335 Mich App at 203 (holding that the trial court erred with respect to its credibility determinations because it "reconciled conflicting testimony"—concluding the witness had a motive to recant her statements—"but it did not consider what a reasonable juror could make of

the conflicting testimony"). A trial court may not conclude that a witness is not credible solely because of the witness's criminal history. *People v Corley*, 503 Mich 1004, 1004, 1006 (2019) (remanding for a new trial where "[t]he prosecution's evidence was not overwhelming, and the new [disinterested] witness's testimony would have undermined that evidence significantly").

"[W]hen evaluating a motion for new trial based on newly discovered evidence, the court must consider the evidence admitted at the original trial and *all* of the *record* evidence that has come to light to-date that could be used at the retrial." *Rogers*, 335 Mich App at 202. For example, a different result was probable on retrial where the witness recanted her statements that the defendant sexually assaulted her, explained she lied because she wanted defendant's family to help her, and after the original trial she admitted to falsely accusing different family members of sexual assault. *Id.* at 189-190, 203. Because the newly discovered evidence—the victim's recantation—combined with the additional evidence that would be presented on retrial—the victim's false accusations of sexual assault against different family members—discredited the victim "to a significant extent," and "[t]he original trial was a classic 'he said/she said' credibility contest between the victim and the defendant," defendant was entitled to a new trial. *Id.* at 205, 208.

**Changed testimony.** When a medical examiner, "who had testified at trial for the prosecution, testified at the evidentiary hearing that he had changed his mind about [the victim's] diagnosis" based on new biomechanical scientific evidence, the Court noted that "in light of the conclusion that most of defendant's proffered expert testimony would be admissible and because *all* evidence that would be presented at a new trial must be considered when deciding whether new evidence would make a different result probable . . . defendant has satisfied all four prongs of *Cress*." *People v Lemons*, ___ Mich ___, ___ (2024) (conviction based on shaken baby syndrome (SBS)). "[U]nlike at the first trial, at retrial defendant could present evidence concerning the alleged controversy in the medical community regarding the SBS diagnosis." *Id.* at ___. "The defense experts opined that other conditions could cause the triad of symptoms and questioned the scientific quality of the literature regarding the diagnostic accuracy of SBS based on the triad." *Id.* at ___. "[Defense experts] cited published articles, reports, and studies in support of their opinions." *Id.* at ___. "As the panel recognized, proponents of the SBS diagnosis as well as experts such as those presented by defendant, who disagree with or are skeptical of the SBS diagnosis, rely on the same sources of data." *Id.* at ___. "They simply reach different conclusions by attaching

different interpretations to that information. *Id*. at ___. "These divergences are a matter of weight, not admissibility." *Id*. at ___.

"[A]t retrial, defendant could call [the medical examiner] to testify about his changed opinion regarding [the victim's] cause of death as well as several expert witnesses who would testify that SBS is a questionable diagnosis, that [the victim's] injuries were not consistent with abusive shaking, and who would provide the jury with a potential alternate cause of death." *Id*. at ___. "In rejecting defendant's claim for relief under *Cress*, the Court of Appeals relied heavily on her confession. But if a fact-finder believes the defense experts' testimony that SBS cannot occur without an accompanying catastrophic neck injury, then the jury might conclude that defendant's confession—obtained only after she was told that [the victim] died from shaking—was false." *Id*. at ___. "As we have recognized elsewhere, suspects presented with seemingly incontrovertible physical evidence of their guilt may confess falsely to ameliorate their current conditions." *Id*. at ___.

"And while, as the Court of Appeals noted, defendant's actions prior to [the victim's] death could easily be construed as indicating consciousness of guilt, . . . in light of the new evidence, a jury might also view defendant's actions as those of a frantic and panicked parent. *Id*. at ___. These are questions properly left to the jury. *Id*. at ___. "Taken together, we conclude that defendant has presented enough evidence to demonstrate that a different result on retrial is 'probable.'" *Id*. at ___. "That is, not that the chance of acquittal is a mere possibility, but instead, there is a reasonably probable likelihood that a jury would have a reasonable doubt as to defendant's guilt." *Id*. at ___.

**Witness recantation.** Concluding that a different result on retrial was probable, the court held that "the trial court erred by not considering the impact that . . . witnesses' recantations would likely have on retrial, especially within the context of a retrial not tainted by the prosecutor's misconduct from the first trial." *People v Bacall*, ___ Mich App ___, ___ (2025).[16] "For a trial court to grant a new trial on the basis of newly discovered evidence, the defendant must show that: '(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered

[16]This case involves four courts, and two of the four had two or more decisions arising from the proceedings there: the trial court (jury trial, motion for relief from judgment, motion for reconsideration of the trial court's denial of relief from judgment); the Michigan Court of Appeals on direct appeal; the United States District Court for the Eastern District of Michigan (defendant's petition for a writ of habeas corpus); the United States Court of Appeals for the Sixth Circuit (appeal of denial of defendant's petition for a writ of habeas corpus); and the Michigan Court of Appeals for a second time (appeal of trial court's denial of defendant's motion for relief from judgment).

evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.'" *Id*. at ___, quoting *People v Cress*, 468 Mich 678, 692 (2003). Here, "the primary issue . . . is whether the new evidence makes a different result probable on retrial." *Bacall*, ___ Mich App at ___ (quotation marks and citation omitted). In this case, "[d]efendant was convicted of first-degree murder and carrying a firearm during commission of a felony." *Id*. at ___. "After two witnesses recanted their testimony, and because of prosecutorial misconduct during trial and indications that the jury struggled with the verdict, the . . . Conviction Integrity Unit [CIU] . . . recommended that the conviction be vacated in exchange for a guilty plea to second-degree murder." *Id*. at ___. "The CIU report explained how the CIU found that, when considering the recantations along with the prosecutor's statements about self-defense and the indication that the jury struggled with the verdict, a different result would be probable on retrial." *Id*. at ___.

On direct appeal of his convictions, the Court of Appeals in an unpublished opinion concluded that "[t]he prosecutor's assertion that defendant never claimed self-defense before trial . . . was 'clearly false' and 'highly inappropriate,' constituting misconduct for which the trial court should have provided curative instructions when so requested." *Bacall*, ___ Mich App at ___, quoting *People v Bacall*, unpublished per curiam opinion of the Court of Appeals, issued March 5, 2013 (Docket No. 306269), p 5. "This Court concluded, however, that, considering 'the overwhelming evidence which includes the testimony of an eyewitness to the shooting, defendant's statements to the police and a videotape of some of the events themselves, we conclude that the prosecutor's improper statement did not deny defendant a fair trial.'" *Id*. at ___. In the appeal from the trial court's denial of defendant's and the prosecution's joint motion for reconsideration of the trial court's denial of defendant's motion for relief from judgment, the Court noted that both witnesses' "testimonies composed much of the evidence of premeditation." *Bacall*, ___ Mich App at ___. "[E]ven without the newly discovered evidence, the Sixth Circuit explained [in defendant's appeal of the district court's denial of his petition for a writ of habeas corpus] that the mention of the excluded concealed-carry permit could seriously damage a jury's willingness to believe the permit holder's claim of self-defense and noted that, if it were directly reviewing the case, the court "might find that a new trial was necessary." *Id*. at ___ (quotation marks and citation removed). "At a new trial, the prosecutor would avoid these plainly improper remarks, and there would

be more evidence of self-defense than was presented at the original trial." *Id*. at ___. "Finally, the jury question [regarding the verdict] indicated that the jury was struggling to arrive at a decision, and this was confirmed by the foreperson, who said that the jury's decision was not an 'easy' one." *Id*. at ___. "Taken together, a different result on retrial is probable, and the trial court abused its discretion in concluding otherwise." *Id*. at ___. Accordingly, "when a trial court grants a motion for relief from judgment on the basis of newly discovered evidence, retrial, rather than dismissal, is the appropriate remedy." *Id*. at ___.

**Codefendant's testimony.** "[W]hen a defendant knew or should have known that a codefendant could provide exculpatory testimony, but did not obtain that testimony because the codefendant invoked the privilege against self-incrimination, the codefendant's posttrial statements do not constitute newly discovered evidence, but are merely newly *available* evidence." *People v Terrell*, 289 Mich App 553, 555 (2010) (emphasis added). There still exists "the possibility that a codefendant's posttrial or postconviction exculpatory statements might qualify as newly discovered evidence under MCR 6.431(B)." *Terrell*, 289 Mich App at 570. However, where a "defendant knew or should have known that his codefendant could offer material testimony about defendant's role in the charged crime, his [or her] inability or unwillingness to procure that testimony before or during trial should not be redressed by granting . . . a new trial." *Id*.

**False confession.** "A false confession (i.e., one that does not coincide with established facts) will not warrant a new trial, and it is within the trial court's discretion to determine the credibility of the confessor." *Cress*, 468 Mich at 692.

**Perjured testimony.** "The discovery that testimony introduced at trial was perjured may be grounds for a new trial." *People v Mechura*, 205 Mich App 481, 483 (1994).

**Impeachment evidence.** "[I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in [*Cress*, 468 Mich at 692; however,] . . . a material, exculpatory connection must exist between the newly discovered evidence and significantly important evidence presented at trial[, and] . . . the evidence must make a different result probable on retrial." *People v Grissom*, 492 Mich 296, 299-300 (2012). Further, counsel must still be reasonably diligent in securing the evidence before trial. *People v Armstrong (Parys)*, 305 Mich App 230, 241-243 (2014) (the trial court properly denied the defendant's motion for a new trial where "defense counsel waited until the evening before trial to search for newly discovered impeachment witnesses[;]" had "defense counsel more actively

attempted to secure impeachment witnesses, he could have discovered the witnesses in time for . . . trial").

Newly discovered impeachment evidence that one of the witnesses in the case—a deputy—made a false statement in a search warrant affidavit in a different case was not grounds for a new trial where the "defendant fail[ed] to make any connection between [the] holding regarding [the deputy's] untruthfulness in [the other case] and the search warrant affidavit or trial testimony in [the defendant's] case." *People v Abcumby-Blair*, 335 Mich App 210, 226-227 (2020). Specifically, defendant has not "pointed to any specific portion of the affidavit potentially tainted by [the deputy's] input, nor has he offered either evidence or argumentation" making "it probable that the trial court would find the warrant invalid and suppress the evidence collected pursuant to the warrant." *Id.* at 227-228 (holding that in light of the other evidence presented at the defendant's trial, the new evidence did not make a different outcome probable).

## 2. In the Interest of Justice

### a. Instructional Error

"Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence." *People v Dobek*, 274 Mich App 58, 82 (2007). "Jury instructions are reviewed in their entirety, and there is no error requiring reversal if the instructions sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Id.*

"'A court must properly instruct the jury so that [the jury] may correctly and intelligently decide the case.'" *People v Allen*, ___ Mich App ___, ___ (2025), quoting *People v Traver*, 502 Mich 23, 31 (2018). "'The instruction to the jury must include all elements of the crime charged, and must not exclude from jury consideration material issues, defenses or theories if there is evidence to support them.'" *Allen*, ___ Mich App at ___, quoting *Traver*, 502 Mich at 31. In *Allen*, "the trial court's decision to deny defendant's request for a self-defense instruction was error and that . . . error was outcome-determinative." *Allen*, ___ Mich App at ___. There, "[d]efendant contend[ed] that the fact he was a felon-in-possession at the time of the shooting was not relevant to whether he was entitled to an instruction under the common law, under which there is no requirement that defendant not be committing a

crime while also employing self-defense." *Allen*, ___ Mich App at ___. "Self-defense may be invoked by a criminal defendant under the common law, under which the defendant must present evidence that (1) he honestly and reasonably believed that he was in danger, (2) the danger feared was death or serious bodily harm, (3) the action taken appeared at the time to be immediately necessary, and (4) he was not the initial aggressor." *Id.* at ___, citing *People v Riddle*, 467 Mich 116, 127 (2002). "Moreover, unless attacked inside one's own home, or subjected to a sudden, fierce, and violent attack, a person has a common-law duty to retreat, if possible, as far as safely possible." *Allen*, ___ Mich App at ___ (quotation marks and citation omitted). "The common law self-defense instruction in M Crim JI 7.16(1) reflects this duty to retreat . . . ." *Allen*, ___ Mich App at ___. Additionally, the Self-Defense Act (SDA) "modified the common law's duty to retreat that was imposed on individuals who were attacked outside their own home or were not subjected to a sudden, fierce, and violent attack." *Id.* at ___ (quotation marks and citation omitted). "However, the SDA continues to require that a person have an honest and reasonable belief that there is a danger of death, great bodily harm, or a sexual assault in order to justify the use of deadly force." *Id.* at ___ (quotation marks and citation omitted). "It is apparent . . . that the trial court based its denial of defendant's request on two factors: (1) defendant possessed a firearm before the shooting, which he was not legally allowed to do; and (2) defendant was at least a co-equal aggressor in the fight and, therefore, could not have believed the use of deadly force was necessary." *Id.* at ___. "The first rationale—that defendant was unlawfully possessing a firearm for hours before the shooting occurred—was improper because defendant was not seeking an instruction under the SDA." *Id.* at ___. "As someone who was committing a crime at the time the shooting occurred—defendant was a convicted felon in possession of a handgun—he was not entitled to seek an instruction under the SDA, which would have potentially allowed him to argue that he had no duty to retreat before using deadly force." *Id.* at ___. But "defendant did not seek an instruction that included a duty to retreat, and the trial court's reliance on the fact that defendant was a felon-in-possession at the time of the shooting when denying the request was erroneous." *Id.* at ___. The trial court's second rationale for denying defendant's request "relied heavily on the fact that defendant was—if not the initial aggressor—at least ready and willing to fight the

victim and therefore had not demonstrated he was in fear of death or bodily harm." *Id*. at ___. "While the fact that defendant assertively asked the victim to meet him outside shows that there may have been no fear of imminent death or great bodily harm at that precise moment, defendant stated that he thought he saw a gun drawn after he issued that challenge." *Id*. at ___. Although "defendant's self-serving testimony was inherently suspect, it was for the jury to decide whether his version of events was more believable." *Id*. at ___. Therefore, "[t]he court . . . usurped the role of the jury by determining that defendant was not credible and that he did not have an honest and reasonable belief that his life was in imminent danger." *Id*. at ___. "Thus, because there was sufficient evidence to support an instruction on self-defense for the murder charge, the trial court abused its discretion when it denied defendant's request for a self-defense instruction." *Id*. at ___.

"[A] jury instruction that improperly omits an element of a crime amounts to constitutional error." *People v Kowalski*, 489 Mich 488, 503 (2011). However, "[w]hen defense counsel clearly expresses satisfaction with a trial court's [jury instructions], counsel's action will be deemed to constitute a waiver." *Id*. "[J]ury instructions that [are] somewhat deficient may nonetheless, when viewed as a whole, . . . suffice[] to protect a defendant's rights when the jury would have convicted the defendant on the basis of the evidence regardless of the instructional error." *Id*. at 506. "If the evidence related to the missing element was overwhelming and uncontested, it cannot be said that the error affected the defendant's substantial rights or otherwise undermined the outcome of the proceedings." *Id*. See also *People v Oros*, 320 Mich App 146, 163 (2017), rev'd in part on other grounds 502 Mich 229 (2018)[17] ("[g]iven th[e] standard [set out in *Kowalski*, 489 Mich at 506], [the Court of Appeals] reviewed the record . . . to determine whether the evidence related to larceny from a person [as the predicate offense for felony-murder] was 'overwhelming and uncontested,' and whether the erroneous instruction [(false pretenses as the predicate offense for felony-murder)] adequately served to protect defendant's rights [and] concluded that [the] circumstances [fell] well short of that demanding standard").

[17]It is unclear whether the remaining portions of *Oros* are binding precedent. For more information on the precedential value of an opinion with negative subsequent history, see our note.

Failure to give a requested jury instruction constitutes "[e]rror requiring reversal[] . . . when the error is outcome determinative, meaning the error undermined the reliability of the jury verdict." *People v Mitchell (Bradford)*, 301 Mich App 282, 288-289 (2013) (the defendant was entitled to a new trial where trial court's failure to give a requested instruction on a lesser included offense constituted error requiring reversal because an inquiry sent by the jury during deliberations "strongly suggest[ed] that it wanted to consider, and likely would have convicted defendant of, a lesser charge"). Cf. *People v Lyles*, 501 Mich 107, 112 (2017) ("[i]n defendant's trial for first-degree murder, the trial court improperly denied defendant's request for an instruction informing the jury that his evidence of good character could create a reasonable doubt[;]" however, "[d]efendant [did] not show[] that it [wa]s more likely than not that the outcome would have been different if the jury had been given th[e] instruction" and "reinstate[ment] [of the] defendant's conviction" was warranted).

### b. Juror Misconduct

"Before [an appellate court] will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox (After Remand)*, 232 Mich App 541, 557 (1998).

"[M]isconduct on the part of a juror will not automatically warrant a new trial[;] [a] new trial will not be granted for misconduct unless it affects the impartiality of the jury." *People v Strand*, 213 Mich App 100, 103-104 (1995) (citations omitted) (trial court did not abuse its discretion in denying the defendant's motion for a new trial where two jurors admitted learning that the defendant had a prior sexual assault conviction, but indicated that it did not affect the impartiality of their verdicts and that they did not disclose the information to the other jurors).

To establish that an extrinsic influence is error requiring reversal, the defendant must prove: (1) that the jury was exposed to an extraneous influence, and (2) that the extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *People v Budzyn*, 456 Mich 77, 80-81, 88-89 (1997) (defendant entitled to a new trial where the extrinsic

influences of a movie and media reports were not harmless beyond a reasonable doubt). Cf. *People v Stokes*, 501 Mich 918, 918 (2017) (even assuming arguendo that a juror's experiment where he tried to recreate the crime scene "constituted an improper extraneous influence on the jury, given that the juror did not share the results of his experiment with the other jurors, it did not create a real and substantial possibility that it could have affected the jury's verdict") (cleaned up).

"'Generally speaking, information is deemed "extraneous" if it derives from a source "external" to the jury[;] "[e]xternal" matters include publicity and information related specifically to the case the jurors are meant to decide, while "internal" matters include the general body of experiences that jurors are understood to bring with them to the jury room.'" *People v Garay*, 320 Mich App 29, 41-42 (2017), rev'd and vacated in part on other grounds 506 Mich 936 (2020),[18] quoting *Warger v Shauers*, 574 US 40, 51 (2014) (the "defendant [did] not establish[] that the jury was subject to any extraneous influence through the use of cell phones" where one juror "used his cell phone for text messaging, and he had no personal knowledge for what purposes the other jurors used their cell phones[;]" additionally, the "[d]efendant [did] not establish[] that the jury was subject to an extraneous influence through" a different juror where the juror's "statements [to the other jurors] regarding [a police officer that testified in the case] were based on his own personal knowledge of and experience with the officer" and "were not based on anything that [the juror] had read or heard about the case").

### c. Misconduct Involving the Parties, Witnesses, or Attorneys

"If a conviction is obtained through the knowing use of perjured testimony, it 'must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury.'" *People v Aceval*, 282 Mich App 379, 389 (2009), quoting *United States v Agurs*, 427 US 97, 103 (1976). "Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or

[18] It is unclear whether the remaining portions of *Garay* are binding precedent. For more information on the precedential value of an opinion with negative subsequent history, see our note.

punishment." *Aceval*, 282 Mich App at 389. See also *People v Brown*, 506 Mich 440, 447 (2020).

"It is inconsistent with due process when the prosecution allows false testimony from a state's witness to stand uncorrected." *People v Smith*, 498 Mich 466, 475 (2015). "'[T]he *effect* of a prosecutor's failure to correct false testimony . . . is the crucial inquiry for due process purposes.'" *Brown*, 506 Mich at 447, quoting *Smith*, 498 Mich at 476.

**New trial required.** In *Smith*, 498 Mich at 470, "the prosecution breached a duty to correct the substantially misleading, if not false, testimony of a key witness about his formal and compensated cooperation in the government's investigation." The defendant was entitled to a new trial because, "[g]iven the overall weakness of the evidence against the defendant and the significance of the witness's testimony, . . . there [was] a reasonable probability that the prosecution's exploitation of the substantially misleading testimony affected the verdict." *Id*. "Due process required that the jury be accurately apprised of the incentives underlying the testimony of this critical witness," and "[c]apitalizing on [the witness]'s testimony that he had no paid involvement in the defendant's case [was] inconsistent with a prosecutor's duty to correct false testimony." *Id*. at 480, 487. Because "there [was] a 'reasonable likelihood' that the false impression resulting from the prosecutor's exploitation of the testimony affected the judgment of the jury[,] . . . the defendant [was] entitled to a new trial." *Id*. at 483, quoting *Napue v Illinois*, 360 US 264, 271 (1959).

In *Brown*, 506 Mich at 447, 454, a detective falsely testified that the defendant admitted to engaging in some sexual activity with the victim during his interview, and the prosecutor not only failed to correct the testimony, but also "undertook affirmative actions to cloud defense counsel's efforts to correct the record."[19] There was a "reasonable likelihood that [the uncorrected false testimony] affected the jury's verdict" where the trial was a "credibility contest between defendant and the victim," and the prosecutor's use of the uncorrected false testimony "left it to the jury to decide if defendant made

[19] A videorecording of the interview demonstrated that the detective's testimony was false; the jury never viewed the video. *Brown*, 506 Mich at 447.

self-incriminatory statements during the interview." *Id.* at 451, 454 (remanding for a new trial).

**New trial not required.** The trial court did not abuse its discretion by denying the defendant's motion for a new trial based on perjury where, "[e]ven if the prosecution knowingly presented perjured testimony, the false testimony likely would not have affected the judgment of the jury"; although "the inconsistencies [in a key witness's testimony] . . . certainly cast doubt on [the witness's] testimony at trial and raised questions as to his involvement in the [defendant's crimes]," "there was concrete evidence presented that implicated defendant, despite the level of [the witness's] potential involvement." *People v Schrauben*, 314 Mich App 181, 188-189 (2016), overruled in part on other grounds by *People v Posey*, 512 Mich 317, 326 (2023).[20]

## d. Ineffective Assistance of Counsel

The Michigan and United States Constitutions guarantee criminal defendants the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *People v LeBlanc*, 465 Mich 575, 578 (2002).

"In order to preserve the issue of effective assistance of counsel for appellate review, the defendant should make a motion in the trial court for a new trial or for an evidentiary [*Ginther*[21]] hearing." *People v Sabin*, 242 Mich App 656, 658 (2000).

"A claim of ineffective assistance of counsel presents a mixed question of fact and constitutional law," and "[t]he trial court's factual findings are reviewed for clear error, while the ultimate constitutional issue is reviewed de novo." *People v Traver (On Remand)*, 328 Mich App 418, 422 (2019).

"[T]o demonstrate ineffective assistance, a defendant must show that his [or her] attorney's performance fell below an objective standard of reasonableness." *People v Grant (William)*, 470 Mich 477, 485 (2004). "The defendant must show also that this performance so prejudiced him [or her] that he [or she] was deprived of a fair trial." *Id.* at 486. "To establish prejudice, he [or she] must show a

[20]For more information on the precedential value of an opinion with negative subsequent history, see our note.

[21]*People v Ginther*, 390 Mich 436 (1973).

reasonable probability that the outcome would have been different but for counsel's errors." *Id*. See *Strickland v Washington*, 466 US 668, 687-688 (1984); *People v Pickens*, 446 Mich 298, 302-303 (1994).[22] "[A] defendant's inability to satisfy the plain-error standard[23] in connection with a specific trial court error does not necessarily mean that he or she cannot meet the ineffective-assistance standard regarding counsel's alleged deficient performance relating to that same error." *People v Randolph*, 502 Mich 1, 22 (2018). "Courts must independently analyze each claim, even if the subject of a defendant's claim relates to the same error." *Id.* at 22.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]" *People v Davis (Marcus) (On Rehearing)*, 250 Mich App 357, 368 (2002). "[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile," *People v Fike*, 228 Mich App 178, 182 (1998), and "[t]rial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425 (2000). The "failure to conduct a reasonable investigation may constitute ineffective assistance of counsel" when counsel fails "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary," and that failure "undermines confidence in the trial's outcome." *People v Loew*, 340 Mich App 100, 121 (2022) (quotation marks and citations omitted), aff'd on other grounds by *People v Loew*, ___ Mich ___, ___ (2024) (holding that trial judge should have recused herself under MCR 2.003(C)(1)(b)(ii), but her failure to do so did not result in a miscarriage of justice; and judge's ex parte communications with prosecutor did not deprive defendant of any constitutional rights). "Trial counsel's failure to request a jury instruction may constitute an

[22] "[T]here is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *United States v Cronic*, 466 US 648, 659 n 26 (1984), citing *Strickland*, 466 US at 693-696. However, in *Cronic*, 466 US at 658-660, the United States Supreme Court identified three rare "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified" and in which prejudice is therefore presumed: (1) "the complete denial of counsel[,]" such as where "the accused is denied counsel at a critical stage of his [or her] trial[;]" (2) where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing[;]" and (3) "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." See also *People v Frazier (Corey)*, 478 Mich 231, 243 (2007).

[23] Unpreserved claims that the trial court erred are reviewed for plain error. *People v Randolph*, 502 Mich 1, 8 (2018). For discussion of the plain error standard, see the Michigan Judicial Institute's *Appeals and Opinions Benchbook*, Chapter 1.

unreasonably deficient level of performance," and when a defendant establishes "both prongs of the ineffective-assistance-of-counsel analysis," they are "entitled to relief in the form of a new trial." *People v Yeager*, 511 Mich 478, 490, 503 (2023).

When defendant withdrew his guilty plea after having waived the protection in MRE 410(a)(1) that would have made evidence of his withdrawn or vacated guilty plea inadmissible against him, "[i]t was . . . reasonable for defense counsel to address defendant's guilty plea before the prosecution could. Doing so allowed the defense to get ahead of the issue."*People v Gash*, ___ Mich App ___, ___ (2024). "Under MRE 410(a)(1), evidence of 'a guilty plea that was later withdrawn or vacated' is inadmissible 'against the defendant who made the plea or participated in the plea discussions.'" *Gash*, ___ Mich App at ___, quoting MRE 410(a)(1). "This protection, however, can be waived." *Gash*, ___ Mich App at ___. Because defendant waived the protection, "MRE 410(a)(1) no longer constrained the prosecution from bringing up defendant's guilty plea during trial." *Gash*, ___ Mich App at ___. Having defense counsel bring it up before the prosecution could "gave defendant the opportunity to explain why he took the guilty plea—because he was scared. That explanation was not only rational but painted defendant in a sympathetic light." *Id.* at ___. "Calculated risks like this are often necessary to win difficult cases, . . . and it clearly constituted sound trial strategy under the circumstances." *Id.* at ___. Accordingly, "defense counsel's decision to ask defendant about his withdrawn guilty plea did not fall below an objective standard of reasonableness, so defendant cannot establish that he is entitled to relief on his ineffective-assistance claim." *Id.* at ___.

Additionally, "'[i]f a client declines to participate in his defense, then an attorney may permissibly guide the defense pursuant to the strategy she believes to be in the defendant's best interest.'" *People v Klungle*, ___ Mich App ___, ___ (2024), quoting *McCoy v Louisiana*, 584 US 414, 424 (2018). In this case, "defendant argue[d] his Sixth Amendment right to counsel was violated when his trial counsel conceded his guilt as to the trespassing charge during closing argument . . . ." *Klungle*, ___ Mich App at ___. However, "defendant never expressly told counsel that he did not want to concede guilt," *id.* at ___, and in fact, "was virtually nonresponsive by the time of trial." *Id.*

at ___ (quotation marks omitted). Further, "[i]n light of the evidence, trial counsel conceded the trespassing charge in an attempt to prevail against the more severe resisting or obstructing charges." *Id*. at ___. "Because defendant did not express a contrary instruction, trial counsel properly exercised his discretion in implementing what he reasonably believed was the most prudent trial strategy." *Id*. at ___. "Defendant argues *McCoy* extends to situations in which defendants make even a generalized expression of innocence." *Klungle*, ___ Mich App at ___. However, "the defendant in *McCoy* asserted his innocence by challenging the factual basis for the charged offense, contesting the facts, and asserting he did not commit the crimes." *Klungle*, ___ Mich App at ___. Here, "defendant's own testimony did not challenge the factual basis for the trespassing charge." *Id*. at ___. Despite the eviction order and his receipt of the eviction notice, "defendant acknowledged that he . . . knowingly remained on the property." *Id*. at ___. "Accordingly, trial counsel's concession of guilt as to the trespassing charge did not violate defendant's Sixth Amendment right to counsel." *Id*. at ___.

Where "[d]efense counsel failed to ask the trial court to instruct the jury on self-defense and defense-of-others with respect to the charge of felony-firearm," and where defendant had been acquitted of first- and second-degree murder, "there [was] a reasonable probability that, but for counsel's error, the result of the trial would have been different as to [the felony-firearm] conviction." *People v Kilgore*, ___ Mich App ___, ___ (2024). In this case, defendant argued that "defense counsel was ineffective for failing to request the self-defense and defense-of-others jury instructions for the offense of felony-firearm." *Id*. at ___. "The trial court's instructions specifically connected these defenses to the murder charges, explaining that if defendant acted in lawful self-defense or defense-of-others, he was not guilty of *murder*." *Id*. at ___ (quotation marks omitted). On the first element of ineffective assistance of counsel, the Court found that "[i]nstructions on these defenses would have been crucial to the defense on [the felony-firearm] charge, and defense counsel's failure to request the instructions was objectively unreasonable." *Id*. at ___. "On the second element of ineffective assistance of counsel, [the Court] conclude[d] that it [was] reasonably probable that, but for counsel's error with respect to felony-firearm, the result of the proceeding would have been different." *Id*. at ___. The

Court noted that when "there is an error in the jury instructions that appear to (i) provide a defense for the charge on which the jury acquitted but (ii) foreclose the same defense on the related charge on which the jury convicted, the probability that the conviction resulted from jury confusion rather than jury choice is too high to ignore." *Id.* at ___. "Given that there was no strategic reason not to ask for the instruction, and given that the jury returned inconsistent verdicts on the murder charges (not guilty) and the felony-firearm charge predicated on murder (guilty), [the Court] conclude[d] that there [was] a reasonable probability that, but for counsel's error, the result of the trial would have been different as to that conviction." *Id.* at ___.

## e. Brady Violations

A defendant may be entitled to a new trial on the basis of a violation of *Brady v Maryland*, 373 US 83 (1963). See *People v Dimambro*, 318 Mich App 204, 221 (2016). In order to establish a *Brady* violation, a defendant must establish that "(1) the prosecution has suppressed evidence; (2) that is favorable to the accused; and (3) viewed in its totality, is material." *People v Chenault*, 495 Mich 142, 155, 158-159 (2014) ("even in the absence of the suppressed evidence, the defendant received a trial that resulted in a verdict worthy of confidence[;] [t]he defendant's *Brady* claim must fail because the suppressed evidence was not material to his guilt"). Cf. *Dimambro*, 318 Mich App at 221 ("the trial court properly concluded that defendant [was] entitled to a new trial based on the government's failure to disclose . . . photographs before trial" because there was "a reasonable probability that the outcome of the trial might have been different had the photographs been disclosed to the defense," and without them the defendant did not receive "a trial resulting in a verdict worthy of confidence") (quotation marks and citation omitted).

## f. Polygraph Examinations

"Polygraph test results may be considered in deciding a motion for a new trial where[] . . . (1) they are offered on behalf of the defendant, (2) the test was taken voluntarily, (3) the professional qualifications and the quality of the polygraph equipment meets with the approval of the court, (4) either the prosecutor or the court is able to obtain an independent examination of the subject or of

the test results by an operator of the court's choice, and (5) the results are considered only with regard to the general credibility of the subject." *Mechura*, 205 Mich App at 484.

### g. Counsel's Admission of Client's Guilt Over Client's Objection

Under the Sixth Amendment of the United States Constitution, "a defendant has the right to insist that counsel refrain from admitting guilt[.]" *McCoy v Louisiana*, 584 US 414, 417 (2018).[24] "With individual liberty . . . at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." *Id.* at 417-418, 427 (holding that defense counsel's concession of the defendant's guilt over his objection was a violation of the defendant's "Sixth Amendment-secured autonomy" that constituted structural error requiring a new trial).

However, where "defendant did not express a contrary instruction, trial counsel properly exercised his discretion in implementing what he reasonably believed was the most prudent trial strategy." *People v Klungle*, ___ Mich App ___, ___ (2024). In this case, "defendant argue[d] his Sixth Amendment right to counsel was violated when his trial counsel conceded his guilt as to the trespassing charge during closing argument . . . ." *Id.* at ___. However, "defendant never expressly told counsel that he did not want to concede guilt," *id.* at ___, and in fact, "was virtually nonresponsive by the time of trial." *Id.* at ___ (quotation marks omitted). "Accordingly, trial counsel's concession of guilt as to the trespassing charge did not violate defendant's Sixth Amendment right to counsel." *Id.* at ___.

### h. Verdict Against the Great Weight of the Evidence

A new trial is required "if the evidence preponderates heavily against the verdict so that it would be a

[24] *McCoy* was not decided under MCR 6.431; however, its analysis is relevant because a new trial may be ordered by the court under MCR 6.431(B) "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." In *McCoy*, the defendant faced the possibility of the death penalty, and defense counsel's "experienced-based view" was that "confessing guilt offer[ed] the defendant the best chance to avoid the death penalty." *McCoy*, 584 US at ___.

miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627 (1998). "A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v Allen*, 331 Mich App 587, 612 (2020) (quotation marks and citation omitted), vacated in part on other grounds 507 Mich 856 (2021).[25] Generally, "issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility for the constitutionally guaranteed jury determination thereof." *Lemmon*, 456 Mich at 642 (quotation marks and citation omitted). However, a new trial may be granted based on issues of witness credibility under "exceptional circumstances," for example, where "testimony contradicts indisputable physical facts or law," where "the testimony is patently incredible or is so inherently implausible that it could not be believed by a reasonable juror," and where "testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id.* at 642, 644, 647 (quotation marks and citations omitted).

Under MCR 2.611(A)(1)(e), "a new trial may be granted to all or some of the parties, on all or some of the issues, whenever their substantial rights are materially affected [because] a verdict or decision is against the great weight of the evidence or contrary to law." *People v Knepper*, ___ Mich App ___, ___ (2024), citing MCR 2.611(A)(1)(e) (quotation marks and brackets omitted). "'[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination.'" *Knepper*, ___ Mich App at ___, quoting *Lemmon*, 456 Mich at 645-646 (alteration in original). In *Knepper*, "[t]he jury ultimately found defendant guilty of attempted CSC-I, but not guilty of CSC-I, unlawful imprisonment, and assault with intent to do great bodily harm less than murder or by strangulation." *Knepper*, ___ Mich App at ___. Defendant argued "that the victim's testimony was so patently implausible that it could not be believed by any reasonable juror." *Id.* at ___. In reviewing the evidence, the Court noted that "although the evidence

[25]For more information on the precedential value of an opinion with negative subsequent history, see our note.

supporting defendant's conviction was not strong, consisting primarily of the victim's testimony which suffered from inconsistencies and an accompanying lack of credibility, the bar defendant must clear to obtain relief in the form of a new trial is exceedingly high." *Knepper*, ___ Mich App at ___. There is "ample evidence to support defendant's conviction for attempt to commit CSC-I, so defendant is not entitled to a new trial on the basis of the great weight of the evidence." *Id.* at ___.

As the trier of fact, "[t]he jury [is] permitted to infer that [a defendant's] implausible testimony [is] evidence of guilt." *People v Skippergosh*, ___ Mich App ___, ___ (2024). "[I]f the jury [does] disbelieve the defendant, it [is] further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Id.* at ___ (cleaned up). "In this case, [the defendant] was found guilty of domestic violence as a habitual offender under MCL 750.81(5)." *Skippergosh*, ___ Mich App at ___. Following testimony from the victim's family members and neighbors, the defendant "provided implausible testimony to explain away . . . two assaults and the circumstances surrounding them." *Id.* at ___. "For example, [the defendant] testified that the January 2020 assault against [the victim] was committed by four anonymous women in the living room while they were covering his eyes, and that [the victim] was screaming for help in December 2021 because she required assistance removing taco meat from the refrigerator." *Id.* at ___. During sentencing, the trial court "characterized [the defendant's] testimony as 'almost laughable in terms of what you tried to convince the jury actually happened.'" *Id.* at ___.

In addition, the *Skippergosh* Court held that "[a] prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Id.* at ___ (quotation marks and citation omitted). However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* at ___ (quotation marks and citation omitted). The Court noted that "in light of the testimony presented at trial, it was reasonable for the prosecution to infer and argue that [the victim's] family members did not have any unusual or impermissible motivations for

testifying, and that they were compelled to do so simply out of commonplace concern for the well-being of a family member." *Id.* at ___. "Further, nothing in the prosecution's closing argument . . . hint[ed] at having special knowledge of the family members' truthfulness or reasons for testifying." *Id.* at ___.

A trial court's decision on a motion for a new trial grounded in a great weight of the evidence claim is reviewed for an abuse of discretion, and "[a] court necessarily abuses its discretion when it makes an error of law," or "operates within an incorrect legal framework." *In re JP*, 330 Mich App 1, 13 (2019) (quotation marks and citations omitted).

### i. Evidence That Should Have Been Suppressed

A new trial is warranted where "there was a Fourth Amendment violation and critical evidence was presented that should have been suppressed under the exclusionary rule[.]" *People v Hammerlund*, 337 Mich App 598, 616 (2021).

### j. Judicial Misconduct

"[A] judge's violation of the Michigan Code of Judicial Conduct is not a legally recognized basis for relief." *People v Loew*, ___ Mich ___, ___ (2024). "A judge's violation of a canon may be grounds for us to exercise our power to discipline that judge, but the canons do not grant litigants any substantive or procedural rights." *Id.* at ___ (citations omitted). "[T]o be entitled to a new trial under MCR 6.431(B), a defendant must do more than show that a judge violated the Michigan Code of Judicial Conduct." *Loew*, ___ Mich at ___.

In *Loew*, the trial judge exchanged e-mails with the county prosecutor during defendant's jury trial. *Id.* at ___. "In her e-mails, the trial judge expressed concern about mistakes law enforcement had made in its investigation and asked questions related to why those mistakes had occurred." *Id.* at ___. "The trial judge never notified defendant or defense counsel of these e-mails or their contents." *Id.* at ___. In determining whether the "ex parte communications warrant[ed] granting defendant a new trial under MCR 6.431(B)," the Court considered two components: (1) "whether the trial judge should have recused herself under MCR 2.003(C)(1)(b)(ii), and if so, whether her failure to do so resulted in a miscarriage of

justice," and (2) "whether defendant was deprived of any constitutional rights because of the ex parte communications." *Loew*, ___ Mich at ___.

Under the first component, the Court considered "whether an ordinary person might reasonably question the judge's integrity, impartiality, or competence on the basis of the judge's observable conduct." *Id.* at ___. "In a word, a judge may not initiate, permit, or consider ex parte communications, but a judge 'may allow' ex parte communications 'for administrative purposes,' so long as the judge reasonably believes that no party or counsel for a party will gain a procedural or tactical advantage and the judge promptly discloses the communication." *Id.* at ___, quoting the Michigan Code of Judicial Conduct, Canon 3(A)(4). Here, the Court opined that "the trial judge commenting about the trooper's investigation, asking whether the Michigan State Police has detectives, and asking why the victim was not referred for a medical examination were not 'communications . . . for administrative purposes,' at least not as that phrase is used in Canon 3(A)(4)(a)." *Loew*, ___ Mich at ___. On the issue of whether there was an appearance of bias, the Court noted that "while the trial judge's communications do not show she was actually biased or that there was an unconstitutionally high probability she was actually biased, we conclude that an ordinary person might still reasonably question her impartiality." *Id.* at ___. Therefore, "the trial judge should have known that grounds for her disqualification might have existed under MCR 2.003(C)(1)(b)(ii)," and "[u]nder Canon 3(C), she should have raised the issue of her disqualification sua sponte, and she should have recused herself." *Loew*, ___ Mich at ___. "Nonetheless, this is not enough to conclude that the trial court had a legally recognized basis for granting defendant a new trial under MCR 6.431(B)." *Loew*, ___ Mich at ___.

The Court next considered "whether defendant was entitled to relief under MCL 769.26." *Loew*, ___ Mich at ___. Under MCL 769.26, "a miscarriage of justice occurs only when a nonconstitutional error affected the finder of fact." *Loew*, ___ Mich at ___. "If a nonconstitutional error had no effect on the finder of fact, a court's inquiry under MCL 769.26 is at its end." *Loew*, ___ Mich at ___. Additionally, "ex parte communications between a judge and the prosecution are not per se unconstitutional," "[b]ut depending on the circumstances, ex parte

communications between a judge and the prosecution might deprive a defendant of the constitutional right to be present, to effective assistance of counsel, or the due-process right to a fair trial more generally." *Id.* at ___."[W]hile a trial judge engaging in ex parte communications with the prosecution may give the *appearance* of bias, it does not inevitably show that the trial judge was *actually* biased or that the appearance of bias was too high to be constitutionally tolerable." *Id.* at ___ . "Altogether, the trial judge's ex parte communications here were not of such a character, substance, or extent as to suggest that the trial judge was actually biased or that the probability she was actually biased was too high to be constitutionally tolerable." *Id.* at ___. Further, the Court held defendant's right to counsel was not violated as "the brief e-mail exchange between the trial judge and [the prosecutor] was not a critical stage of the proceedings," and "the jury was unaware of the trial judge's communications with [the prosecutor], and there is no evidence that these communications affected how the jury was instructed or the substance of the jury's deliberation over a verdict." *Id.* at ___. "Defendant has therefore failed to show that the trial judge's ex parte communications violated his due-process right to a fair trial on this basis." *Id.* at ___. Accordingly, "because the trial judge's failure to recuse herself did not result in a miscarriage of justice at defendant's trial or deprive defendant of any constitutional right, we conclude that the trial court had no such legal basis [for granting defendant a new trial]." *Id.* at ___.

## k. Violation of Constitutional Right to an Appeal

"The inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal under Const 1963, art 1, § 20 that a new trial must be ordered." *People v Craig*, 342 Mich App 217, 226 (2022) (cleaned up). However, "[t]he failure of the state to provide a transcript when, after good faith effort, it cannot physically do so, does not automatically entitle a defendant to a new trial." *Id.* (quotation marks and citation omitted). For example, a new trial is not warranted when:

- The "presumption of regularity" applies; for example, where a defendant argues they were not given statutory notice of the right to a jury trial and there is no transcript of the relevant proceeding, in

the absence of substantial proofs to the contrary, it is presumed that the official discharged their public duty. *Id.* at 226-227.

- "When the surviving record is sufficient to allow evaluation of the appeal, the defendant's constitutional right is satisfied," and "where only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of defendant's claim on appeal." *Id.* at 227 (cleaned up).

  A new trial was warranted where the transcript of the last substantive day of the defendant's trial was missing, and "defendant cited specific facts from the surviving record and the evidentiary hearing to identify multiple possible appellate issues which, if meritorious, would entitle him to a new trial." *Id.* at 231 (noting that defendant successfully showed prejudice because of his inability to review whether error exists rather than merely asserting "that the missing transcript *might* reveal the existence of error warranting reversal"). Specifically, defendant argued that "the trial court might have provided improper jury instructions," and that there may have been insufficient evidence to support one of the charges of which he was convicted—the Court noted that "the record of a critical day of trial is completely missing and there is little else in the record to corroborate what occurred that day, such as a record of the preliminary jury instructions or a transcript of any preliminary hearing," and the testimony on the sufficiency of the evidence at the record-settlement hearing "was vague at best." *Id.* at 231, 233-234 (noting "that the prosecution did not contend in the trial court, and does not contend on appeal, that an additional evidentiary hearing would be sufficient to establish a record to address the allegations of trial error").

  "[I]f a defendant argues that they were not given statutory notice of the right to a jury trial and there is no transcript of the relevant proceeding, the presumption of regularity applies, and in the absence of substantial proofs to the contrary, it will be presumed that the official discharged their public duty in this regard." *People v Skippergosh*, ___ Mich App ___, ___ (2024) (quotation marks and citation omitted). Here, defendant "argues that he is entitled to relief because . . . the trial transcript does not reflect that trial counsel objected to introduction of his

telephone call from jail, does not reflect trial counsel's full objections to [the expert witness's] testimony, and does not include [the investigating officer's] original testimony. *Id.* at ___. "[W]here only a portion of the trial transcript is missing, the surviving record must be reviewed in terms of whether it is sufficient to allow evaluation of a defendant's claim on appeal." *Id.* at ___ (cleaned up). In this case, the *Skippergosh* Court noted that "[t]he purported transcript errors identified by [the defendant] are irrelevant to the claims presented on appeal or nonexistent." *Id.* at ___. Therefore, the defendant "has not shown a due-process violation or violation of the court rules for the allegations of error identified in his affidavit." *Id.* at ___.

## 1.7 Motion for Judgment of Acquittal (Directed Verdict) After Jury Verdict[26]

In addition to the following discussion, see the Michigan Judicial Institute's Motion for Directed Verdict of Acquittal After Jury Verdict Checklist.

### A. After Jury Verdict

"After a jury verdict, the defendant may file an original or renewed motion for directed verdict of acquittal in the same manner as provided by MCR 6.431(A) for filing a motion for a new trial." MCR 6.419(C).[27]

"No judgment or verdict shall be set aside or reversed . . . by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26. MCL 769.26 "creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that the error resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 493 (1999). "[MCL 769.26] presumes that a preserved, nonconstitutional error is not a ground for reversal unless 'after an examination of the entire cause, it shall affirmatively appear' that it is more probable

[26] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 10, for more information on a prejudgment motion for directed verdict.

[27] See Section 1.6 for more information on MCR 6.431(A) and motions for a new trial.

than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496. See *People v Feezel*, 486 Mich 184, 188 (2010) (where "the trial court abused its discretion by failing to admit evidence of the victim's intoxication because it was relevant to the element of causation[,]" "the error resulted in a miscarriage of justice, which therefore requires reversal under MCL 769.26").

"If the court grants a directed verdict of acquittal after the jury has returned a guilty verdict, it must also conditionally rule on any motion for a new trial by determining whether it would grant the motion if the directed verdict of acquittal is vacated or reversed." MCR 6.419(E).

### B. Explanation of Rulings on the Record

"The court must state orally on the record or in a written ruling made a part of the record its reasons for granting or denying a motion for a directed verdict of acquittal and for conditionally granting or denying a motion for a new trial." MCR 6.419(F).

See *Order of Acquittal/Dismissal or Remand*, MC 262; *Order Vacating Conviction and Entering New Disposition*, CC 387.

### C. Standard of Review

"When reviewing a trial court's decision on a motion for a directed verdict, [the appellate court] reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich*, 246 Mich App 101, 122 (2001).

## 1.8 Motion to Withdraw Plea After Sentence

"The defendant may file a motion to withdraw the plea within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and [MCR 7.205(A)(2)(b)(*i*)-(*iii*)]." MCR 6.310(C)(1). MCR 7.205(A)(2) provides, in relevant part:

> "In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:
>
> (a) 6 months after entry of the judgment or order; or
>
> (b) 42 days after:

> (*i*) an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;
>
> (*ii*) the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;
>
> (*iii*) the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed[.]"

"Thereafter, the defendant may seek relief only in accordance with the procedure set forth in [MCR 6.500 *et seq*[28]]." MCR 6.310(C)(2).

"If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." MCR 1.112.

"If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C)(3). "If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for purposes of further proceedings, including appeals." *Id*.

"A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Brown (Shawn)*, 492 Mich 684, 693 (2012).

In *Brown*, 492 Mich at 687-688, the defendant pleaded guilty, as a second-offense habitual offender under MCL 769.10, to second-degree home invasion. The defendant was advised at his plea hearing that the maximum sentence for second-degree home invasion was 15 years in

[28]See Chapter 3 for more information on motions for relief from judgment under MCR 6.500 *et seq*.

prison; however, the defendant was subsequently sentenced, as an habitual offender, to a maximum prison term of more than 22 years. *Brown*, 492 Mich at 688. The Michigan Supreme Court concluded that MCR 6.302(B)(2) requires that "before pleading guilty, a defendant must be notified of the maximum possible prison sentence with habitual-offender enhancement, because the enhanced maximum becomes the 'maximum possible prison sentence' for the principal offense." *Brown*, 492 Mich at 693-694, overruling *People v Boatman*, 273 Mich App 405, 406-410 (2006). The Court additionally held that "[MCR 6.310(C)(3)] . . . provides the proper remedy for a plea that is defective under MCR 6.302(B)(2), which is to allow the defendant the opportunity to withdraw his or her plea." *Brown*, 492 Mich at 698.[29]

A plea is not "understanding or knowingly entered into when it was, in significant part, induced on the basis of an inaccurate understanding of the minimum and maximum possible prison sentence[.]" *People v Guyton*, 511 Mich 291, 302-304 (2023) (remanding to allow the defendant to elect to allow her plea to stand or to withdraw her plea where "defendant was led to believe that her guilty plea would result in the dismissal of a third-offense habitual offender sentence enhancement—a likely consequence and relevant circumstance of her plea—when she was subject only to a second-offense habitual offender enhancement"). When evaluating a motion to withdraw a plea when the defendant was given inaccurate information, the focus should not be on "whether a defendant receives any benefit from the bargained-for plea," but rather, whether a defendant "had an exaggerated belief in the benefits of the plea agreement," and whether any inaccurate information was corrected. *Id.* at 303-304 (holding that "[w]hen a defendant has been misinformed by prosecutors about the benefit of the bargain they have struck, the defendant does not have sufficient awareness of the relevant circumstances").

"[U]nder MCR 6.310(C), a defendant, upon showing a defect in the plea-taking process, is entitled to have the error corrected by the trial court and to thereafter have 'the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.'" *People v Blanton*, 317 Mich App 107, 121, 126 (2016) ("[b]ecause the plea agreement was indivisible, the trial court did not abuse its discretion by allowing defendant to withdraw the plea in its entirety, rather than withdraw only the plea affected by the trial court's omission"). See also *People v Coleman*, 327 Mich App 430, 444 (2019) (where the defendant "pleaded to multiple charges at the same time, some charges were dropped in exchange for her plea, the charges and the plea agreement were described in singular documents, and the plea was accepted in a single proceeding," the defendant "should have been afforded the right to withdraw her *entire*

[29] *Brown* refers to MCR 6.310(C); however, MCR 6.310 was amended after *Brown* was decided, and the text of MCR 6.310(C) pertinent to the holding in *Brown* was renumbered as MCR 6.310(C)(3). See ADM File No. 2019-27.

plea" despite the fact that the defect—failure to inform the defendant about mandatory registration as a sex offender—only pertained to one of the charges); *People v Pointer-Bey*, 321 Mich App 609, 617 (2017) (where the "defendant was not informed of the maximum possible sentence for felon-in-possession," the erroneous advice "rendered defendant's plea proceeding defective[; c]onsequently, defendant was entitled to withdraw his plea in its entirety" and be given "'the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea' pursuant to MCR 6.310(C)") (citations omitted).

See also the Michigan Judicial Institute's Motion to Withdraw Plea After Sentence Checklist.

## A. Ineffective Assistance of Counsel

"[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v Kentucky*, 559 US 356, 373 (2010).[30] See also *Missouri v Frye*, 566 US 134, 143 (2012) ("plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages").

"[C]laims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*[ *v Washington*, 466 US 668, 687 (1984)]." *Frye*, 566 US at 140 (objective standard of reasonableness and resulting prejudice).

### 1. Lapsed or Rejected Plea Offer

#### a. Establishing Ineffective Assistance of Counsel Under *Strickland*

"[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused[,] . . . [and w]hen defense counsel allow[s such an] offer to expire without advising the defendant or allowing him to consider it, defense counsel [does] not render the effective assistance the Constitution requires." *Frye*, 566 US at 145. "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or

[30] *Padilla*, 559 US 356, has prospective application only under both federal and state rules of retroactivity. See *Chaidez v United States*, 568 US 342, 344 (2013); *People v Gomez*, 295 Mich App 411, 413 (2012).

been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer[;] . . . a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law[;] . . . [and] a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 147.

"In *Frye*, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms." *Lafler v Cooper*, 566 US 156, 160 (2012) (*Frye*, 566 US at 151, was remanded for the state court to determine whether the defendant satisfied the *Strickland* requirements). In *Lafler*, 566 US at 160, "[a] favorable plea offer was reported to the client but, on advice of counsel, was rejected[;]" "after the plea offer had been rejected, there was a full and fair trial before a jury [and] [a]fter a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain." The *Lafler* Court determined that "*Strickland*'*s* two-part test [was satisfied:] . . . the fact of deficient performance [was] conceded by all parties . . . and [the defendant showed] that but for counsel's deficient performance there [was] a reasonable probability he and the trial court would have accepted the guilty plea." "In addition, as a result of not accepting the plea and being convicted at trial, [the defendant] received a minimum sentence [much] greater than he would have received under the plea." *Id.* at 274. Cf. *People v Douglas*, 496 Mich 557, 590-591, 598 (2014) ("[a]lthough during the plea-bargaining process counsel indisputably misadvised the defendant of the consequences he faced if convicted at trial, the trial court did not reversibly err in determining that the defendant ha[d] not shown prejudice as a result of counsel's deficient performance[;]" "the record amply support[ed] the conclusion that, even had the defendant been properly advised of the consequences he faced if convicted at trial, it was not reasonably probable that he would have accepted the prosecution's plea offer").

"The *Lafler* opinion did not create a new rule—it merely determined *how* the *Strickland* test applied to the specific factual context concerning plea bargaining." *People v Walker (On Remand)*, 328 Mich App 429, 448 (2019). Accordingly, *Lafler* applies retroactively. *Walker*, 328 Mich

App at 436 (affirming the trial court's "order ruling that defendant was denied the effective assistance of counsel when his trial attorney failed to inform defendant of the plea offer").

### b. Remedy

"The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms." *Lafler*, 566 US at 170. "In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence." *Id*. at 170-171. "This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial." *Id*. at 171. "In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he [or she] would have accepted the plea." *Id*. "If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he [or she] received at trial, or something in between." *Id*.

"In some situations it may be that resentencing alone will not be full redress for the constitutional injury." *Lafler*, 566 US at 171. "If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge's sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice." *Id*. "In these circumstances, the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal." *Id*. "Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." *Id*.

"In implementing a remedy in both of these situations, the trial court must weigh various factors[.]" *Lafler*, 566 US at 171. "[T]wo considerations . . . are of relevance[: f]irst, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions[; s]econd, . . . any information concerning the crime that was discovered after the plea offer was made[] . . . can be consulted in

finding a remedy that does not require the prosecution to incur the expense of conducting a new trial." *Id.* at 171-172.

## 2. Erroneous Advice Leading to Entry of Plea

"[I]n reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, the courts should focus upon whether the defendant's plea was made voluntarily and understandingly." *In re Oakland Co Pros*, 191 Mich App 113, 120 (1991).

"Where . . . a defendant is represented by counsel during the plea process and enters his [or her] plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill*, 474 US at 56, quoting *McMann v Richardson*, 397 US 759, 771 (1970).

*Strickland*, 466 US at 694, ordinarily requires the defendant to establish "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Lee v United States*, 582 US 357, 364 (2017), quoting *Roe v Flores-Ortega*, 528 US 470, 482 (2000). However, where a claim of ineffective assistance of counsel arises from the acceptance of a plea, the defendant must establish prejudice by demonstrating "a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" *Lee*, 582 US at 364-365, quoting *Hill*, 474 US at 59.[31]

Under this type of claim, "counsel's 'deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.'" *Lee*, 582 US at 364 (quoting *Flores-Ortega*, 528 US at 482-483, and noting that while "'a strong presumption of reliability [ordinarily applies] to judicial proceedings,'" such a presumption cannot be accorded "'to judicial proceedings that never took place'").

For a defendant deciding whether to plead guilty, "there is more to consider than simply the likelihood of success at trial," and when the consequences of a conviction are dire, "even the smallest chance of success at trial may look attractive." *Lee*, 582

[31]Prejudice is presumed "when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued," and this presumption applies "even when the defendant has, in the course of pleading guilty, signed what is often called an 'appeal waiver'—that is, an agreement forgoing certain, but not all, possible appellate claims." *Garza v Idaho*, 586 US ___, ___ (2019), citing *Flores-Ortega*, 528 US at 484.

US at 367. "Rather than asking how a hypothetical trial would have played out absent the error, the [court should consider] whether there was an adequate showing that the defendant, properly advised, would have opted to go to trial." *Id*. at 365. In making this determination, "[c]ourts should not upset a plea solely because of *post hoc* assertions from a defendant about how he would have pleaded but for his attorney's deficiencies"; "[j]udges should instead look to contemporaneous evidence to substantiate a defendant's expressed preferences." *Id*. at 358, 369 (rejecting "a *per se* rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial").

In *Lee*, 582 US at 360-362, the defendant, a lawful permanent resident of the United States, accepted a plea agreement and pleaded guilty to a drug charge after defense counsel erroneously advised him that the conviction would not result in deportation.[32] The United States Supreme Court held that the defendant had demonstrated prejudice and was entitled to relief from his conviction on ineffective-assistance-of-counsel grounds, even though he "had no *bona fide* defense, not even a weak one." *Id*. at 363, 371 (cleaned up). Although it was unlikely that he would be acquitted after a trial, "the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right" because "deportation was the determinative issue in his decision whether to accept the plea deal." *Id*. at 364, 369 (noting that the defendant "asked his attorney repeatedly whether there was any risk of deportation from the proceedings," and that both the defendant and his attorney testified at the evidentiary hearing on the defendant's motion to vacate his conviction and sentence that the defendant "would have gone to trial if he had known about the deportation consequences") (cleaned up). The defendant's "claim that he would not have accepted a plea had he known it would lead to deportation was backed by substantial and uncontroverted evidence"; accordingly, he "demonstrated a reasonable probability that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id*. at 371 (cleaned up).

## B. Standard of Review

Appellate courts "review[] for an abuse of discretion a trial court's ruling on a motion to withdraw a plea." *People v Brown (Shawn)*, 492 Mich 684, 688 (2012).

[32] Defense counsel is constitutionally required to inform his or her client that a plea "may carry a risk of adverse immigration consequences[,]" e.g., deportation. *Padilla*, 559 US at 369.

### C. Plea Withdrawal by Prosecutor

"[A]s a general rule, a trial court may not vacate a plea on its own motion because the plain language of MCR 6.310(B)(1) and [MCR] 6.310(E)[33] contemplate that plea withdrawal must be made by the defendant's motion, with the defendant's approval, or by the prosecutor only when a defendant has failed to perform." *People v Jackson*, ___ Mich App ___, ___ (2023). However, the Court has "acknowledged that situations may arise that are simply not covered by the court rules." *Id.* at ___ (quotation marks and citation omitted). For example, "a prosecutor should be permitted to withdraw a plea when the trial court imposed a sentence much shorter than the one the parties contemplated in their plea agreement." *Id.* at ___. Similarly, in the context of sentencing for a probation violation following a guilty plea, where the trial court revoked the defendant's probation and sentenced him to a term of 30 months to 15 years in prison, but the court was not aware of new amendments to MCL 771.4b under which defendant's probation should not have been revoked and the maximum allowable sentence was 30 days in jail, the sentence was invalid and the trial court correctly vacated the defendant's plea and held a new probation violation hearing over the defendant's objection. *Jackson*, ___ Mich App at ___. In *Jackson*, the defendant "repeatedly stated that he does *not* wish to withdraw his plea," but the prosecutor argued "that the plea should be withdrawn, if not by defendant, then on behalf of plaintiff." *Id.* at ___. In other words, the defendant asked the Court "to order the trial court to reform the plea agreement in a manner that would allow him to keep the plea but change the penalty." *Id.* at ___. However, "a trial court cannot simply reject or change a term in the plea agreement without allowing the prosecutor an opportunity to withdraw from the agreement[.]" *Id.* at ___. Accordingly, "the trial court correctly ordered that the plea agreement is vacated on the basis of plaintiff's request for withdrawal." *Id.* at ___.

## 1.9 Motion to Correct Invalid Sentence

In addition to the following discussion, see the Michigan Judicial Institute's Motion to Correct an Invalid Sentence Checklist.

### A. Authority to Modify Sentence

"The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party." MCR 6.429(A). If the court corrects an invalid sentence on its

[33] Similarly, MCR 6.310(C) uses language specifically referencing the "defendant" filing a motion and seeking relief.

own initiative, it must do so within 6 months of the entry of the judgment of conviction and sentence. *Id*.

"[T]he court may not modify a valid sentence after it has been imposed except as provided by law." MCR 6.429(A). "This reflects the well-recognized principle that trial courts possess the power to review and correct an invalid sentence." *People v Comer*, 500 Mich 278, 295 (2017).[34] "It also distinguishes this power from the trial court's authority to modify a valid sentence, which is much more circumscribed." *Id*. See also *People v Holder*, 483 Mich 168, 170, 177 (2009) (holding the trial court had no authority to modify the defendant's judgment of sentence where the original sentence was valid at the time it was imposed); *People v Moore (Louis)*, 468 Mich 573, 579 (2003) ("[a] trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid"); *People v Wybrecht*, 222 Mich App 160, 166 (1997) (holding a "trial court lacks authority to set aside a valid sentence once the defendant begins serving it").

Where the trial court corrected an invalid judgment of sentence sua sponte to add a mandatory lifetime electronic monitoring (LEM) requirement within the six-month period provided by MCR 6.429(A), but failed to give the parties an opportunity to be heard on the matter before correcting the judgment of sentence, it "acted in violation of MCR 6.429(A)." *People v Pendergrass*, 348 Mich App 81, 87, 88 (2023) (finding the trial court's error harmless where "there is nothing defendant could have argued to avoid the mandatory LEM").[35]

"The trial court had jurisdiction to consider [the defendant's] arguments concerning his second-degree murder sentence at the resentencing for first-degree murder held pursuant to MCL 769.25a and *Miller v Alabama*, 567 US 460 (2012)." *People v Williams*, 505 Mich 1013 (2020) (ordering the trial court to "consider whether the sentence for second-degree murder was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole for first-degree murder," and noting that if the trial court determines the sentence was based on a legal misconception it

[34] *Comer* interpreted a former version of MCR 6.429; however, this provision remains substantially the same as the version that *Comer* interpreted. The 2018 amendments to MCR 6.429 specifically granted trial courts *sua sponte* authority to amend erroneous judgments in response to the holding in *Comer*. See the May 23, 2018 Staff Comment to MCR 6.429; ADM File No. 2015-04. "[A] staff comment to the Michigan Court Rules is not binding authority." *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

[35] The Court held that failure to include the mandatory LEM in the judgment of sentence was a substantive mistake rather than a clerical mistake. *People v Pendergrass*, 348 Mich App 81, 85 (2023). Because the judgment of sentence had already been entered, the trial court did not have authority under MCR 6.435(B) to amend it, accordingly, MCR 6.429 governed modification of the judgment of sentence. *Pendergrass*, 348 Mich App at 86.

"may exercise its discretion to resentence the defendant for second-degree murder").[36]

## B. Invalid Sentences

"Invalid sentence refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced or to have the sentence changed." 1989 Staff Comment to MCR 6.429.[37] "[A]n inadvertently stated sentence cannot be set aside merely on the ground that the court misspoke." *People v Thomas (Gerry)*, 447 Mich 390, 393 (1994).

A sentence is invalid under the following circumstances:

- When it violates the "two-thirds rule" in *People v Tanner*, 387 Mich 683, 689-690 (1972),[38] and MCL 769.34(2)(b). See *Thomas*, 447 Mich at 392-394 (determining proper way to correct a sentence that violates the two-thirds rule, assuming without explicitly stating that the sentence in violation of the two-thirds rule is invalid; specifically, the Court noted that "a sentencing court may not later modify a valid sentence," and holds that adjustment of a sentence in violation of the two-thirds rule requires adjustment of the part of the sentence that is invalid, i.e., the minimum term of the sentence in violation of the two-thirds rule).

- When it exceeds statutory limits. *People v Shipley*, 256 Mich App 367, 378 (2003); *People v Pointer-Bey*, 321 Mich App 609, 620 (2017) (holding the defendant's sentence was invalid and had to be corrected where "the sentence imposed exceeded the statutory limit"). A sentence in excess of the statutory limit is only invalid to the extent it exceeds the statutory limit. MCL 769.24; *Thomas*, 447 Mich at 393-394.

- When it is an impermissible combination of terms. *People v Parish*, 282 Mich App 106, 107-108 (2009) (the defendant's sentence of a minimum term of years and a maximum of life in prison violated MCL 769.9(2), which provides that "[t]he court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence").

- When concurrent sentences were imposed and consecutive sentencing was mandatory.[39] *People v Howell (Marlon)*, 300

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[36] See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19, for a detailed discussion of resentencing under MCL 769.25a and *Miller*.

[37] "[A] staff comment to the Michigan Court Rules is not binding authority." *Williams*, 483 Mich at 239 n 15.

[38] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 5, for discussion of the *Tanner* rule.

Mich App 638, 646-647 (2013); *People v Thomas (Roberto)*, 223 Mich App 9, 11 (1997).

- When the court mistakenly imposes consecutive sentences without statutory authority to do so. *People v Alexander (Ronald)*, 234 Mich App 665, 677-678 (1999).

    - A defendant's due process rights are not implicated and a resentencing hearing is unnecessary where correction of the invalid sentence results in a decrease to the defendant's overall prison term. *Alexander*, 234 Mich App at 678.

- When the sentence is based on inaccurate information or an error in scoring the sentencing guidelines.[40] *People v Jackson (Leonard)*, 487 Mich 783, 792 (2010).[41] See also *People v Miles (Dwayne)*, 454 Mich 90, 96 (1997) (stating a sentence is invalid where it is based on inaccurate information); *People v Turner*, 505 Mich 954 (2020) (stating a sentence is invalid if it is based on a misconception of law and explaining that "a concurrent sentence for a lesser offense is invalid if there is reason to believe that it was based on a legal misconception that the defendant was required to serve a mandatory sentence of life without parole on the greater offense").

- When the sentence is based on constitutionally impermissible grounds. *Miles*, 454 Mich at 96; *People v Conley*, 270 Mich App 301, 316 (2006) (holding that MCL 769.34(10) "cannot authorize action in violation of the federal or state constitutions").[42]

    - Where a trial court implies that it might impose a more lenient sentence if the defendant provides the court with information that requires the defendant to

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[39] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 7 for more information on concurrent and consecutive sentencing.

[40] In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," the guidelines "are advisory only." Because nothing in *Lockridge* specifically calls into question the standards currently governing appellate review of judicial fact-finding in scoring the (now advisory) guidelines, it is unclear to what extent these standards remain good law.

[41] "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8 (2006). However, a defendant is entitled to challenge the proportionality of any sentence on appeal; within-guidelines sentences reviewed for reasonableness are subject to a rebuttable presumption of proportionality. *People v Posey*, 512 Mich 317, 360 (2023).

[42] The Court clarified that "the portion of MCL 769.34(10) that requires appellate affirmation of within-guidelines sentences that are based on accurate information without scoring errors is unconstitutional," and the Court struck down that portion of MCL 769.34(10). *People v Posey*, 512 Mich 317, 352, 361 (2023) (Justice WELCH did not join this section of the opinion, but she agreed that the first sentence of MCL 769.34(10) must be severed albeit for a different reason).

effectively admit his guilt, the court "violate[s] [the defendant's] constitutional right against self-incrimination," and the sentence is invalid. *Conley*, 270 Mich App at 314-316.

- It is constitutionally impermissible when fashioning a defendant's sentence for a trial court to rely on a defendant's constitutionally infirm prior convictions. *People v Whalen*, 412 Mich 166, 169 (1981). However, there exists no presumption that a court considered an unconstitutional prior conviction simply because the conviction was included in the information before the court at the time of sentencing. *Alexander*, 234 Mich App at 672. For such an issue to merit review, there must be some affirmative evidence that a sentencing court actually considered the conviction in question. *Id.*

- When the sentence is based on a trial court's improper assumption of the defendant's guilt. *Miles*, 454 Mich at 96.

- When the sentence "conforms to local sentencing policy rather than individualized facts." *Miles*, 454 Mich at 96.

- When a trial court "fails to exercise its discretion because of a mistaken belief in the law." *People v Green (Donte)*, 205 Mich App 342, 346 (1994). See also *Miles*, 454 Mich at 96 (stating a sentence is invalid where it is based on a misconception of law).

  - A sentence was deemed invalid when the trial court imposed consecutive sentences under the mistaken belief that consecutive sentencing was mandatory. *People v Daniels (Virgil)*, 69 Mich App 345, 349-350 (1976).

  - "[T]here is no legal requirement that a trial court state on the record that it understands it has [sentencing] discretion and is utilizing that discretion [when imposing a sentence]." *People v Knapp*, 244 Mich App 361, 389 (2001). In the absence of record evidence that a court wrongly believed it had no discretion, a court is presumed to know the law and the judicial discretion the law authorizes. *Id.*

  - There was "no misunderstanding [of the law] by the sentencing judge that would entitle the defendant to resentencing" where the trial court clearly expressed its intention that—despite imposing a sentence of life imprisonment—the defendant be considered for parole, and after consideration of the defendant the Parole Board determined that it had "no interest" in

granting parole. *People v Moore (Louis)*, 468 Mich 573, 580 (2003) (noting that "the sentencing judge did not express any intention that defendant *actually be paroled*, but only that the Parole Board consider whether to parole him," and holding that "the failure to accurately predict the actions of the Parole Board does not constitute a misapprehension of the law that could render the sentence invalid").

- When a court fails to utilize a reasonably updated presentence investigation report (PSIR) when imposing a sentence. *People v Hemphill*, 439 Mich 576, 580-581 (1992) (holding defendant waived right to have PSIR updated for resentencing hearing).

- When the defendant and defense counsel are not given the opportunity to address the court before sentence is imposed. MCR 6.425(D)(1)(c); *People v Wells*, 238 Mich App 383, 392 (1999).

- When the trial court entered a judgment of sentence but failed to include a mandatory lifetime electronic monitoring requirement in the judgment of sentence. *People v Pendergrass*, 348 Mich App 81, 85, 86 (2023) (additionally holding that the failure to include the lifetime electronic monitoring requirement was a substantive mistake, not a clerical error).

## C. Time for Filing Motion

"MCR 6.429(B) provides a detailed process governing how and when a party may file a motion to correct an invalid sentence." *People v Comer*, 500 Mich 278, 295 (2017).

"A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal." MCR 6.429(B)(1). "Specifically, before the filing of a timely claim of appeal, either party may file a motion to correct an invalid sentence under MCR 6.429(B)(1)." *Comer*, 500 Mich at 295.

"After a claim of appeal has been filed, a party may only file a motion to correct an invalid sentence as specified by MCR 6.429(B)(2) and [MCR 6.429(B)(3)]." *Comer*, 500 Mich at 295. "These motions are time limited." *Id.*

"If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B)[43] or the remand procedure set forth in MCR

[43]See Section 1.3 for more information on MCR 7.208(B).

7.211(C)(1)." MCR 6.429(B)(2). "If a claim of appeal has been filed, a defendant has 56 days to file a motion to correct an invalid sentence." *Comer*, 500 Mich at 295-296. Otherwise, "the appellant may file a motion to remand within the time provided for filing the appellant's brief." *Id*. at 296.

"If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within the time for filing an application for leave to appeal under MCR 7.205(A)(2)(a) and [MCR 7.205(A)(2)(b)(*i*)-(*iii*)]." MCR 6.429(B)(3).

MCR 7.205(A)(2) provides, in relevant part:

> "In a criminal case involving a final judgment or final order entered in that case, an application for leave to appeal filed on behalf of the defendant must be filed within the later of:
>
> (a) 6 months after entry of the judgment or order; or
>
> (b) 42 days after:
>
> (*i*) an order appointing appellate counsel or substitute counsel, or denying a request for appellate counsel, if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;
>
> (*ii*) the filing of transcripts ordered under MCR 6.425(G)(1)(f), if the defendant requested counsel within 6 months after entry of the judgment or order to be appealed;
>
> (*iii*) the filing of transcripts ordered under MCR 6.433, if the defendant requested the transcripts within 6 months after entry of the judgment or order to be appealed[.]"

"If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in [MCR 6.500 *et seq*]." MCR 6.429(B)(4).

"If filed by an unrepresented individual who is incarcerated in a prison or jail, a pleading or other document must be deemed timely filed if it was deposited in the institution's outgoing mail on or before the filing deadline. Proof of timely filing may include a receipt of mailing, a sworn statement setting forth the date of deposit and that postage has been prepaid, or other evidence (such as a postmark or date stamp) showing that the document was timely deposited and that postage was prepaid." MCR 1.112.

## D. Correcting Invalid Sentences

### 1. Vacating Partial or Entire Sentence

"Where a sentence is partially invalid, only the invalid part is to be vacated for resentencing; however, a wholly invalid sentence is to be vacated in its entirety[.]" *People v Parish*, 282 Mich App 106, 108 (2009). In *Parish*, the defendant's sentence of 126 months to life in prison was invalid because it violated MCL 769.9(2), which provides that a court "shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." *Parish*, 282 Mich App at 107. The Court of Appeals held that the defendant's original sentence was wholly invalid because it was "an impermissible *combination of* terms," and resentencing was required. *Id.* at 108.

The Court of Appeals found "no support for the proposition that [courts] have inherent authority to broadly prohibit contact with all individuals outside of prison, with the sole exception of legal counsel . . . ." *People v Lafey*, ___ Mich App ___, ___(2024). "'A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court.'" *Lafey*, ___ Mich App at ___, quoting MCL 769.1(1). However, "[t]he sentence shall not exceed the sentence prescribed by law." *Lafey*, ___ Mich App at ___. According to the *Lafey* Court, "there is no statute expressly authorizing the trial court to impose a blanket no-contact condition of sentence as was imposed in this case, and we are unaware of any statute that authorizes such a sentence by implication." *Id.* at ___.

### 2. Resentencing is De Novo

"[O]nce an original sentence is vacated, the case is placed in a presentence posture," and "[a]s a result, at resentencing, every aspect of the sentence is before the judge de novo[.]" *People v Davis (Stafano)*, 300 Mich App 502, 509 (2013) (quotation marks and citation omitted, third alteration in original). See also *People v Parish*, 282 Mich App 106, 108 (2009) (holding that "resentencing is to be de novo," and concluding "that the trial court was not precluded from imposing a new sentence with a longer minimum term").

In resentencing the defendant, "[t]he trial court may consider the contents of the presentence investigation report [(PSIR)] when calculating the guidelines and the victims may have their statements included in the PSIR." *Davis*, 300 Mich App at 509-510 (holding that where the case was remanded to reconsider the

scoring of OV 13 and the remand order instructed the trial court to consider whether to resentence the defendant if it determined that OV 13 was improperly scored "the trial court was able to consider and decide other issues at resentencing once it determined that OV 13 had been erroneously scored, . . . includ[ing] consideration of [a] newly appended victim's impact statement").

## 3. Required Notice

MCL 769.27 states that a court must provide notice to all parties of any change made to a sentence:

> "If the court changes any sentence imposed under this act in any respect, the clerk of the court shall give written notice of the change to the prosecuting attorney, the defendant, and the defendant's counsel. The prosecuting attorney, the defendant's counsel, or the defendant may file an objection to the change. The court shall promptly hold a hearing on any objection filed."

## 4. Due Process Requirements

"Certain sentence modifications of invalid sentences are ministerial in nature and do not require a resentencing hearing; however, other modifications require the due process protections of a resentencing hearing." *People v Miles (Dwayne)*, 454 Mich 90, 98-99 (1997) (noting that "the majority of cases presume that the correction of a sentence found invalid because of inaccuracies in information relied on at sentencing will occur at a resentencing hearing"). "[W]hen the trial court corrects a mistaken sentence and it does not have discretion to sentence a defendant any differently, the defendant is not entitled to a hearing." *People v Howell (Marlon)*, 300 Mich App 638, 648-651 (2013) (holding that where the defendant's original judgments of sentence failed to specify that the sentences were to run consecutively the failure was "an omission within the meaning of [MCR 6.435(A)], not a reconsideration within the meaning of [MCR 6.435(B)]," and the defendant's right to due process did not entitle him to a hearing before correction of his judgments of sentence to reflect the mandatory consecutive nature of the sentences). But see *People v Thomas (Roberto)*, 223 Mich App 9, 15-16 (1997) (holding that the due process afforded by a resentencing hearing is required when a defendant is exposed to a greater possible penalty or when a defendant's original sentence would be "drastically increased" by the modified sentence, and accordingly, resentencing was required where the

trial court corrected concurrent sentences to consecutive sentences).

### 5. Remedy for *Tanner* Violation[44]

The proper remedy for a violation of the two-thirds rule in MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683 (1972), is a reduction in the minimum sentence. *People v Thomas (Gerry)*, 447 Mich 390, 392-394 (1994).

## E. Preservation of Issues Concerning Sentencing Guidelines Scoring and Challenges Based on Scoring

**Note:** In *People v Lockridge*, 498 Mich 358, 365, 399 (2015), the Court held that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," the guidelines "are advisory only." Because nothing in *Lockridge* specifically calls into question the standards currently governing appellate review of sentences imposed under the (now advisory) guidelines, it is unclear to what extent all of these standards remain good law.[45]

### 1. Sentences Within the Guidelines Range

MCL 769.34(10) and MCR 6.429(C) both provide that "[a] party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals." A defendant therefore preserves a sentencing issue for appeal by raising the issue "'at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.'" *People v Clark (Tyrone)*, 315 Mich App 219, 223 (2016), quoting MCR 6.429(C). However, "MCL 769.34(10) cannot constitutionally be applied to preclude relief for sentencing errors of constitutional magnitude." *People v Conley*,

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[44] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 5 for discussion of the *Tanner* rule.

[45] See, however, *People v Steanhouse (Steanhouse I)*, 313 Mich App 1, 38 (2015) (concluding that "the standards of review traditionally applied to the trial court's scoring of the variables remain viable after *Lockridge*[, 498 Mich 358]") (citations omitted). The Court clarified that "the portion of MCL 769.34(10) that requires appellate affirmation of within-guidelines sentences that are based on accurate information without scoring errors is unconstitutional," and the Court struck down that portion of MCL 769.34(10). *People v Posey*, 512 Mich 317, 352, 361 (2023) (Justice WELCH did not join this section of the opinion, but she agreed that the first sentence of MCL 769.34(10) must be severed albeit for a different reason).

270 Mich App 301, 316-317 (2006) (resentencing required when, even though the defendant's sentence was within the appropriate guidelines sentence range, the trial court constitutionally erred in considering the defendant's refusal to admit guilt at sentencing).

When a defendant raises a challenge to their within-guidelines sentence, that sentence is reviewed for reasonableness. *People v Posey*, 512 Mich 317, 326 (2023) (striking down the first sentence of MCL 769.34(10) that requires appellate affirmation of within-guidelines sentences that are based on accurate information without scoring errors; note that Justice WELCH did not join this section of the opinion, but she agreed that the first sentence of MCL 769.34(10) must be severed albeit for a different reason). While Courts must review within-guidelines sentences for reasonableness, there is a nonbinding rebuttable presumption of proportionality that the defendant bears the burden of rebutting. *Posey*, 512 Mich at 360 (Justice WELCH agreed with this remedy).

Note that if the trial court declines to impose an intermediate sanction under MCL 769.34(4)(a) and instead imposes a prison sentence that is within the recommended minimum sentencing range, the prison sentence "is within the range authorized by law." *People v Schrauben*, 314 Mich App 181, 195-196 (2016), overruled in part on other grounds by *People v Posey*, 512 Mich 317, 326 (2023).[46] "In accordance with the broad language of [*People v Lockridge*, 498 Mich 358, 365 n 1, 391 (2015)], under [MCL 769.34(4)(a)], a trial court may, but is no longer required to, impose an intermediate sanction if the upper limit of the recommended minimum sentence range is 18 months or less." *Schrauben*, 314 Mich App at 195. Accordingly, these sentences are reviewed for reasonableness and subject to a presumption of proportionality. *Posey*, 512 Mich at 359.

"To ignore [a] meritorious sentencing argument based on [a] defendant's label for his timely motion would [erroneously] exalt form over substance." *People v Pointer-Bey*, 321 Mich App 609, 620 n 3 (2017) ("[a]lthough defendant did not title his motion in the trial court as one for resentencing or to correct an invalid sentence under MCR 6.429, he plainly argued that he was not subject to enhanced sentencing," and he was entitled to have his invalid sentence corrected).

"[W]hen the request to remand will not be ripe for review until after the Court of Appeals has adjudicated the merits, the

[46]For more information on the precedential value of an opinion with negative subsequent history, see our note.

mandate of a *proper motion* in MCL 769.34(10) is met when a defendant makes a request to remand for resentencing with supporting grounds within his appellate brief." *People v Jackson (Leonard)*, 487 Mich 783, 800 (2010).

Where the prosecution agreed to recommend a sentence *within* a certain minimum-sentence range, but the defendant did not agree to a *specific* sentence range, "the defendant did not bind himself to a particular guidelines range as part of his plea agreement and did not waive his challenges to the offense variable scoring." *People v Osborne*, 494 Mich 861, 861 (2013).

Resentencing is not required "[w]here a scoring error does not alter the appropriate guidelines range," or "[w]here the trial court has clearly indicated that it would have imposed the same sentence regardless of the scoring error and the sentence falls within the appropriate guidelines range." *People v Francisco*, 474 Mich 82, 89 n 8 (2006). However, note that under *Posey*, a defendant who argues that their sentence is disproportionate is entitled to review subject to a rebuttable presumption of proportionality. *Posey*, 512 Mich at 359-361 (severing the first sentence of MCL 769.34(10) that required appellate courts to affirm within-guidelines sentences).[47]

## 2. Sentences Outside the Guidelines Range[48]

Resentencing is required when a scoring error alters the appropriate guidelines range, even if the initial sentence falls within the corrected range, because if resentencing does not occur, "the defendant will have been given a sentence which stands differently in relationship to the correct guidelines range than may have been the trial court's intention." *People v Francisco*, 474 Mich 82, 89-92 (2006). "[R]equiring resentencing in such circumstances . . . respects the defendant's right to be sentenced on the basis of the law, [as well as] the trial court's interest in

[47]The *Posey* Court did not discuss the decision in *Francisco*; however, *Francisco* cited and appeared to rely on the first sentence of MCL 769.34(10). See *Francisco*, 474 Mich at 88-89.

[48]Courts are no longer required articulate a substantial and compelling reason when departing from the guidelines range. In 2015, holding that Michigan's mandatory sentencing guidelines scheme was constitutionally deficient, the Michigan Supreme Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory" and "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)," holding that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," the legislative sentencing guidelines "are *advisory* only." *People v Lockridge*, 498 Mich 358, 364-365, 391-392, 399 (2015) (emphasis supplied). Subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021. A sentencing court has discretion to depart from the guidelines range, and a departure sentence "will be reviewed by an appellate court for *reasonableness*." *Lockridge*, 498 Mich at 392, citing *United States v Booker*, 543 US 220, 261 (2005) (emphasis supplied).

having defendant serve the sentence that it truly intends." *Id*. at 92. See also *People v Biddles*, 316 Mich App 148, 156 (2016) (noting that a defendant who raises a successful evidentiary challenge to the scoring of the variables, resulting in an alteration of the minimum sentence range, is entitled to resentencing under *Francisco*, 474 Mich at 89).

MCL 769.34(7) and MCR 6.425(F)(5) authorize defendants to appeal a sentence outside the guidelines range on that basis alone. See also *People v Kimble (Richard)*, 470 Mich 305, 310 (2004) (holding that "a sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand"). However, unlike MCL 769.34(10) and MCR 6.429(C) (provisions applicable to appealing sentences within the guidelines), MCL 769.34(7) and MCR 6.425(F)(5), the provisions governing appeals of sentences outside the guidelines, make no mention of preservation requirements. Although the language used in MCL 769.34(7) and MCR 6.425(F)(5) is not identical, they are substantially similar and neither one requires something the other does not:

> "If the trial court imposes on a defendant a minimum sentence that is longer or more severe than the appropriate sentence range, as part of the court's advice of the defendant's rights concerning appeal, the court shall advise the defendant orally and in writing that he or she may appeal the sentence as provided by law on grounds that it is longer or more severe than the appropriate sentence range." MCL 769.34(7).

> "When imposing sentence in a case in which sentencing guidelines enacted in . . . MCL 777.1 *et seq*., are applicable, if the court imposes a minimum sentence that is longer or more severe than the range provided by the sentencing guidelines, the court must advise the defendant on the record and in writing that the defendant may seek appellate review of the sentence, by right if the conviction followed trial or by application if the conviction entered by plea, on the ground that it is longer or more severe than the range provided by the sentencing guidelines." MCR 6.425(F)(5).

The Court of Appeals ordered the trial court to remove a condition that "broadly prohibit[ed] contact with all individuals outside of prison, with the sole exception of legal counsel . . . ."

*People v Lafey*, ___ Mich App ___, ___(2024). "'A judge of a court having jurisdiction may pronounce judgment against and pass sentence upon a person convicted of an offense in that court.'" *Lafey*, ___ Mich App at ___, quoting MCL 769.1(1). However, "[t]he sentence shall not exceed the sentence prescribed by law." *Lafey*, ___ Mich App at ___. While "a trial court possesses statutory authority to impose a limited no-contact order in certain circumstances," the Court stated it was not aware of any "broad statute prohibiting contact to the entire world, excluding an attorney, outside of the confines of the four walls of a prison." *Id*. at ___ n 11.

**Waiver.** "[P]ursuant to MCL 769.34(10) and [*Kimble (Richard)*, 470 Mich at 310-312]," a defendant whose sentence is outside the appropriate guidelines range "is entitled to appeal the matter unless he is deemed to have waived the error at sentencing." *People v Hershey*, 303 Mich App 330, 349 (2013). "[T]here are no 'magic words' that constitute a waiver, and . . . a waiver analysis should consider the entire context of a defendant's conduct concerning a purportedly waived issue to determine whether the defendant, in fact, intentionally relinquished a known right." *Id*. at 350.

## 3. Scoring Error and Departure Sentence

As a matter of law, "[i]n cases . . . that involve a minimum sentence that is an upward departure, a defendant necessarily cannot show plain error because the sentencing court has already clearly exercised its discretion to impose a *harsher* sentence than allowed by the guidelines and expressed its reasons for doing so on the record." *People v Lockridge*, 498 Mich 358, 395 n 31 (2015). See also *People v Steanhouse (Steanhouse II)*, 500 Mich 453, 475 (2017) (holding that "departure sentences [are exempted] from [the *Crosby*] remand procedure, at least for cases in which the error was unpreserved, because a defendant who [has] received an upward departure [cannot] show prejudice resulting from the constraint on the trial court's sentencing discretion"); *People v Ambrose*, 317 Mich App 556, 565 (2016) (even assuming an error in scoring the guidelines, the defendant was not entitled to resentencing where a departure sentence was imposed and reasonable "[i]n light of the facts of [the] case, the trial court's lengthy articulation of its reasons for departing from the guidelines, and the minor extent of the departure").

The trial court must actually score the guidelines before imposing a departure sentence. See *People v Geddert*, 500 Mich 859, 859 (2016) (stating "the scoring of the guidelines themselves is mandatory"). Where the trial court failed to score points for

any offense variables but departed from the guidelines range in part on the basis of conduct that should have been scored under OV 13, resentencing was required under *People v Francisco*, 474 Mich 82 (2006); "[e]ven though the guidelines ranges are now advisory[ under *Lockridge*, 498 Mich 358]," resentencing was required "[b]ecause correcting the OV score would change the applicable guidelines range[.]" *Geddert*, 500 Mich at 859.

### 4. Constitutional Errors in Calculating Guidelines Scores

In 2015, the Michigan Supreme Court, applying *Alleyne v United States*, 570 US 99 (2013), and *Apprendi v New Jersey*, 530 US 466 (2000), held that "Michigan's sentencing guidelines . . . [are] constitutionally deficient . . . [to] the extent [that they] . . . *require* judicial fact-finding beyond facts admitted by the defendant or found by the jury to score offense variables (OVs) that *mandatorily* increase the floor of the guidelines minimum sentence range[.]" *People v Lockridge*, 498 Mich 358, 364, 399 2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). "To remedy the constitutional violation," the *Lockridge* Court "sever[ed] MCL 769.34(2) to the extent that it is mandatory" and "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)," further holding that although "a sentencing court must determine the applicable guidelines range and take it into account when imposing a sentence," the legislative sentencing guidelines "are *advisory* only." *Lockridge*, 498 Mich at 364-365, 391, 399, citing *United States v Booker*, 543 US 220, 233, 264 (2005) (emphasis added). Subsequently, MCL 769.34 was amended to omit the substantial and compelling language and to explicitly provide for reasonable departures. See 2020 PA 395, effective March 24, 2021.

A defendant raising a constitutional guidelines-scoring error based on *Lockridge* may be entitled to resentencing. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 5 for discussion of appellate review of felony sentences, and specifically, review of claims of constitutional guidelines-scoring error under *Lockridge*.

## 1.10 Motion to Correct Mistakes[49]

In addition to the following discussion, see the Michigan Judicial Institute's Motion to Correct Mistakes After Judgment Checklist.

## A. Clerical Mistakes

"Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it." MCR 6.435(A). For example, "[a] prison sentence entered on a judgment that is erroneous because the judge misspoke or the clerk made a typing error is correctable under [MCR 6.435(A)]." 1989 Staff Comment to MCR 6.435.[50]

"Under [MCR 6.435(A)], a court may correct a clerical mistake on its own initiative at any time, including after a judgment has entered." *People v Comer*, 500 Mich 278, 293 (2017). "MCR 6.435(A) does not require the trial court to give the defendant a hearing before correcting a clerical error, . . . [and] a defendant's rights to due process do not require the trial court to give a defendant a hearing before correcting a clerical error under MCR 6.435(A)." *People v Howell*, 300 Mich App 638, 649-650 (2013).

"To determine the nature of a filing, [the Court] look[s] beyond the party's labels and focus[es] on the substance of the filing." *People v Beard*, 327 Mich App 702, 706 (2019). Where the beginning date of the sentence in the original judgment of sentence was ambiguous, the defendant "was not seeking to correct an invalid sentence imposed by the trial court but rather was attempting to enforce the imposed sentence," and under these circumstances, the defendant's motion was "best viewed as a motion to correct a mistake." *Id.* at 706, 707 (rejecting the prosecution's argument that the defendant's motion should be construed as an untimely motion to correct an invalid sentence and holding that because it was a motion to correct a clerical mistake it could be brought at any time).

## B. Correction of Record

"If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected." MCR 6.435(C).

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[49] MCR 6.435(B) provides that "[a]fter giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous." "A substantive mistake is a conclusion or decision that is erroneous, because it is based on a mistaken belief in the facts or the applicable law." *People v Jones (Carlos Lorenzo)*, 203 Mich App 74, 80 (1993). "[T]he court's ability to correct substantive mistakes under MCR 6.435(B) ends upon entry of the judgment." *People v Comer*, 500 Mich 278, 294 (2017). Accordingly, further discussion of this topic is outside the scope of this volume of the benchbook.

[50] "[A] staff comment to the Michigan Court Rules is not binding authority." *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

### C. Correction During Appeal

"If a claim of appeal has been filed or leave to appeal granted in the case, corrections under [MCR 6.435] are subject to MCR 7.208(A)[51] and [MCR 7.208(B)[52]]." MCR 6.435(D).

## 1.11 Motion to Amend Restitution

"The court may amend an order of restitution entered under the Crime Victim's Rights Act on a motion filed by the prosecuting attorney, the victim, or the defendant based upon new or updated information related to the injury, damages, or loss for which the restitution was ordered." MCR 6.430(A).

MCR 6.430 applies to felony and misdemeanor cases. MCR 6.001(A)-(B).

### A. Filing

"The moving party must file the motion and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced. Upon receipt of a motion, the clerk shall file it under the same case number as the original conviction. If an appeal is pending when the motion is filed, the moving party must serve a copy on the appellate court." MCR 6.430(B).

### B. Service and Notice of Hearing

"If the defendant is the moving party, he/she shall serve a copy of the motion and notice of its filing on the prosecuting attorney and the prosecutor shall then serve a copy of the motion and notice upon the victim." MCR 6.430(C).

"If the prosecutor is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the victim." MCR 6.430(C).

"If the victim is the moving party, he/she shall serve a copy of the motion and notice of its filing on the defendant and the prosecutor." MCR 6.430(C).

"The home address, home telephone number, work address, and work telephone number of the victim, if included on a motion to amend restitution, is nonpublic." MCR 6.430(C).

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[51] See Section 1.2 for more information on MCR 7.208(A).

[52] See Section 1.3 for more information on MCR 7.208(B).

"The non-moving party is permitted but not required to respond. Any response to the motion shall comply with the time for service of the response as provided in MCR 2.119(C)(2)." MCR 6.430(C).

"The court shall provide written notice of hearing on the motion to the defendant and prosecutor. The prosecutor shall then serve notice of hearing upon the victim." MCR 6.430(C).

### C. Appearance

"As permitted by MCR 6.006(A), the court may allow the defendant to appear by two-way interactive video technology to conduct the proceeding between a courtroom and a prison, jail, or other location." MCR 6.430(D).

### D. Ruling

"The court, in writing, shall enter an appropriate order disposing of the motion and, if the motion is granted, enter an order amending the restitution. If an appeal was pending when the motion was filed, the moving party must provide a copy of the order to the appellate court." MCR 6.430(E).

### E. Appeal

"An appeal from this subsection is processed as provided by MCR 7.100 *et seq.*, and [MCR] 7.200 *et seq.*" MCR 6.430(F).

## 1.12 Petition for DNA Testing and New Trial

A defendant may request postconviction DNA testing under MCL 770.16. The request for testing may be accompanied by a motion for new trial, and the court may order a new trial based on the outcome of the testing. See MCL 770.16(1). For more information on postconviction DNA testing, see the Michigan Judicial Institute's *Evidence Benchbook*, Chapter 4.

# Chapter 2: Probation Violations

## 2.1 In General

"It is the intent of the legislature that the granting of probation is a matter of grace requiring the agreement of the probationer to its granting and continuance." MCL 771.4(1).

"Probation is a matter of grace, not of right, and the trial court has broad discretion in determining the conditions to impose as part of probation." *People v Breeding*, 284 Mich App 471, 479-480 (2009). "Therefore, when a judge imposes probation, it is 'revocable on the basis of a judge's findings of fact at an informal hearing, and largely at the judge's discretion.'" *Id.* at 480, quoting *People v Harper*, 479 Mich 599, 626 (2007). "[T]he scope of a probation violation hearing is limited and . . . a probationer's rights at a probation violation hearing are not as broad as the rights afforded to a defendant in a criminal trial." *Breeding*, 284 Mich App at 480.

"A convicted defendant has no vested right in the continuance of his probation if he violates its conditions." *People v Ritter*, 186 Mich App 701, 707 (1991). "The probation statutes confer upon the sentencing court a broad range of discretionary power in handling all aspects of the probationary process." *Id.* at 707-708. MCL 771.4 "must be construed to authorize the sentencing court to revoke a defendant's probation, limited only by the requirements that the decision to revoke be based on violations which occur during the probationary period." *Ritter*, 186 Mich App at 708.[1] Note that MCL 771.4 was subsequently amended to further limit when probation revocation is appropriate; specifically, "[a]ll probation orders are revocable subject to the requirements of [MCL 771.4b, addressing technical probation violations], but revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, as otherwise allowed in [MCL 771.4b], or upon request of the probationer. MCL 771.4(2). See 2020 PA 397, effective April 1, 2021. Note that MCR 6.450 limits the discretion of a court when it allows a probationer to acknowledge a technical probation violation without a hearing by providing that "[t]he court may not impose a sentence of incarceration or revoke probation for acknowledging a technical probation violation[.]" MCR 6.450(B).[2] See also *People v Smith*, ___ Mich App ___, ___ (2024) (violation of a no-contact order is nontechnical only when the order names a specific individual; violation of a no-contact order prohibiting contact with a broad class of persons is not a nontechnical violation).

[1]Note that Effective April 1, 2021, 2020 PA 397 amended MCL 771.4 and omitted the statute's reference to the "probation period" on which the Court in *Ritter*, (and the cases *Ritter* cites), relied to conclude that the Court may not revoke probation after the probation period has expired. The current version of MCL 771.4 does not reference the "probation period" at all, and it is unclear whether the holding in *Ritter* is still valid.

[2]See Section 2.11(B) for a detailed discussion of MCR 6.450.

"[A] judge who sentences a defendant to probation retains jurisdiction over the case in all subsequent proceedings, including revocation of probation." *People v Manser*, 172 Mich App 485, 487 (1988). "'The underlying policy is simply to insure that revocation will be considered by the judge who is most acquainted with the matter.'" *Id.* at 487, quoting *People v Clemons (Alvin)*, 116 Mich App 601, 604 (1981).

"[V]iolation of probation is not a crime, and a ruling that probation has been violated is not a new conviction." *People v Kaczmarek*, 464 Mich 478, 482 (2001). "'If a judge finds that a probationer violated his probation by committing an offense, the probationer is neither burdened with a new conviction nor exposed to punishment other than that to which he was already exposed . . . .'" *Id.* at 483, quoting *People v Johnson*, 191 Mich App 222, 226 (1991). "Instead, revocation of probation simply clears the way for a resentencing on the original offense." *Kaczmarek*, 464 Mich at 483.

"In [probation violation] proceedings, the focus is on whether one who has already been convicted of a crime violated a term of probation, and whether probation should be revoked." *Johnson*, 191 Mich App at 225-226. "Because of the limited nature and scope of a probation violation hearing, as a practical matter the prosecutor may not present all the evidence bearing on the commission of the alleged offense." *Id.* at 226. "The determination whether one committed an offense for the purpose of a new conviction should be made in a criminal trial, which is the intended forum for such a determination, and not in an informal, summary proceeding." *Id.* "The principles of collateral estoppel . . . should not be permitted to preclude such a determination following a probation violation decision adverse to the people." *Id.* Additionally, "further criminal proceedings [following a probation violation hearing] [do not] violate the Double Jeopardy Clause." *Id.* at 226-227 ("'Jeopardy' within the meaning of the constitutional double jeopardy provision requires a criminal prosecution in a court of justice . . . [and] [a] probation violation hearing is not a criminal prosecution.").

The Michigan Judicial Institute created the following Quick Reference Materials relevant to probation violations:

- Probation Violation Flowchart
- Arraignment Checklist
- Plea Checklist
- Contested Hearing Checklist
- Sentencing Checklist

## 2.2 Issuance of Summons; Warrant

"The court may issue a bench warrant or summons[3] upon finding probable cause to believe that a probationer has committed a non-technical violation of probation. The court must issue a summons, rather than a bench warrant, upon finding probable cause to believe a probationer has committed a technical violation of probation unless the court states on the record a specific reason to suspect that one or more of the following apply:

> (1) The probationer presents an immediate danger to himself or herself, another person, or the public.
>
> (2) The probationer has left court-ordered inpatient treatment without the court's or the treatment facility's permission.
>
> (3) A summons has already been issued for the technical probation violation and the probationer failed to appear as ordered." MCR 6.445(A)(1)-(3).

"An arrested[4] probationer must promptly be brought before the court for arraignment on the alleged violation." MCR 6.445(A).

If the probation violation is a technical probation violation, "there is a rebuttable presumption that the court shall not issue a warrant for arrest," and "shall issue a summons or order to show cause to the probationer instead." MCL 771.4b(7). A warrant may be issued if the court overcomes the presumption by stating on the record "a specific reason to suspect" that the probationer (1) "presents an immediate danger to himself or herself, another person, or the public"; (2) has left court-ordered inpatient treatment without permission; or (3) has already failed to appear after being issued a summons or order to show cause. *Id.*

"The Michigan statutory scheme governing probation and Michigan caselaw recognize that a probation revocation must occur, or must at least have been commenced, during the probation period." *People v Glass*, 288 Mich App 399, 403, 405 (2010) ("The term 'probation period' in MCL 771.4 refers to the specific probation term that the sentencing court has imposed on a particular defendant."). However, effective April 1, 2021, 2020 PA 397 amended MCL 771.4 and omitted the statute's reference to the "probation period," which is the statutory language that Court in *Glass*, and the cases *Glass* cites, relied on to conclude that the Court may

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[3] See *Request and Summons For Probation Violation*, MC 246.

[4] "[A] warrant is not required under the Fourth Amendment to make an arrest for a probation violation[.]" *People v Glenn-Powers*, 296 Mich App 494, 496 (2012). Specifically, MCL 764.15(1)(g) provides that a "peace officer, without a warrant, may arrest a person in any of the following situations: . . . [t]he peace officer has reasonable cause to believe the person . . . has violated 1 or more conditions of a . . . probation order imposed by a court of this state, another state, Indian tribe, or United States territory."

not revoke probation after the probation period has expired. The current version of MCL 771.4 does not reference the "probation period" at all, and this omission makes it unclear whether the holding in *Glass* is still valid.

"[A] defendant's period of probation is tolled when he [or she] absconds from probationary supervision." *Ritter*, 186 Mich App at 711.[5] "An absconding defendant should not be allowed to benefit from his wrongful noncompliance with the terms of his probation order." *Id.* at 711-712 ("trial court properly revoked defendant's probation because revocation proceedings were pending when the normal term of defendant's probation would have expired and because defendant's period of probation was tolled when he absconded from probationary supervision").

"[O]nce a warrant for probation violation has been issued, the probation authorities must exercise due diligence in executing it." *People v Ortman*, 209 Mich App 251, 254, 257 (1995). "If there is a determination that the probation authorities did not act with reasonable dispatch under all the circumstances, then there is a waiver of the probation violation." *Id* ("Because the probation authorities did not exercise due diligence in executing the warrant, the probation violation should have been waived.").

## 2.3 Arraignment on the Charge

"At the arraignment on the alleged probation violation, the court must

> (1) ensure that the probationer receives written notice of the alleged violation,
>
> (2) inform the probationer whether the alleged violation is charged as a technical or non-technical violation of probation, and the maximum possible jail or prison sentence,
>
> (3) advise the probationer that
>
> > (a) the probationer has a right to contest the charge at a hearing, and
> >
> > (b) the probationer is entitled to a lawyer's assistance at the hearing and at all court proceedings, including the

[5]Note that Effective April 1, 2021, 2020 PA 397 amended MCL 771.4 and omitted the statute's reference to the "probation period" on which the Court in *Ritter*, (and the cases *Ritter* cites), relied to conclude that the Court may not revoke probation after the probation period has expired. The current version of MCL 771.4 does not reference the "probation period" at all, and in light of that omission it is unclear whether the holding in *Ritter* is still valid.

> arraignment on the violation/bond hearing, and that a lawyer will be appointed at public expense if the probationer wants one and is financially unable to retain one,
>
> (4) if requested and appropriate, refer the matter to the local indigent criminal defense system's appointing authority for appointment of a lawyer,
>
> (5) determine what form of release, if any, is appropriate, and
>
> (6) subject to [MCR 6.445(C)[6]], set a reasonably prompt hearing date or postpone the hearing." MCR 6.445(B).

"[A] probationer at a revocation proceeding has the right to counsel." *People v Kitley*, 59 Mich App 71, 73 (1975). The trial court must advise the defendant of the right to be represented by either appointed or retained counsel. *Id.*

"[D]ue process . . . require[s] the trial court, at the very least, to specifically inform each defendant that, as an alternative to pleading guilty, he has the right to a hearing in which he will have an opportunity to contest the charges against him." *People v Edwards*, 125 Mich App 831, 833 (1983). "Failure to so inform the defendant requires reversal absent direct and affirmative proof that the defendant was aware that he had such a right and that it would be waived by a plea of guilty." *Id.*

See also the Michigan Judicial Institute's probation violation Arraignment Checklist.

## 2.4 Timing of Hearing

"The hearing of a probationer being held in custody for an alleged probation violation must be held within the permissible jail sentence for the probation violation, but in no event longer than 14 days after the arrest or the court must order the probationer released from that custody pending the hearing." MCR 6.445(C). "If the alleged violation is based on a criminal offense that is a basis for a separate criminal prosecution, the court may postpone the hearing for the outcome of that prosecution." *Id.*

When a probationer is arrested and detained for a technical probation violation hearing, the hearing must be held "as soon as is possible," and "[i]f the hearing is not held within the applicable and permissible jail sanction, as determined under [MCL 771.4b(1)(a)-(b)], the probationer must be returned to community supervision." MCL 771.4b(8).

[6]See Section 2.4 for more information on MCR 6.445(C).

## 2.5 Continuing Duty to Advise of Right to Assistance of Lawyer

"Even though a probationer charged with probation violation has waived the assistance of a lawyer, at each subsequent proceeding the court must comply with the advice and waiver procedure in MCR 6.005(E)." MCR 6.445(D). See also *People v McKinnie*, 197 Mich App 458, 460 (1992).

"If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding . . . need show only that the court advised the defendant of the continuing right to a lawyer's assistance (at public expense if the defendant is indigent) and that the defendant waived that right." MCR 6.005(E). "Before the court begins such proceedings,

> (1) the defendant must reaffirm that a lawyer's assistance is not wanted; or
>
> (2) if the defendant requests a lawyer and is financially unable to retain one, the court must refer the defendant to the local indigent criminal defense system's appointing authority for the appointment of one; or
>
> (3) if the defendant wants to retain a lawyer and has the financial ability to do so, the court must allow the defendant a reasonable opportunity to retain one." *Id*.

"The court may refuse to adjourn a proceeding for the appointment of counsel or allow a defendant to retain counsel if an adjournment would significantly prejudice the prosecution, and the defendant has not been reasonably diligent in seeking counsel." *Id*.

"A defendant has limited due process rights with regard to a revocation hearing." *McKinnie*, 197 Mich App at 460-461. "The right to counsel, however, is fundamental and compliance with MCR 6.005(E) must be strict." *McKinnie*, 197 Mich App at 461 (defendant's judgment of sentence for probation violation vacated where the trial court did not comply with MCR 6.445 and MCR 6.005(E)).

"Because the advice and waiver procedures for subsequent proceedings are specifically referenced in MCR 6.445(D), but the advice and waiver procedures for initial criminal hearings are not referred to at all in the rest of the rule, it appears clear that the procedural safeguards set forth in MCR 6.005(D)[7] were deliberately omitted for probation revocation cases." *People v Belanger*, 227 Mich App 637, 646 (1998). "[D]ue process is satisfied in a probation revocation proceeding if a trial court advises a defendant of his right to counsel and the appointment of counsel, if he is indigent, and determines that there is a knowing and intelligent waiver

of that right." *Id.* at 647. "Factors to be considered when deciding whether [a] defendant ha[s] made a knowing waiver of his right to counsel are defendant's age, education, prior criminal experience, mental state, financial condition, and the various factors, pressures or inducements which led him to admit the allegations against him without the assistance of counsel." *People v Kitley*, 59 Mich App 71, 76 (1975).

## 2.6 The Violation Hearing

In addition to the following discussion, see the Michigan Judicial Institute's probation violation Contested Hearing Checklist.

Note that under MCR 6.450 probationers may acknowledge a technical probation violation without a hearing. See Section 2.11(B) for a discussion of technical probation violation acknowledgments.

### A. Procedure

"Hearings on the revocation must be summary and informal and not subject to the rules of evidence or of pleadings applicable in criminal trials." MCL 771.4(2). "In its probation order or by general rule, the court may provide for the apprehension, detention, and confinement of a probationer accused of violating a probation condition." MCL 771.4(3). "The method of hearing and presentation of charges are within the court's discretion, except that the probationer is entitled to a written copy of the charges constituting the claim that he or she violated probation and to a probation revocation hearing." MCL 771.4(4).

MCL 771.4 "places an affirmative obligation on the trial court to . . . provide the probationer with a written copy of the charges constituting the probation violation and to conduct a probation revocation hearing." *People v Hendrick*, 472 Mich 555, 562 (2005). "A defendant is entitled to receive written notice of a probation violation sufficiently in advance of the scheduled revocation hearing to allow him a reasonable opportunity to prepare his defense." *People v Irving*, 116 Mich App 147, 151 (1982).

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[7] MCR 6.005(D) provides that "[w]here the court makes the determination that a defendant is financially unable to retain a lawyer, it must promptly refer the defendant to the local indigent criminal defense system's appointing authority for appointment of a lawyer. The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer. The court should encourage any defendant who appears without counsel to be screened for indigency and potential appointment of counsel."

## B. Conduct of the Hearing

"The evidence against the probationer must be disclosed to the probationer." MCR 6.445(E)(1). "The probationer has the right to be present at the hearing, to present evidence, and to examine and cross-examine witnesses." *Id*. "The court may consider only evidence that is relevant to the violation alleged, but it need not apply the rules of evidence except those pertaining to privileges." *Id*. "The state has the burden of proving a violation by a preponderance of the evidence." *Id*.

"Probation violation hearings are summary and informal and are not subject to the rules of evidence or of pleading applicable in a criminal trial." *People v Pillar*, 233 Mich App 267, 269 (1998). "The scope of these proceedings is limited and the full panoply of constitutional rights applicable in a criminal trial do not attach." *Id*. "However, probationers are afforded certain due process at violation hearings because of the potential for loss of liberty." *Id*. "Specifically, a probationer has the right to a procedure consisting of (1) a factual determination that the probationer is in fact guilty of violating probation, and (2) a discretionary determination of whether the violation warrants revocation." *Id*. "[O]nly evidence relating to the charged probation violation activity may be considered at a violation hearing and only such evidence may provide the basis for a decision to revoke one's probation." *Id*. at 270 (trial judge erroneously considered evidence unrelated to the charged probation violation in decision to revoke the defendant's probation).

"A trial court's discretionary authority regarding the admission of evidence at a probation revocation hearing is broad." *People v Breeding*, 284 Mich App 471, 479 (2009). "Except for the rules of evidence pertaining to privileges, a trial court 'need not apply the rules of evidence' in a probation revocation hearing." *Breeding*, 284 Mich App at 479, quoting MCR 6.445(E)(1). "Probationers in Michigan have a right to confront witnesses in a probation revocation hearing pursuant to MCR 6.445(E)(1)[.]" *Breeding*, 284 Mich App at 483.[8] "In addition, probationers also have certain due process rights at such a hearing because of the potential loss of liberty." *Id*. "The liberty interest brings the probationer within the protection of the Fourteenth Amendment, even though revocation is not a stage of a criminal

[8] "In *Crawford* [*v Washington*, 541 US 36 (2004)], the [United States Supreme] Court held that in a criminal prosecution, the introduction of an out-of-court testimonial statement is precluded unless the witness is unavailable and the defendant has previously had an opportunity to cross-examine the witness." *People v Breeding*, 284 Mich App 471, 480 (2009). However, "the Sixth Amendment right to confrontation, as defined and applied in *Crawford*, does not apply to probation revocation proceedings." *Breeding*, 284 Mich App at 482. "Rather, a due process standard applies in determining the admissibility of statements made by out-of-court declarants at probation violation proceedings, regardless of whether the statements are testimonial or nontestimonial in nature." *Id*.

prosecution." *Id*. "Furthermore, the due process rights applicable to a probation revocation hearing allow for procedures that are more flexible than those required during a criminal prosecution." *Id*. at 483-484. "'[T]he process [of admitting evidence at a probation revocation hearing] should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.'" *Id*. at 484, quoting *Morrissey v Brewer*, 408 US 471, 489 (1972).

In *Morrissey*, 408 US 471, 485-489, the United States Supreme Court instructed that there are "two important stages in the typical process of *parole* revocation[:]" (1) the arrest of the parolee and preliminary hearing and (2) the revocation hearing. (Emphasis added.) In *Gagnon v Scarpelli*, 411 US 778 (1973), the United States Supreme Court "extended the *Morrissey* due process requirements to probation revocation proceedings." *People v Jackson (Leroy)*, 63 Mich App 241, 245 (1975). However, "Michigan's judicial warrant procedure coupled with the strict due process requirements of the revocation hearing is constitutionally equal or superior to the preliminary 'minimal inquiry' hearing and final revocation hearing procedure required by *Morrissey* and *Gagnon*." *Jackson (Leroy)*, 63 Mich App at 248 ("[i]n conjunction with a preliminary determination of probable cause, Michigan requires a revocation hearing which far exceeds the minimal due process requirements set forth in *Morrissey* and *Gagnon*").

"Th[e] fundamental privilege against compulsory self-incrimination accompanies a criminal defendant throughout the entire course of every criminal prosecution, including both sentencing and any subsequent probation revocation proceeding." *People v Manser*, 172 Mich App 485, 488 (1988) ("it was error for the trial court to call upon defendant where defendant had not testified or otherwise first waived the privilege [against self-incrimination]").

## C. Judicial Findings

"At the conclusion of the hearing, the court must make findings in accordance with MCR 6.403 and, if the violation is proven, whether the violation is a technical or non-technical violation of probation." MCR 6.445(E)(2). MCR 6.403 provides, in relevant part, that "[t]he court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment[; t]he court must state its findings and conclusions on the record or in a written opinion made a part of the record." See *Order Following Probation Violation Hearing*, MC 433.

"A trial court must base its decision that a probation violation was proven on verified facts in the record." *People v Breeding*, 284 Mich

App 471, 487 (2009). "The evidence, viewed in a light most favorable to the prosecution, must be sufficient to enable a rational trier of fact to find a probation violation by a preponderance of the evidence." *Id.* "Where a resolution of a factual issue turns on the credibility of witnesses or the weight of evidence, deference is given to the trial court's resolution of these issues." *Id.*

"[P]robation may not be revoked solely on the basis that the probationer was arrested." *People v Pillar*, 233 Mich App 267, 269 (1998). "There must be verified facts in the record from which the court can find by a preponderance of the evidence that a violation was committed." *Id.* at 270. Further, revocation is limited to the circumstances set out in MCL 771.4(2), MCL 771.4b, and MCR 6.450.[9]

"The standard of proof in a probation revocation hearing is less than in a regular criminal trial." *People v Tebedo*, 107 Mich App 316, 320 (1981). "When revocation is sought on the basis of a subsequent violation of the criminal law, there must be proof sufficient to allow the court to find by the preponderance of the evidence that defendant committed the new offense." *Id.* at 320-321. "There must be sufficient proof on each element of the offense." *Id.* at 321. "Because the standard of proof is lower than the reasonable doubt standard employed in a criminal trial, probation may be revoked before the trial on the substantive offense, and a decision to revoke probation will be valid even if the defendant is ultimately acquitted of the substantive crime." *Id.* "For the same reasons, the subsequent reversal of a conviction on a criminal offense would not require vacation of a probation revocation which was based on that offense if the testimony or the defendant's admissions at the revocation hearing were sufficient to establish by a preponderance of the evidence that the defendant committed the offense." *Id.*

"If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order must be a condition of probation." MCL 771.3(8). "Subject to the requirements of [MCL 771.4b], the court may only sanction a probationer to jail or revoke the probation of a probationer who fails to comply with the order if the probationer has the ability to pay and has not made a good-faith effort to comply with the order." MCL 771.3(8). "In determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the

[9]Specifically, MCL 771.4(2) provides in relevant part: "All probation orders are revocable subject to the requirements of [MCL 771.4b], but revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, as otherwise allowed in [MCL 771.4b], or upon request of the probationer." MCL 771.4b and MCR 6.450 address technical probation violations; see the discussion in Section 2.11.

probationer's ability to pay." *Id.* "The proceedings provided for in [MCL 771.3(8)] are in addition to those provided in [MCL 771.4]." MCL 771.3(8).

"[MCL 769.1k(1)[10] and MCL 769.1k(2)[11]] apply even if the defendant is placed on probation, probation is revoked, or the defendant is discharged from probation." MCL 769.1k(3).

If the defendant is placed on probation, any restitution ordered under MCL 769.1a, MCL 780.766, and/or MCL 780.826 must be a condition of that probation. MCL 769.1a(11); MCL 780.766(11); MCL 780.826(11). The court may revoke probation if the defendant fails to comply with the order and if the defendant has not made a good faith effort to comply with the order. MCL 769.1a(11); MCL 780.766(11); MCL 780.826(11). In determining whether to revoke probation, the court must consider the defendant's employment status, earning ability, and financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay. MCL 769.1a(11); MCL 780.766(11); MCL 780.826(11). However, a defendant must not be imprisoned, jailed, or incarcerated for a violation of probation or otherwise for failure to pay restitution as ordered unless the court determines that the defendant has the resources to pay the ordered restitution and has not made a good faith effort to do so. MCL 769.1a(14); MCL 780.766(14); MCL 780.826(14).

## 2.7 Pleas of Guilty

"The probationer may, at the arraignment or afterward, plead guilty to the violation." MCR 6.445(F). See the Michigan Judicial Institute's probation violation Plea Checklist.

"Before accepting a guilty plea, the court, speaking directly to the probationer and receiving the probationer's response, must

> (1) advise the probationer that by pleading guilty the probationer is giving up the right to a contested hearing and, if the probationer is proceeding without legal representation,

[10] MCL 769.1k(1) requires the court to impose the minimum state costs as set out in MCL 769.1j, and allows the court to impose any authorized fines, any authorized costs, and any cost reasonably related to the actual costs incurred by the trial court. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8, for detailed information about fines, costs, and assessments.

[11] "In addition to any fine, cost, or assessment imposed under [MCL 769.1k(1)], the court may order the defendant to pay any additional costs incurred in compelling the defendant's appearance." MCL 769.1k(2). See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 8, for discussion of what constitutes a cost incurred in compelling the defendant's appearance.

> the right to a lawyer's assistance as set forth in [MCR 6.445(B)(3)(b)[12]],
>
> (2) advise the probationer of the maximum possible jail or prison sentence for the offense,
>
> (3) ascertain that the plea is understandingly, voluntarily, and accurately made, and
>
> (4) establish factual support for a finding that the probationer is guilty of the alleged violation and whether the violation is a technical or non-technical violation of probation." MCR 6.445(F).

"[D]ue process . . . require[s] the trial court, at the very least, to specifically inform each defendant that, as an alternative to pleading guilty, he has the right to a hearing in which he will have an opportunity to contest the charges against him." *People v Edwards*, 125 Mich App 831, 833 (1983). "Failure to so inform the defendant requires reversal absent direct and affirmative proof that the defendant was aware that he had such a right and that it would be waived by a plea of guilty." *Id*. See *People v Alame*, 129 Mich App 686, 689-690 (1983) (Court of Appeals construed former GCR 1963, 791.5, which contained language substantially similar to MCR 6.445(F), and held that "failure to follow the clear mandates of the rule . . . cannot produce an understanding, knowing, or voluntary plea" such as where "the trial court did not advise defendant of the maximum possible sentence he might receive as a result of his plea [and] did not adequately advise the defendant of his right to a hearing . . . or advise defendant that he was giving up his right to a contested hearing before accepting defendant's plea").

If "[t]he trial court [does] not secure an adequate factual basis to support acceptance of [a] guilty plea" under MCR 6.445(F)(4), remand is appropriate to allow "the prosecutor an opportunity to establish a factual basis to support the plea." *People v McCullough*, 462 Mich 857 (2000). "If the prosecutor establishes a factual basis and no contrary evidence exists, defendant's conviction shall stand." *Id*. "If the prosecutor is unable to establish that defendant violated a condition of probation, the trial court shall vacate the order revoking defendant's probation." *Id*. "If contrary evidence is produced, the trial court shall treat the matter as a motion to withdraw the plea, and decide the matter in the exercise of its discretion." *Id*.

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[12] MCR 6.445(B)(3)(b) requires the court to "advise the probationer that . . . the probationer is entitled to a lawyer's assistance at the hearing and at all court proceedings, including the arraignment on the violation/bond hearing, and that a lawyer will be appointed at public expense if the probationer wants one and is financially unable to retain one[.]"

Where a defendant pleaded guilty pursuant to a plea agreement that was later determined to impose a penalty contrary to statutory requirements regarding permissible penalties for technical probation violations,[13] the proper remedy was withdrawal of the plea and vacation of the plea agreement. *People v Jackson*, ___ Mich App ___, ___ (2023). The Court rejected the defendant's request "to order the trial court to reform the plea agreement in a manner that would allow him to keep the plea but change the penalty." *Id.* at ___. It explained that if the court rejected the "sentence while keeping the rest of the agreement" it would be imposing a plea bargain upon the prosecution to which it did not agree. *Id.* at ___ (quotation marks and citation omitted). Instead, the Court held that where it is discovered that the penalty imposed as a result of a plea bargain was improper, "the trial court must give the prosecutor the opportunity to withdraw the plea" even if the defendant does not request withdrawal. *Id.* at ___.

## 2.8 Sentencing

"Subject to the requirements of [MCL 771.4b], the court may investigate and enter a disposition of the probationer as the court determines best serves the public interest." MCL 771.4(5). "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." *Id.*

"If the court finds that the probationer has violated a condition of probation, or if the probationer pleads guilty to a violation, the court may continue probation, modify the conditions of probation, extend the probation period, or revoke probation and impose a sentence of incarceration pursuant to law." MCR 6.445(G). An eligible probationer may be sentenced to temporary incarceration for a technical probation violation as provided in MCL 771.4b (setting out the procedure for imposing incarceration and the length of the incarceration following a technical probation violation).

However, "[t]he court may not impose a sentence of incarceration or revoke probation" when a probationer acknowledges a technical probation violation under MCR 6.450. MCR 6.450(B). See Section 2.11(B) for more information. "The court may not sentence the probationer to prison without having considered a current presentence report and may not sentence the probationer to prison or jail (including for failing to pay

[13]The trial court was not aware of the amendments to MCL 771.4b made by 2020 PA 397, effective April 1, 2021, and revoked the defendant's probation and sentenced him to 30 months to 15 years in prison in violation of MCL 771.4b(1)(b)(*ii*) and MCL 771.4b(4) because the probation violation was defendant's second technical probation violation; accordingly, the maximum allowable sentence was 30 days in jail and his probation should not have been revoked. *People v Jackson*, ___ Mich App ___, ___ (2023). See Section 2.11 for a detailed discussion of technical probation violations.

fines, costs, restitution, and other financial obligations imposed by the court) without having complied with the provisions set forth in MCR 6.425(B)[14] and [MCR 6.425(D)]." MCR 6.445(G). See *People v Hawkins*, 500 Mich 987 (2017) (Michigan Supreme Court vacated the defendant's sentence and remanded for resentencing where "[t]here [wa]s no indication in the record that, at sentencing, the trial court considered an updated Sentencing Information Report, or applicable guidelines range, in imposing its sentence following the defendant's probation violations").

**Sentencing guidelines.**[15] "[T]he [legislative] sentencing guidelines apply to sentence imposed after a probation violation and . . . acts giving rise to the probation violation may constitute substantial and compelling reasons to depart from the guidelines." *People v Hendrick*, 472 Mich 555, 557 (2005). MCL 771.4(5) "states that if probation is revoked, the court *may* sentence the probationer to the same penalty as if probation had never been granted, but does not *require* that the same penalty be imposed." *Hendrick*, 472 Mich at 557 (emphasis in original). "Thus, the sentencing court is not precluded from considering events surrounding the probation violation when sentencing the defendant on the original offense." *Id*. *Hendrick* applies retroactively. *People v Parker (Charles)*, 267 Mich App 319, 328 (2005). However, "the holding in *Hendrick* is not applicable when probation is [not revoked, but is instead] continued, modified, or extended pursuant to MCR 6.445(G)." *People v Malinowski*, 301 Mich App 182, 187 (2013).

See also the Michigan Judicial Institute's probation violation Sentencing Checklist.

## 2.9 Review[16]

"In a case involving a sentence of incarceration under [MCR 6.445(G)[17]], the court must advise the probationer on the record, immediately after imposing sentence, that

> (a) the probationer has a right to appeal, if the underlying conviction occurred as a result of a trial, or

[14] MCR 6.425(B) concerns disclosure of the presentence report before sentencing.

[15] In *People v Lockridge*, 498 Mich 358, 391 (2015), the Michigan Supreme Court "[struck] down the requirement of a 'substantial and compelling reason' to depart from the guidelines range in MCL 769.34(3)." The *Lockridge* Court additionally stated that "[t]o the extent that any part of MCL 769.34 or another statute refers to use of the sentencing guidelines as mandatory or refers to departures from the guidelines, that part or statute is also severed or struck down *as necessary*." *Lockridge*, 498 Mich at 365 n 1, emphasis supplied. The *Lockridge* Court did not specifically address intermediate sanctions such as probation.

[16] "An appeal from a misdemeanor case is governed by [MCR 7.100 *et seq*]." MCR 6.625(A).

[17] See Section 2.8 for information on MCR 6.445(G).

> (b) the probationer is entitled to file an application for leave to appeal, if the underlying conviction was the result of a plea of guilty or nolo contendere." MCR 6.445(H)(1).

"In a case that involves a sentence other than incarceration under [MCR 6.445(G)], the court must advise the probationer on the record, immediately after imposing sentence, that the probationer is entitled to file an application for leave to appeal." MCR 6.445(H)(2).

"[T]he subsequent reversal of a criminal conviction on which a probation violation is based does not require reversal of the probation revocation if (1) at the revocation hearing defendant admitted facts sufficient to establish by a preponderance of the evidence that he committed the offense, or (2) if testimony is presented at the revocation hearing which meets this same standard." *People v Tebedo*, 107 Mich App 316, 322 (1981). "If the only thing established at the hearing is that defendant was convicted of the offense, then reversal of that conviction requires reversal of the probation revocation as well." *Id.*

## 2.10 Violation of Sex Offenders Registration Act

"The court shall revoke probation pursuant to [MCL 771.4] if the individual willfully violates the sex offenders registration act." MCL 771.4a.

## 2.11 Technical Probation Violation

### A. Statutory Requirements

Unless acknowledged under MCR 6.450[18] and "[e]xcept as otherwise provided in [MCL 771.4b], a probationer who commits a technical probation violation and is sentenced to temporary incarceration may be incarcerated for each technical violation as follows:

> (a) For a technical violation committed by an individual who is on probation because he or she was convicted of or pleaded guilty to a misdemeanor:
>
> > (*i*) For a first violation, jail incarceration for not more than 5 days.
> >
> > (*ii*) For a second violation, jail incarceration for not more than 10 days.

[18] See Section 2.11(B).

(*iii*) For a third violation, jail incarceration for not more than 15 days.

(*iv*) For a fourth or subsequent violation, jail incarceration for any number of days, but not exceeding the total of the remaining eligible jail sentence.

(b) For a technical violation committed by an individual who is on probation because he or she was convicted of or pleaded guilty to a felony:

(*i*) For a first violation, jail incarceration for not more than 15 days.

(*ii*) For a second violation, jail incarceration for not more than 30 days.

(*iii*) For a third violation, jail incarceration for not more than 45 days.

(*iv*) For a fourth or subsequent violation, jail or prison incarceration for any number of days, but not exceeding the total of the remaining eligible jail or prison sentence." MCL 771.4b(1).

A jail sanction for a technical probation violation "may be extended to not more than 45 days if the probationer is awaiting placement in a treatment facility and does not have a safe alternative location to await treatment." MCL 771.4b(3). When counting technical probation violations, violations that "arise[] out of the same transaction" must be counted as a single probation violation for purposes of MCL 771.4b. MCL 771.4b(5).

"A probationer may acknowledge a technical probation violation in writing without a hearing before the court being required." MCL 771.4b(2). MCR 6.450 governs the acknowledgment of a technical probation violation. See Section 2.11(B). See also SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

"Subject to the exception in [771.4b(6)[19]], the court shall not revoke probation on the basis of a technical probation violation unless a probationer has already been sanctioned for 3 or more technical probation violations and commits a new technical probation violation." 771.4b(4).

[19]MCL 771.4b(6) provides that MCL 771.4b(1) is not applicable to a probationer who is on probation for a domestic violence violation of MCL 750.81 or MCL 750.81a, an offense involving domestic violence, or a violation of MCL 750.411h or MCL 750.411i. MCL 771.4b(6).

"[T]here is a rebuttable presumption that the court shall not issue a warrant for arrest for a technical probation violation and shall issue a summons or order to show cause to the probationer instead." MCL 771.4b(7). A warrant may be issued if the court overcomes the presumption by stating on the record "a specific reason to suspect" that the probationer (1) "presents an immediate danger to himself or herself, another person, or the public"; (2) has left court-ordered inpatient treatment without permission; or (3) has already failed to appear after being issued a summons or order to show cause. *Id.*

When a probationer is arrested and detained for a technical probation violation hearing, the hearing must be held "as soon as is possible," and "[i]f the hearing is not held within the applicable and permissible jail sanction, as determined under [MCL 771.4b(1)(a)-(b)], the probationer must be returned to community supervision." MCL 771.4b(8).

"MCL 771.4b(9)(b)(*i*) unambiguously provides that a violation of a no-contact provision in a probation order is nontechnical only when the no-contact order pertains to a named individual, [and] it was error for the trial court to conclude that the Legislature intended defendant's violation of the probation order prohibiting contact with a broad class of persons to be 'nontechnical.'" *People v Smith*, ___ Mich App ___, ___ (2024). In *Smith*, the trial court erred when it sentenced defendant to serve 35 to 60 months in prison where the "violation of his probation conditions was a technical one, [and] MCL 771.4b(1)(b)(*i*) limited the sentence for defendant's first and single technical violation of having contact with persons under 17 years old to 15 days in jail." *Smith*, ___ Mich App at ___. In *Smith*, "[a]fter defendant pleaded guilty to violating his probation order requiring him to not have physical contact with anyone under the age of 17, the trial court found that defendant committed a 'nontechnical' probation violation . . . ." *Id.* at ___. However, "defendant's probation order [did] not name an 'individual,' and describing a class of persons does not fall within the clear words of the statute." *Id.* at ___. Further, "MCL 771.4(2) specifically provides that all probation orders are revocable subject to the requirements of section 4b . . . and continues that revocation of probation, and subsequent incarceration, should be imposed only for repeated technical violations, for new criminal behavior, . . . or upon request of the probationer." *Smith*, ___ Mich App at ___ (quotation marks omitted). Additionally, "the provisions of MCL 771.4b(7)(a) and MCL 771.4(1) . . . do not pertain to whether defendant's violation could properly be considered nontechnical." *Smith*, ___ Mich App at ___. The Court of Appeals rejected the "argument that the use of 'should' rather than 'shall' within MCL 771.4(2) . . . indicates that probation revocation need not necessarily follow from the bases specified." *Smith*, ___ Mich App ___, ___ (2024). "However, despite the permissive language, the Legislature

continued to incorporate the definitions and restrictions regarding technical violations found in MCL 771.4b." *Smith*, ___ Mich App at ___. "Thus, there is no statutory ambiguity allowing construction of MCL 771.4b(9)(b)(*i*) in any way other than recognizing that its plain language renders defendant's violation of the no-contact order a technical one." *Smith*, ___ Mich App at ___.

## B. Court Rule Procedure for Acknowledgment Without a Hearing

"In lieu of initiating a probation violation proceeding under MCR 6.445, the court may allow a probationer to acknowledge a technical probation violation without a hearing." MCR 6.450(A).

**Required advice.** "The acknowledgment must be in writing and advise the probationer of the following information

> (1) the probationer has a right to contest the alleged technical probation violation at a formal probation violation hearing;
>
> (2) the probationer is entitled to a lawyer's assistance at the probation violation hearing and at all subsequent court proceedings, and that the appointing authority will appoint a lawyer at public expense if the probationer wants one and is financially unable to retain one;
>
> (3) the court will not revoke probation or sentence the probationer to incarceration as a result of the acknowledgment, but the court may continue probation, modify the conditions of probation, or extend probation;
>
> (4) if the probationer violates probation again, the court may consider the acknowledgment a prior technical probation violation conviction for the purposes of determining the maximum jail or prison sentence and probation revocation eligibility authorized by law;
>
> (5) acknowledging a technical probation violation may delay the probationer's eligibility for an early discharge from probation."[20] MCR 6.450(A)(1)-(5).

See also SCAO Form MC 521, *Technical Probation Violation Acknowledgment*.

[20] See the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 9, for a discussion of early discharge from probation under MCR 6.441.

**Permissible actions by the court.** "Upon acknowledgment of a technical probation violation by a probationer, the court may continue probation, modify the conditions of probation, or extend the term of probation." MCR 6.450(B).

**Court may not revoke probation or order incarceration.** "The court may not impose a sentence of incarceration or revoke probation for acknowledging a technical probation violation under this rule, but the court may count the acknowledgment for the purpose of identifying the number of technical probation violations under MCL 771.4b." MCR 6.450(B).

## 2.12 Revoking Probation of Juvenile for Conviction of Felony or Misdemeanor

MCR 6.933 governs juvenile probation revocation. See the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 16, for a detailed discussion of juvenile probation revocation.

"If the court finds that a juvenile placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4) (governing automatic waiver cases)] to an institution or agency described in the youth rehabilitation services act, [MCL 803.301 *et seq.*], violated probation by being convicted of a felony or a misdemeanor punishable by imprisonment for more than 1 year, the court shall revoke probation and order the juvenile committed to the department of corrections for a term of years that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation." MCL 771.7(1). See also MCR 6.933(G)(1)(a). "The court shall grant credit against the sentence for the period of time the juvenile served on probation." MCL 771.7(1).

"If the court finds that a juvenile placed on probation and committed under [MCL 769.1(3) or MCL 769.1(4)] to an institution or agency described in the youth rehabilitation services act, [MCL 803.301 *et seq.*], violated probation other than as provided in [MCL 771.7(1)], the court may order the juvenile committed to the department of corrections or may order any of the following for the juvenile:

(a) A change of placement.

(b) Community service.

(c) Substance abuse counseling.

(d) Mental health counseling.

(e) Participation in a vocational-technical education program.

(f) Incarceration in a county jail for not more than 30 days. If a juvenile is under 17 years of age, the juvenile shall be placed in a room or ward out of sight and sound from adult prisoners. [Note that MCR 6.933(G)(2) requires juveniles under 18 years of age to be placed separately from adult prisoners under these circumstances.]

(g) Other participation or performance as the court considers necessary." MCL 771.7(2). See also MCR 6.933(G)(2) (listing the same options as the statute, but additionally including restitution).

## 2.13 Probation Swift and Sure Sanctions Act

"The swift and sure sanctions probation program (SSSPP) is an intensive probation supervision program that targets high-risk felony offenders with a history of probation violations or failures. . . . SSSPP participants are closely monitored, including being subjected to frequent random testing for drug and alcohol use and being required to attend frequent meetings with probation and/or case management staff. SSSPP aims to improve probationer success by promptly imposing graduated sanctions, including small amounts of jail time, for probation violations. Judges in Michigan's SSSPP courts have reported a reduction in positive drug tests and failures to appear at scheduled meetings with probation officers among their SSSPP participant population." See https://www.courts.michigan.gov/administration/court-programs/swift-and-sure-sanctions-probation-program/.

"The circuit court in any judicial circuit may adopt or institute a swift and sure sanctions court, by statute or court rule." MCL 600.1086(1). "A swift and sure sanctions court shall carry out the purposes of the swift and sure sanctions act, [MCL 771A.1 *et seq*]." MCL 600.1086(2).

### A. Intent to Create and Implementation

"It is the intent of the legislature to create a voluntary state program to fund swift and sure probation supervision based on the immediate detection of probation violations and the prompt imposition of sanctions and remedies to address those violations." MCL 771A.3. "In furtherance of this intent, the state swift and sure sanctions program must be implemented and maintained as provided in [MCL 771A.1 *et seq*.] as follows:

(a) Probationers are to be sentenced with prescribed terms of probation meeting the objectives of [MCL 771A.1 *et seq*]. Probationers are to be aware of their

probation terms as well as the consequences for violating the terms of their probation.

(b) Probationers are to be closely monitored and every detected violation is to be promptly addressed by the court.

(c) Probationers are to be arrested as soon as a violation has been detected and are to be promptly taken before a judge for a hearing on the violation.

(d) Continued violations are to be addressed by increasing sanctions and remedies as necessary to achieve results.

(e) To the extent possible and considering local resources, probationers subject to swift and sure probation under [MCL 771A.1 *et seq.*] shall be treated uniformly throughout this state." MCL 771A.3.

## B. Grants

"A court may apply for a grant to fund a program of swift and sure probation supervision under [MCL 771A.1 *et seq.*] by filing a written application with the state court administrative office in the manner required by that office." MCL 771A.4(3).

## C. Participants From Other Jurisdictions

"A court that has received a grant under [MCL 771A.1 *et seq.*] to fund programs of swift and sure probation supervision may accept participants from any other jurisdiction in this state based upon either the residence of the participant in the receiving jurisdiction or the unavailability of a swift and sure probation supervision program in the jurisdiction where the participant is charged." MCL 771A.4(4). "The transfer may occur at any time during the proceedings, including, but not limited to, prior to adjudication." *Id.* "The receiving court shall have jurisdiction to impose sentence, including, but not limited to, sanctions, incentives, incarceration, and phase changes." *Id.* "A transfer under [MCL 771A.4(4)] is not valid unless it is agreed to by all of the following individuals:

(a) The defendant or respondent in writing.

(b) The attorney representing the defendant or respondent.

(c) The judge of the transferring court and the prosecutor of the case.

(d) The judge of the receiving court and the prosecutor of the receiving court funding unit." *Id*. See also MCL 600.1086(3).

## D. Duties of Judge

"A judge shall do all of the following if swift and sure probation applies to a probationer:

(a) Inform the probationer in person of the requirements of his or her probation and the sanctions and remedies that may apply to probation violations.

(b) Adhere to and not depart from the prescribed list of sanctions and remedies imposed on the probationer.

(c) Require the probationer to initially meet in person with a probation agent or probation officer and as otherwise required by the court.

(d) Provide for an appearance before the judge or another judge for any probation violation as soon as possible but within 72 hours after the violation is reported to the court unless a departure from the 72-hour requirement is authorized for good cause as determined by criteria established by the state court administrative office.

(e) Provide for the immediate imposition of sanctions and remedies approved by the state court administrative office to effectively address probation violations. The sanctions and remedies approved under this subdivision may include, but are not limited to, 1 or more of the following:

(*i*) Temporary incarceration in a jail or other facility authorized by law to hold probation violators.

(*ii*) Extension of the period of supervision within the period provided by law.

(*iii*) Additional reporting and compliance requirements.

(*iv*) Testing for the use of drugs and alcohol.

(*v*) Counseling and treatment for emotional or other mental health problems, including for substance abuse.

(*vi*) Probation revocation.

(*vii*) Any other sanction approved by the state court administrative office." MCL 771A.5(1).

## E. Power of the State Court Administrative Office

"The state court administrative office may, under the supervision of the supreme court, do any of the following regarding programs funded under [MCL 771A.1 *et seq.*]:

(a) Establish general eligibility requirements for offender participation.

(b) Require courts and offenders to enter into written participation agreements.

(c) Create recommended and mandatory sanctions and remedies for use by participating courts.

(d) Establish criteria for deviating from recommended and mandatory sanctions and remedies if necessary to address special circumstances.

(e) Establish a system for determining sanctions and remedies that should or may be imposed under subdivision (c) and for alternative sanctions and remedies under subdivision (d)." MCL 771A.5(2).

## F. Programming Requirements/Consultation

"The state court administrative office may, under the supervision of the supreme court, consult with the department of corrections to establish programming requirements under [MCL 771A.1 *et seq*]." MCL 771A.6(1).

## G. Eligibility of Individual/Exceptions

"An individual is eligible for the swift and sure probation supervision program if he or she receives a risk score of other than low on a validated risk assessment." MCL 771A.6(2).

"A defendant who is charged with a crime under 1 or more of the following is not eligible under [MCL 771A.1 *et seq.*]:

(a) [MCL 750.316, MCL 750.317, MCL 750.520b, MCL 750.520d, MCL 750.529, or MCL 750.544].

(b) A major controlled substance offense . . . except for a violation of [MCL 333.7403(2)(a)(*v*)]." MCL 771A.6(3).

See also the Michigan Judicial Institute's table listing all the charges that render a defendant ineligible.

## 2.14 Procedures for Handling Cases Under the Interstate Compact for Adult Offender Supervision

The Interstate Commission for Adult Offender Supervision, MCL 3.1012, provides uniformity in the transfer of adult offenders from one state to another. All compacting states must comply with the substantive rules issued by the Interstate Commission for Adult Offender Supervision (ICAOS). For more information, visit https://www.interstatecompact.org or see the *ICAOS Bench Book for Judges and Court Personnel*.

# Chapter 3: Postappeal Relief

# *Part A: Motion for Relief From Judgment*[1]

## 3.1 Scope of Michigan Court Rules Subchapter 6.500

MCR 6.500 *et seq*. "establishes a procedure for postappeal proceedings challenging criminal convictions." 1989 Staff Comment to MCR 6.501. "It provides the exclusive means to challenge convictions in Michigan courts for a defendant who has had an appeal by right or by leave, who has unsuccessfully sought leave to appeal, or who is unable to file an application for leave to appeal to the Court of Appeals because [six] months have elapsed since the judgment." *Id*. See MCR 7.205(A)(4)(a).

"Unless otherwise specified by [the Michigan Court Rules], a judgment of conviction and sentence entered by the circuit court not subject to appellate review under [MCR 7.200 *et seq*. or MCR 7.300 *et seq*.] may be reviewed only in accordance with the provisions of [MCR 6.500 *et seq*]." MCR 6.501. See also *People v Gibson*, 503 Mich 1034, 1034-1035 (2019) (holding that the trial court erred in citing MCR 2.612(C)(2) as a reason for denying defendant's motion for relief from judgment, and remanding for reconsideration under the provisions of subchapter 6.500).

## 3.2 Motion for Relief From Judgment

"The defendant initiates proceedings under [MCR 6.500 *et seq*.] by filing a motion for relief from judgment." 1989 Staff Comment to MCR 6.502. "[MCR 6.502(C)] spells out the required contents of the motion, which is to be in substantially the form approved by the State Court Administrator." 1989 Staff Comment to MCR 6.502.

Subject to exceptions discussed in Section 3.2(G), "[MCR 6.502(G)] limits criminal defendants to filing one motion for relief from judgment with respect to a conviction[.]" Staff Comment to 1995 Amendment of MCR 6.502.

### A. Nature of Motion

"The request for relief under [MCR 6.500 *et seq*.] must be in the form of a motion to set aside or modify the judgment." MCR 6.502(A). "The motion must specify all of the grounds for relief which are available to the defendant and of which the defendant has, or by the exercise of due diligence, should have knowledge." *Id*.

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[1] *Part A: Motion for Relief From Judgment*, contains numerous references to staff comments to the Michigan Court Rules. It is important to note that "a staff comment to the Michigan Court Rules is not binding authority." *People v Williams (Carletus)*, 483 Mich 226, 238 n 15 (2009).

## B. Limitations on Motion

"A motion may seek relief from one judgment only." MCR 6.502(B). To challenge the validity of additional judgments, the defendant must file separate motions. *Id.* "For the purpose of [MCR 6.502], multiple convictions resulting from a single trial or plea proceeding shall be treated as a single judgment." MCR 6.502(B).

## C. Form of Motion

"The motion may not be noticed for hearing, and must be typed or legibly handwritten and include a verification by the defendant or defendant's lawyer in accordance with MCR 1.109(D)(3)." MCR 6.502(C).

"Except as otherwise ordered by the court, the combined length of the motion and any memorandum of law in support may not exceed 50 pages double-spaced, exclusive of attachments and exhibits." MCR 6.502(C). "If the court enters an order increasing the page limit for the motion, the same order shall indicate that the page limit for the prosecutor's response provided for in MCR 6.506(A) is increased by the same amount." MCR 6.502(C).

"The motion must be substantially in the form approved by the State Court Administrative Office, and must include:

> (1) The name of the defendant;
>
> (2) The name of the court in which the defendant was convicted and the file number of the defendant's case;
>
> (3) The place where the defendant is confined, or, if not confined, the defendant's current address;
>
> (4) The offenses for which the defendant was convicted and sentenced;
>
> (5) The date on which the defendant was sentenced;
>
> (6) Whether the defendant was convicted by a jury, by a judge without [a] jury, or on a plea of guilty, guilty but mentally ill, or nolo contendere;
>
> (7) The sentence imposed (probation, fine, and/or imprisonment), the length of the sentence imposed, and whether the defendant is now serving that sentence;
>
> (8) The name of the judge who presided at trial and imposed sentence;

> (9) The court, title, and file number of any proceeding (including appeals and federal court proceedings) instituted by the defendant to obtain relief from conviction or sentence, specifying whether a proceeding is pending or has been completed.
>
> (10) The name of each lawyer who represented the defendant at any time after arrest, and the stage of the case at which each represented the defendant;
>
> (11) The relief requested;
>
> (12) The grounds for the relief requested;
>
> (13) The facts supporting each ground, stated in summary form;
>
> (14) Whether any of the grounds for the relief requested were raised before; if so, at what stage of the case, and, if not, the reasons they were not raised;
>
> (15) Whether the defendant requests the appointment of counsel, and, if so, information necessary for the court to determine whether the defendant is entitled to appointment of counsel at public expense." MCR 6.502(C).

See SCAO Form CC 257, *Motion for Relief from Judgment*.

"Upon request, the clerk of each court with trial level jurisdiction over felony cases shall make available blank motion forms without charge to any person desiring to file such a motion." MCR 6.502(C).

## D. Return of Insufficient Motion

"If a motion is not submitted on a form approved by the State Court Administrative Office, or does not substantially comply with the requirements of these rules, the court shall either direct that it be returned to the defendant with a statement of the reasons for its return, along with the appropriate form, or adjudicate the motion under the provisions of these rules. The clerk of the court shall retain a copy of the motion." MCR 6.502(D). "Motions that do not substantially comply with the requirements of the court rules . . . may be returned to the defendant under certain conditions." *People v Harris*, 500 Mich 874-875 (2016). However, "the court may not dismiss a defendant's motion for relief from judgment merely for failure to comply with court rules; rather, the court must adjudicate the motion or return it 'with a statement of reasons for its return.'" *People v Gatiss*, 486 Mich 960 (2010), quoting MCR 6.502(D).

***Pro se* defendants.** "When a *pro se* defendant files his or her first motion effectively seeking to set aside or modify the judgment but styles the motion as something other than a motion for relief from judgment, the court shall promptly notify the defendant of its intention to recharacterize the pleading as a motion for relief from judgment[.]" MCR 6.502(D).

The court must also:

- inform the defendant of any effects the recharacterization might have on subsequent motions for relief (see MCR 6.502(B) and MCR 6.502(G)); and
- provide the defendant 90 days to withdraw or amend the motion before the court recharacterizes it. MCR 6.502(D).

"If the court fails to provide this notice and opportunity for withdrawal or amendment, or the defendant establishes that notice was not actually received, the defendant's motion cannot be considered a motion for relief from judgment for purposes of MCR 6.502(B) [and MCR 6.502](G)." MCR 6.502(D).

## E. Attachments to Motion

"The defendant may attach to the motion any affidavit, document, or evidence to support the relief requested." MCR 6.502(E).

## F. Amendment and Supplementation of Motion

"The court may permit the defendant to amend or supplement the motion at any time." MCR 6.502(F).

## G. Successive Motions

"Except as provided in [MCR 6.502(G)(2)], regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction." MCR 6.502(G)(1). See *Ambrose v Recorder's Court Judge*, 459 Mich 884 (1998) ("[u]nder MCR 6.502(G)(1), a criminal defendant may file one motion for relief from judgment after August 1, 1995, notwithstanding the defendant's having filed one or more such motions before that date").

"A defendant may file a second or subsequent motion based on any of the following:

> (a) a retroactive change in law that occurred after the first motion for relief from judgment was filed,

> (b) a claim of new evidence that was not discovered before the first such motion was filed, or
>
> (c) a final court order vacating one or more of the defendant's convictions either described in the judgment from which the defendant is seeking relief or upon which the judgment was based." MCR 6.502(G)(2).

"The court may waive the provisions of this rule if it concludes that there is a significant possibility that the defendant is innocent of the crime." *Id.* See also *People v Owens*, 338 Mich App 101, 114, 125 (2021) (noting that "before a trial court may consider a successive motion for relief from judgment, the defendant must make a threshold showing that the motion is brought on the basis of a retroactive change in law, that there is new evidence that was not discovered before the first motion, or that there is a significant possibility that the defendant is actually innocent").

MCR 6.502(G) requires a preliminary showing for a successive motion for relief for judgment; MCR 6.508(D) is the court rule that addresses the defendant's burden to establish entitlement to relief and "only becomes relevant *after* the defendant has made a preliminary showing under MCR 6.502(G)." *Owens*, 338 Mich App at 115. Accordingly, after a defendant meets the MCR 6.502(G) threshold, he or she "may be entitled to relief from judgment if[, under MCR 6.508(D),] good cause and actual prejudice warrant granting relief." *Id.* at 114-115. See also *People v Lemons*, ___ Mich ___, ___ (2024) (holding that "the trial court abused its discretion by deeming defendant's proposed expert testimony inadmissible," and [defendant] overcame "the procedural threshold of MCR 6.502(G) and established 'good cause' and 'actual prejudice' as required by MCR 6.508(D)(3) by demonstrating all four factors of *Cress*"). See Section 3.8(C) for information on entitlement to relief under MCR 6.508(D).

"The clerk shall refer a successive motion to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions." MCR 6.502(G)(2). *In propria persona* defendants are "entitled to an even greater degree of lenity and generosity in construing [their] pleadings than a lawyer would have been." *Owens*, 338 Mich App at 117.

"For motions filed under both [MCR 6.502(G)(1) and MCR 6.502(G)(2)], the court shall enter an appropriate order disposing of the motion." MCR 6.502(G)(2).

## 1. New Evidence

"For purposes of [MCR 6.502(G)(2)(b)], 'new evidence' includes new scientific evidence." MCR 6.502(G)(3). New scientific evidence "includes, but is not limited to, shifts in science entailing changes: (a) in a field of scientific knowledge, including shifts in scientific consensus; (b) in a testifying expert's own scientific knowledge and opinions; or (c) in a scientific method on which the relevant scientific evidence at trial was based." *Id*. See also *People v Lemons*, ___ Mich ___, ___ (2024) (granting defendant a new trial based on new scientific evidence that caused an expert witness to change his previous testimony).

Note that the Michigan Supreme Court has stated that *People v Cress*, 468 Mich 678 (2003), which sets out a test that must be satisfied in order for a defendant to be entitled to a new trial on the basis of newly discovered evidence, does not apply "to an analysis of a successive motion filed pursuant to MCR 6.502(G)(2)[;] *Cress* does not apply to the procedural threshold of MCR 6.502(G)(2), as the plain text of the court rule does not require that a defendant satisfy all elements of the test." *People v Swain*, 499 Mich 920 (2016). See also *People v Owens*, 338 Mich App 101, 116 (2021) (holding that "MCR 6.502(G) [does] not require defendant to meet his ultimate burden as part of his preliminary showing").

Examples of new evidence:

- An order vacating a conviction after a trial can be new evidence for purposes of MCR 6.502(G). *Owens*, 338 Mich App at 122 (noting that a change in scientific consensus occurring after trial can constitute new evidence, and the language of MCR 6.502(G)(3) does not limit new evidence to evidence that could have been admitted at trial).

- An affidavit not previously presented to the trial court. *People v Wagle*, 508 Mich 950 (2021) (remanding to the trial court for reconsideration of defendant's motion for relief from judgment where the motion was based "in part" on an affidavit not previously presented because the affidavit constituted new evidence that was not discovered before the first motion for relief from judgment).

- Changed testimony in light of new scientific evidence. *People v Lemons*, ___ Mich ___, ___ (2024) (granting defendant a new trial on the basis of new evidence satisfying the *Cress* Test, and noting that "there is a reasonably probable likelihood that a jury

would have a reasonable doubt as to defendant's guilt").

## 2. Retroactive Change in the Law

Rules that do **not** qualify as retroactive changes in the law:

- The rule from *People v Lockridge*, 498 Mich 358 (2015),[2] does not apply retroactively for purposes of collateral review under MCR 6.500 (motion for relief from judgment). *People v Barnes*, 502 Mich 265, 268 (2018).

- An order from a federal court granting habeas relief does not constitute a retroactive change in the law under MCR 6.502(G); "a retroactive change in the law under MCR 6.502(G) can only be the retroactive change in a law of general application, not a change in the law of a defendant's case." *People v Owens*, 338 Mich App 101, 118 (2021).

- "[R]etroactive application of *Beck* on collateral review is not warranted under either the federal or Michigan frameworks." *People v Motten*, ___ Mich App ___, ___ (2024). In *People v Beck*, 504 Mich 605 (2019), the Michigan Supreme Court "concluded that reliance on acquitted conduct at sentencing violates due process . . . ." *Motten*, ___ Mich App at ___. "*Beck*, like *Lockridge*, concerns an issue applicable during the sentencing process only." *Motten*, ___ Mich App at ___.

Rules that **do** qualify as retroactive changes in the law:

- A motion for relief from judgment based on the holdings in *Miller* and *Montgomery*[3] satisfy the procedural requirement in MCR 6.502(G)(2); specifically, where *Miller* and *Montgomery* serve "as a 'foundation' or 'base' for a defendant's claim" the motion overcomes the procedural bar in MCR 6.502(G)(2). *People v Stovall*, 510 Mich 301, 310 (2022). "Reading the rule more narrowly to require that the defendant's claims fall squarely within a retroactive

[2] In 2015, the Michigan Supreme Court rendered the previously-mandatory sentencing guidelines "advisory only." *People v Lockridge*, 498 Mich 358, 365 (2015), rev'g in part 304 Mich App 278 (2014) and overruling *People v Herron*, 303 Mich App 392 (2013). Although "sentencing courts [are no longer] *bound* by the applicable sentencing guidelines range," they must "continue to consult the applicable guidelines range and take it into account when imposing a sentence," and they "must justify the sentence imposed in order to facilitate appellate review." *Lockridge*, 498 Mich at 392, citing *People v Coles*, 417 Mich 523, 549 (1983), overruled in part on other grounds by *People v Milbourn*, 435 Mich 630, 644 (1990). For more information on the precedential value of an opinion with negative subsequent history, see our note. See the Michigan Judicial Institute's *Criminal Proceedings Benchbook Vol. 2*, Chapter 1, for a detailed discussion of *Lockridge*.

change in law would effectively merge the procedural hurdle in MCR 6.502(G)(2) with the merits inquiry in MCR 6.508(D), rendering one of those provisions nugatory." *Stovall*, 510 Mich at 310.

- **Retroactive application of *People v Parks*, 510 Mich 225 (2022):** *Miller* "held that mandatory life without parole for a juvenile convicted of a homicide offense constitutes cruel and unusual punishment as prohibited by the Eighth Amendment . . . ." *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024). In *Parks*, the Michigan Supreme Court "held that federal precedent concerning the Eighth Amendment's prohibition against 'cruel and unusual punishments' did not support extending *Miller*'s protections to 18-year-olds," but "that our state Constitution's broader prohibition against 'cruel or unusual punishment' under Const 1963, art 1, § 16 did support such an extension." *Poole*, ___ Mich at ___. Whether *Parks* would have retrospective or prospective application required an initial determination of "whether the *Parks* holding was merely procedural, or whether it concerned substantive rights of a fundamental nature." *Id.* at ___. "[S]ubstantive rules should normally be given retroactive application." *Id.* at ___. Also relevant to determining whether a decision should be applied retroactively or prospectively are the *Linkletter-Hampton* factors: "'(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice.'" *Poole*, ___ Mich at ___, quoting *People v Hampton*, 384 Mich 669, 674 (1971) (utilizing the standard set in *Linkletter v Walker*, 381 US 618 (1965)). However, "[t]he importance of the *Linkletter-Hampton* factors is greatly circumscribed when substantive rules or rights are implicated in a holding, and retrospective application is favored." *Poole*, ___ Mich at ___. Only when the *Linkletter-Hampton* factors "strongly indicate otherwise" will a

[3] *Miller v Alabama*, 567 US 460 (2012), and *Montgomery v Louisiana*, 577 US 190 (2016), address sentencing juvenile offenders to life without the possibility of parole. Further, in the context of sentencing following a first-degree murder conviction, the Court held that an automatic sentence of life without parole violates the Michigan Constitution's prohibition against cruel or unusual punishment, and "18-year-old defendants convicted of first-degree murder are entitled to the full protections of MCL 769.25 and [the Michigan Supreme Court's] caselaw[.]" *People v Parks*, 510 Mich 225, 268 (2022). The *Parks* opinion does not directly address LWOP sentences for other offenses. Additionally, "application of a *mandatory* sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, § 16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). For a detailed discussion of this issue, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

substantive rule be limited to prospective application. *Id*. at ___. Because *Parks* involved a substantive rule, it should be given retroactive application and its application to the defendant in *Poole* required that the defendant be resentenced according to MCL 769.25. *Poole*, ___ Mich at ___ (confirming retroactivity with *Linkletter-Hampton* factors and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).[4]

### 3. Successive Motion Restriction Limitations

"[T]he restrictions on a trial court's authority contained in MCR 6.500 *et seq*. . . . only limit a court's ability to review a 'judgment of conviction and sentence[.]'" *People v Washington*, 508 Mich 107, 131 (2021). Accordingly, the "trial court's ability to recognize a subject-matter jurisdiction error and remedy it" was not limited by the provisions of MCR 6.502(G) despite the fact that the error was raised in a successive motion for relief from judgment, and "MCR 6.502(G)(2) does not contain an exception for jurisdictional errors[.]" *Washington*, 508 Mich at 131-132 (holding the judgment of sentence rendered by the court without subject-matter jurisdiction was void *ab initio*, and under those circumstances, "there was no valid sentence to review"). Stated differently, "[a] defect in the court's subject-matter jurisdiction can be raised at any time, including in a successive motion brought under MCR 6.502(G)." *People v Johnson*, 345 Mich App 51, 58 (2022), citing *Washington*, 508 Mich at 132.

However, there is no subject-matter jurisdiction defect in a criminal case where the trial court resentences a defendant pursuant to a remand order from the Court of Appeals and the Supreme Court simultaneously exercises jurisdiction over a separate but related civil complaint for superintending control. *Johnson*, ___ Mich App at ___. Accordingly, because "the trial court did not lack subject-matter jurisdiction to resentence" the defendant, the defendant's successive motion for relief from judgment should have been denied. *Id*. at ___ (in his successive motion for relief from judgment defendant argued he was entitled to resentencing because the trial court lacked jurisdiction on the basis of his civil complaint for superintending control pending in the Supreme Court; the Court rejected this argument).

[4] For a detailed discussion of this issue, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

"[A] successive motion for relief from judgment may only be filed if, after the first motion, there is a retroactive change in the law or new evidence is discovered . . . ." *People v Robinson*, ___ Mich App ___, ___ (2024). In *Robinson*, defendant "contend[ed] that the trial court erroneously denied his successive motion for relief from judgment" because the decision in *People v Peeler*, 509 Mich 381 (2022), rendered defendant's charges and subsequent prosecution void. *Robinson*, ___ Mich App at ___. Defendant claimed that his "indictment by a one-man grand jury, without a preliminary examination, [deprived] the trial court of subject-matter jurisdiction over the case." *Id*. at ____. Defendant claimed that "this lack of jurisdiction render[ed] the judgment [against him] void[.]" *Id*. at ___. The Court disagreed, stating "that an indictment via one-man grand jury, although erroneous under *Peeler*, does not deprive the circuit court of subject-matter jurisdiction." *Id*. at ___. "Therefore, the judgment [in *Robinson*] was not void for a lack of jurisdiction." *Id*. at ___.

In addition, "*Peeler* did not involve a retroactive change in the law, so [the *Robinson* defendant was] not entitled to relief from judgment on this basis." *Robinson*, ___ Mich App at ___. "In determining retroactivity, courts must first address the threshold question of whether a decision amounts to a new rule of law." *Id*. at ___ (cleaned up). A rule of law is new for purposes of determining its retroactivity when it overrules an established precedent or when it decides an issue of first impression that was not foreshadowed by an earlier appellate decision. *Id*. at ___. The *Robinson* Court concluded that "*Peeler*'s holdings did not establish any new rule because the Court did not announce a new rule that was not dictated by precedent." *Robinson*, ___ Mich App at ___. "Instead, *Peeler*'s decision was based on the proper interpretation of longstanding statutory authority in existence since well before [the *Robinson* defendant's] indictment and conviction[.]" *Robinson*, ___ Mich App at ___.

## H. No Filing Deadline

"MCR 6.502 does not contain a deadline by which motions for relief from judgment must be filed." *People v Suttles*, 505 Mich 1038 (2020) (vacating the trial court's order denying the defendant's motion for relief from judgment in part on the basis of it being "untimely").

## 3.3 Filing and Service of Motion

### A. Filing and Copies

"A defendant seeking relief under [MCR 6.500 *et seq.*] must file a motion, and a copy of the motion with the clerk of the court in which the defendant was convicted and sentenced." MCR 6.503(A)(1).

"Upon receipt of a motion, the clerk shall file it under the same number as the original conviction." MCR 6.503(A)(2).

### B. Service

"The defendant shall serve a copy of the motion and notice of its filing on the prosecuting attorney." MCR 6.503(B). Unless the court orders otherwise, the prosecutor need not respond. *Id.*

## 3.4 Assignment, Preliminary Consideration by Judge, and Summary Denial

### A. Assignment to Judge

The motion must be presented to the judge assigned to the case at the time of the defendant's conviction. MCR 6.504(A). If he or she is not available, "the motion must be assigned to another judge in accordance with the court's procedure for the reassignment of cases." *Id.*

"The chief judge may reassign cases in order to correct docket control problems arising from the requirements of [MCR 6.504]." MCR 6.504(A).

### B. Initial Consideration by Court

"The court shall promptly examine the motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack." MCR 6.504(B)(1). "The court may request that the prosecutor provide copies of transcripts, briefs, or other records." *Id.*

"If it plainly appears from the face of the materials described in [MCR 6.504(B)(1)] that the defendant is not entitled to relief, the court shall deny the motion without directing further proceedings." MCR 6.504(B)(2). "The order must include a concise statement of the reasons for the denial." *Id.* The "concise statement of the reasons for the denial" requirement was not satisfied by a statement that "'the

defendant's motion is without merit,'" or by a statement that "'[d]efendant has failed to demonstrate good cause and actual prejudice under MCR 6.508(D)[; f]urthermore, the defendant's claims have no merit.'" *People v Finnie*, 504 Mich 968 (2019); *People v Holmes*, 505 Mich 856 (2019) (both orders vacated the trial court's order denying the defendant's motion for relief from judgment and remanded to the trial court for reconsideration).

"The clerk shall serve a copy of the order on the defendant and the prosecutor." MCR 6.504(B)(2). "The court may dismiss some requests for relief or grounds for relief while directing a response or further proceedings with respect to other specified grounds." *Id*.

"If the motion is summarily dismissed under [MCR 6.504(B)(2)], the defendant may move for reconsideration of the dismissal within 21 days after the clerk serves the order." MCR 6.504(B)(3). "The motion must concisely state why the court's decision was based on a clear error and that a different decision must result from correction of the error." *Id*. "A motion which merely presents the same matters that were considered by the court will not be granted." *Id*.

"If the entire motion is not dismissed under [MCR 6.504(B)(2)], the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in [MCR 6.505–MCR 6.508]." MCR 6.504(B)(4).

"The trial court erred by deciding defendant's motion for relief from judgment without affording the prosecution an opportunity to respond." *People v Shaver*, ___ Mich App ___, ___ (2024).[5] MCR 6.500 "governs criminal procedure for seeking relief from judgment when no further appeal by right is available." *Shaver*, ___ Mich App at ___. "[W]hen the entire motion is not dismissed pursuant to subrule (B)(2), the court shall order the prosecuting attorney to file a response . . . ." *Shaver*, ___ Mich App at ___, citing MCR 6.504(B)(4) (quotation marks omitted). MCR 6.506(A) further states, "The trial court shall allow the prosecutor a minimum of 56 days to respond." *Shaver*, ___ Mich App at ___. "By granting defendant's motion for relief from judgment the day after it was filed, the trial court violated the pertinent court rules because it failed to afford the prosecution 56 days, to respond." *Id*. at ___.

[5]The trial court also erred by deciding [*People v Betts*, 507 Mich 527 (2021)] had retroactive application; in *Shaver*, the Court "conclude[d] that *Betts* applie[d] prospectively, and those whose convictions were finalized before *Betts* was decided are not entitled to collateral relief."

## 3.5 Right to Counsel

"The matter of appointment of counsel for a defendant is covered by MCR 6.505." 1989 Staff Comment to MCR 6.505.

### A. Appointment of Counsel

"If the defendant has requested the appointment of counsel, and the court has determined that the defendant is indigent,[6] the court may appoint counsel for the defendant at any time during the proceedings under [MCR 6.500 *et seq*]." MCR 6.505(A).

"Counsel must be appointed if the court directs that oral argument or an evidentiary hearing be held." MCR 6.505(A). See also *People v Sanders (Sam)*, 497 Mich 978 (2015) ("[w]hen the circuit court determines that an evidentiary hearing is required to resolve an issue . . . it must appoint counsel for an indigent defendant, as required by MCR 6.505(A)").

### B. Opportunity to Supplement the Motion

"If the court appoints counsel to represent the defendant, it shall afford counsel 56 days to amend or supplement the motion." MCR 6.505(B). "The court may extend the time on a showing that a necessary transcript or record is not available to counsel." *Id*.

## 3.6 Response by Prosecutor

"If the court does not summarily dismiss the motion under MCR 6.504, it is to direct the prosecutor to file a response." 1989 Staff Comment to MCR 6.506. "MCR 6.506 has several provisions regarding filing and service of the response." *Id*. "The prosecutor is to supply copies of transcripts or briefs to which the response refers that are not in the court's file." *Id*.

### A. Contents of Response

If the court directs the prosecutor to respond to the allegations under MCR 6.504(B)(4), the prosecutor must do so in writing, and the court

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[6] With the implementation of the Michigan Indigent Defense Commission Act (MIDCA), an indigency determination, including a determination regarding partial indigency, should have been made by the indigent criminal defense system earlier in the case, and the indigent criminal defense system may review that determination at any time during the criminal proceedings. See MCL 780.991(3)(a). However, nothing in the MIDCA prevents a court from making an indigency determination for any purpose consistent with Const 1963, art 6 § 4. MCL 780.991(3)(a). For more information on the MIDCA, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*, Chapter 3.

must afford the prosecutor at least 56 days to respond. MCR 6.506(A). "If the response refers to transcripts or briefs that are not in the court's file, the prosecutor shall submit copies of those items with the response." *Id*. "Except as otherwise ordered by the court, the response shall not exceed 50 pages double-spaced, exclusive of attachments and exhibits." *Id*.

### B. Filing and Service

The prosecutor must file one copy of the response with the clerk of the court and serve one copy on the defendant. MCR 6.506(B).

## 3.7 Expansion of Record

"The court is given considerable discretion in the matter of expanding the record if further information is necessary to decide the motion." 1989 Staff Comment to MCR 6.507.

### A. Order to Expand Record

"If the court does not deny the motion pursuant to MCR 6.504(B)(2), it may direct the parties to expand the record by including any additional materials it deems relevant to the decision on the merits of the motion." MCR 6.507(A). "The expanded record may include letters, affidavits, documents, exhibits, and answers under oath to interrogatories propounded by the court." *Id*.

"[W]hen expansion of the record is necessary to resolve a defendant's motion for relief from judgment under [MCR 6.500 *et seq*.], it can only do so within the constraints set out in MCR 6.507(A)." *People v Sanders (Sam)*, 497 Mich 978-979 (2015). A procedural error was committed where the court "did not direct the parties to expand the record, but rather acted *sua sponte* to conduct an evidentiary hearing at which the defendant's trial counsel was questioned directly by the court[,] . . . [and t]he defendant . . . was not represented by counsel." *Id*.

### B. Submission to Opposing Party

If a party submits items to expand the record, the party must serve copies of the items on the opposing party, and the court must afford the opposing party "an opportunity to admit or deny the correctness of the items." MCR 6.507(B).

### C. Authentication

"The court may require the authentication of any item submitted under [MCR 6.507]." MCR 6.507(C).

## 3.8 Procedure, Evidentiary Hearing, and Determination

"Most of the provisions on governing hearings and decision on the motion are found in MCR 6.508." 1989 Staff Comment to MCR 6.508. "Where no particular provision of [MCR 6.500 *et seq.*] prescribes a procedure, the court has discretion to select appropriate procedures." 1989 Staff Comment to MCR 6.508.

### A. Procedure Generally

"If the rules in [MCR 6.500 *et seq.*] do not prescribe the applicable procedure, the court may proceed in any lawful manner." MCR 6.508(A). "The court may apply the rules applicable to civil or criminal proceedings, as it deems appropriate." *Id.*

### B. Decision With or Without Evidentiary Hearing

"After reviewing the motion and response, the record, and the expanded record, if any, the court shall determine whether an evidentiary hearing is required." MCR 6.508(B). "If the court decides that an evidentiary hearing is not required, it may rule on the motion or, in its discretion, afford the parties an opportunity for oral argument." *Id.*

"When [a] circuit court determines that an evidentiary hearing is required to resolve an issue, . . . it must comply with MCR 6.508(C)[.]" *People v Sanders*, 497 Mich 978 (2015). MCR 6.508(C) requires the court to "schedule and conduct the hearing as promptly as practicable." "At the hearing the rules of evidence other than those with respect to privilege do not apply." *Id.* The court must ensure that the hearing is recorded verbatim. *Id.*

### C. Entitlement to Relief

"The defendant has the burden of establishing entitlement to the relief requested." MCR 6.508(D). "[W]hile MCR 6.508(D) requires the defendant to establish entitlement to relief, it does not require him to state with particularity under which subrule he is seeking that relief." *People v Owens*, 338 Mich App 101, 113, 116-117 (2021) (rejecting the prosecution's argument "that the trial court should not have granted defendant's motion for relief from judgment on the basis of a change in law when defendant only argued that he was entitled to relief from

judgment on the basis of new evidence").[7] *In propria persona* defendants are "entitled to an even greater degree of lenity and generosity in construing [their] pleadings than a lawyer would have been." *Id.* at 117.

"The court may not grant relief to the defendant if the motion

> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to [MCR 7.200 *et seq.* or MCR 7.300 *et seq.*];
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under [MCR 6.500 *et seq.*], unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously-decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial,[8] or if the previously-decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under [MCR 6.500 *et seq.*], unless the defendant demonstrates
>
> > (a) ***good cause*** for failure to raise such grounds on appeal or in the prior motion, and
> >
> > (b) ***actual prejudice*** from the alleged irregularities that support the claim for relief. . . ." MCR 6.508(D) (emphasis added).

"As used in [MCR 6.508(D)], 'actual prejudice' means that,

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[7]Further noting that the trial court did not abuse its discretion by recharacterizing defendant's argument and then granting relief on that basis where the prosecution had notice and the opportunity to be heard concerning the recharacterized argument. *People v Owens*, 338 Mich App 101, 117(2021).

[8]To determine whether new evidence warrants granting relief, courts should apply the test articulated in *People v Cress*, 468 Mich 678 (2003). *People v Rogers*, 335 Mich App 172, 193 (2020) (stating that "cases interpreting and applying *Cress*'s four-part standard are relevant to the question in this case—whether defendant is entitled to a new trial based on newly discovered evidence—regardless of whether the particular case involved a motion for new trial or motion for relief from judgment"). See also *Owens*, 338 Mich App at 123 ("[t]his four-part test applies regardless of whether a defendant is seeking a new trial or relief from judgment"); *People v Bacall*, ___ Mich App ___, ___ (2025) (applying the *Cress* standard and concluding that "the trial court erred by not considering the impact that . . . witnesses' recantations would likely have on retrial, especially within the context of a retrial not tainted by the prosecutor's misconduct from the first trial"). See Section 1.5(F)(1) for discussion of *Cress*'s four-part standard.

(*i*) in a conviction following a trial,

(A) but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; or

(B) where the defendant rejected a plea based on incorrect information from the trial court or ineffective assistance of counsel, it is reasonably likely that

(1) the prosecutor would not have withdrawn any plea offer;

(2) the defendant and the trial court would have accepted the plea but for the improper advice; and

(3) the conviction or sentence, or both, under the plea's terms would have been less severe than under the judgment and sentence that in fact were imposed.

(*ii*) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceeding was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(*iii*) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(*iv*) in the case of a challenge to the sentence, the sentence is invalid." MCR 6.508(D)(3)(b).

**Previously decided issues (MCR 6.508(D)(2)).** The Court of Appeals did not decide an issue against defendant for purposes of MCR 6.508(D)(2) when it strictly adhered to the scope of a remand order and dispensed with the issue on procedural grounds. *People v Good (On Reconsideration)*, 346 Mich App 275, 288 (2023).

**Issues that could have been raised earlier (MCR 6.508(D)(3)).** "In order to be entitled to relief under MCR 6.508(D)(3), both 'good cause' and 'actual prejudice' must be established." *People v Kimble*, 470 Mich 305, 313-314 (2004). See also *Owens*, 338 Mich App at 124 (holding "good cause or actual prejudice are not independent bases to grant relief from judgment"). A defendant is required to fulfill the good cause requirement regardless of whether he or she filed a prior motion *in propria persona* or with representation. *People v Clark (Paul)*, 274 Mich App 248, 254 (2007). However, "[t]he court may waive the

'good cause' requirement of [MCR 6.508(D)(3)(a)] if it concludes that there is a significant possibility that the defendant is innocent of the crime." MCR 6.508(D).

"'Good cause' can be established by proving ineffective assistance of counsel." *Kimble*, 470 Mich at 314. "To demonstrate ineffective assistance, it must be shown that defendant's attorney's performance fell below an objective standard of reasonableness and this performance prejudiced him [or her]." *Id.* (good cause and actual prejudice established where defense counsel admitted that an offense variable was erroneously scored, he should have brought it to the court's attention, and his failure to do so resulted in a sentencing error). See also *People v Pennell*, 507 Mich 993 (2021) (good cause was demonstrated where the defendant submitted a timely but incomplete request for appointment of appellate counsel, but "the record contain[ed] no indication that the circuit court notified the defendant that his request was defective or that it would not be granted," and "[b]y the time the unrepresented defendant submitted a second request for the appointment of appellate counsel, the deadline for pursing an appeal by leave had expired"; prejudice was demonstrated where the sentence was invalid because the sentencing court relied on an inappropriate guidelines range due to a scoring error); *People v Brown*, 491 Mich 914, 914-915 (2012) (granting the defendant a new trial under MCR 6.508(D) because the defendant's trial counsel was ineffective in failing to present certain corroboratory evidence and in failing to "effectively cross-examine the sole complainant" about inconsistencies in her testimony; "[b]ecause the defendant's former appellate counsel was ineffective for failing to raise these issues on the defendant's direct appeal, and the defendant was prejudiced thereby, he . . . met the burden of establishing entitlement to relief under MCR 6.508(D)"). Further, "a defendant who has supplemented appellate counsel's efforts with a Standard 4 brief does not per se waive their ability to later raise ineffective assistance of appellate counsel claims in a motion for relief from judgment." *Good*, ___ Mich App at ___ (noting that "[a] court presented with such a claim in a motion for relief from judgment should carefully consider any pro se appellate advocacy when deciding both if the Standard 4 brief covered some alleged deficiency in appellate counsel's performance, and if the defendant has satisfied the good-cause requirements under MCR 6.508(D)(3) for failing to raise issues on direct appeal").

Actual prejudice in a plea case requires a showing of a defect in the proceedings *and* a showing that the defect rendered the plea involuntary "'to a degree that it would be manifestly unjust to allow the conviction to stand.'" *People v White*, 337 Mich App 558, 577 (2021), quoting MCR 6.508(D)(3)(b)(*ii*). A defect in the proceedings was established where the trial court failed to advise the defendant of

mandatory consecutive sentencing; however, in order to grant relief the defect must have rendered the plea involuntary to the degree that it would be manifestly unjust to allow the conviction to stand. *White*, 337 Mich App at 577 (remanding for additional findings and noting that actual prejudice could not be established if there was "adequate evidence that defendant was fully aware of the mandatory consecutive sentencing when pleading guilty").

In any case, actual prejudice "can be demonstrated when an 'irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]'" *White*, 337 Mich App at 577, quoting MCR 6.508(D)(3)(b)(*iii*) (alteration in original). An irregularity occurred where the trial court failed to advise the defendant of mandatory consecutive sentencing; however, "it is for the trial court to assess on remand whether the irregularity was sufficiently offensive to the maintenance of a sound judicial process irrespective of defendant's guilt or innocence." *White*, 337 Mich App at 577-578.

"[W]hen a defendant's requested relief is resentencing, the prejudice portion of the test would consider whether the party could not have produced the evidence at sentencing and whether the evidence would make a different result probable on resentencing." *Owens*, 338 Mich App at 123-124 (holding the defendant's successive motion for relief from judgment seeking resentencing should have been granted on the basis of newly discovered evidence where a federal court partially granted his petition for writ of habeas corpus vacating two convictions because they were not supported by sufficient evidence).

The "defendant satisfied the 'good cause' and 'actual prejudice' requirements for purposes of MCR 6.508(D)(3)" where he was convicted of first-degree murder and sentenced to life without the possibility of parole as an 18-year-old in 2001, but the Court later determined that such sentences violate the prohibition on cruel and/or unusual punishment. *People v Poole*, ___ Mich App ___, ___ (2024) (vacating the defendant's sentence and remanding for resentencing consistent with the procedure set out in MCL 769.25). See also *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that the decision in *Parks* is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)).[9]

### D. Ruling

"The court, either orally or in writing, shall set forth in the record its findings of fact and its conclusions of law, and enter an appropriate order disposing of the motion." MCR 6.508(E).

### E. Reissue Order

"If, while considering a motion filed under MCR 6.502, the court initially issues an order deciding the motion in part, within 7 days of entering an order deciding the remaining issue(s), the court must reissue the order so that all decisions on the motion are reflected in a single order." MCR 6.508(F).

## 3.9 Appeal

### A. Availability of Appeal

"Appeals from decisions under [MCR 6.500 *et seq*.] are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205(A)(1)." MCR 6.509(A). "The 6-month time limit provided by MCR 7.205(A)(4)(a), runs from the decision under [MCR 6.500 *et seq*]." MCR 6.509(A). "For purposes of [MCR 6.509(A)], a 'decision under [MCR 6.500 *et seq*.]' includes a decision on a motion filed under MCR 6.502, a decision on a timely-filed motion for reconsideration, and a reissued order under MCR 6.508(F)." MCR 6.509(A)."The rule does not limit the availability of an appeal to a defendant." *People v Reed*, 198 Mich App 639, 644 (1993). "Thus, [the Court of Appeals] has jurisdiction to review [a] trial court's order granting [a] defendant relief from judgment." *Id*. "Nothing in [MCR 6.500 *et seq*.] shall be construed as extending the time to appeal from the original judgment." MCR 6.509(A).

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[9] MCL 769.25 governs the procedure for imposition of a sentence of life without the possibility of parole for a defendant who is less than 18 years old, and in *People v Parks*, 510 Mich 225, 255 (2022), the Michigan Supreme Court determined that "mandatorily subjecting 18-year-old defendants to life in prison, without first considering the attributes of youth, is unusually excessive imprisonment and thus a disproportionate sentence that constitutes cruel or unusual punishment under Const 1963, art 1, § 16." *People v Poole*, ___ Mich App ___, ___ (2024). Additionally, "application of a mandatory sentence of LWOP under MCL 750.316 to [defendants who were 19 or 20 years old at the time of the offense] constitutes unconstitutionally harsh and disproportionate punishment and thus 'cruel' punishment in violation of Const 1963, art 1, §16." *People v Taylor*, ___ Mich ___, ___ (2025), rev'g *People v Czarnecki (On Remand, On Reconsideration)*, ___ Mich App ___ (2023) (further holding that the decision in *Taylor* "also applies retroactively to all relevant criminal cases on collateral review"). *People v Poole*, ___ Mich ___, ___ (2025), aff'g ___ Mich App ___ (2024) (holding that *Parks*, 510 Mich 225 (2022) is retroactive "to cases where the period for direct review had expired when *Parks* was decided" and overruling the state retroactivity analysis in *People v Carp*, 496 Mich 440 (2014)). For a detailed discussion of this issue, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 19.

## B. Responsibility of Appointed Counsel

"If the trial court has appointed counsel for the defendant during the proceeding, that appointment authorizes the attorney to represent the defendant in connection with an application for leave to appeal to the Court of Appeals." MCR 6.509(B). See also MCR 6.425 (governing the appointment of appellate counsel).[10]

## C. Responsibility of the Prosecutor

"If the prosecutor has not filed a response to the defendant's application for leave to appeal in the appellate court, the prosecutor must file an appellee's brief if the appellate court grants the defendant's application for leave to appeal." MCR 6.509(C). "The prosecutor must file an appellee's brief within 56 days after an order directing a response pursuant to [MCR 6.509(D)]." MCR 6.509(C).

## D. Responsibility of the Appellate Court

"If the appellate court grants the defendant's application for leave to appeal and the prosecutor has not filed a response in the appellate court, the appellate court must direct the prosecutor to file an appellee's brief, and give the prosecutor the opportunity to file an appellee's brief pursuant to [MCR 6.509(C)], before granting further relief to the defendant." MCR 6.509(D).

## E. Ineffective Assistance of Counsel

"[W]hen an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed 'with no further showing from the defendant of the merits of his underlying claims.'" *Garza v Idaho*, 586 US ___, ___ (2019), quoting *Roe v Flores-Ortega*, 528 US 470, 484 (2000). This presumption of prejudice "applies even when the defendant has, in the course of pleading guilty, signed what is often called an 'appeal waiver'—that is, an agreement forgoing certain, but not all, possible appellate claims." *Garza*, ___ US at ___ (noting that "even the broadest appeal waiver does not deprive a defendant of all appellate claims"). In *Garza*, although the defendant's plea agreements included an appeal waiver, his "attorney performed deficiently in failing to file a notice of appeal despite the defendant's express instructions" to do so. *Id.* at ___. "[S]imply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the

[10] See Section 1.4 for discussion of MCR 6.425.

waiver's scope. And in any event, the bare decision whether to appeal is ultimately the defendant's, not counsel's, to make." *Id*. at ___.

"[A]ppellate counsel's failure to raise an *Alleyne*[11] claim on direct appeal constitute[s] ineffective assistance of appellate counsel," and "demonstrat[es] cause and prejudice to excuse any procedural default." *Chase v MaCauley*, 971 F3d 582, 586 (CA 6, 2020) (conditionally granting the defendant's petition for writ of habeas corpus where defendant's minimum sentencing range was increased on the basis of facts not found by the jury and defendant's appellate counsel did not raise *Alleyne* claims).[12]

## 3.10 Standard of Review

A trial court's ruling on a motion for relief from judgment is reviewed for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681 (2003). A trial court's findings of fact supporting the ruling are reviewed for clear error. *Id*. A trial court's interpretation of a court rule is a question of law that is reviewed de novo. *People v Clark (Paul)*, 274 Mich App 248, 251 (2007).

# *Part B: Setting Aside a Conviction*

## 3.11 Quick Reference Materials

The Michigan Judicial Institute has created several Quick Reference Materials relevant to setting aside convictions:

- Setting Aside a Conviction Flowchart
- Setting Aside a Conviction Checklist
- Setting Aside a Human Trafficking Conviction Flowchart
- Setting Aside a Conviction for Human Trafficking Victim Checklist

[11] *Alleyne v United States*, 570 US 99 (2013), which held that mandatory sentencing on the basis of judge-found facts violates a defendant's Sixth Amendment rights. For a detailed discussion of *Alleyne*, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 2*, Chapter 1.

[12] Decisions of lower federal courts are not binding on Michigan courts, but they may be persuasive and instructive. *Abela v Gen Motors Corp*, 469 Mich 603, 607 (2004).

- Setting Aside a Misdemeanor Marijuana Conviction Flowchart
- Setting Aside a Conviction for First Violation Operating While Intoxicated Checklist

## 3.12 Application for Order Setting Aside a Conviction

"The setting aside of a conviction or convictions under [the Setting Aside Convictions Act (SACA), MCL 780.621 *et seq.*] is a privilege and conditional and is not a right." MCL 780.621d(14).

"Except as otherwise provided in [the SACA], a person who is convicted of 1 or more criminal offenses may file an application with the convicting court for the entry of an order setting aside 1 or more convictions as follows:

> (a) Except as provided in subdivisions (b) and (c), a person convicted of 1 or more criminal offenses, but not more than a total of 3 felony offenses, in this state, may apply to have all of the applicant's convictions from this state set aside.
>
> (b) An applicant may not have more than a total of 2 convictions for an assaultive crime set aside under this act during the applicant's lifetime.
>
> (c) An applicant may not have more than 1 felony conviction for the same offense set aside under this section if the offense is punishable by more than 10 years imprisonment.
>
> (d) A person who is convicted of a violation or an attempted violation of . . . MCL 750.520e [(fourth-degree criminal sexual conduct)], before January 12, 2015 may petition the convicting court to set aside the conviction if the individual has not been convicted of another offense other than not more than 2 minor offenses."[13] MCL 780.621(1).

**One bad night provision.** "For purposes of a petition to set aside a conviction under [MCL 780.621 or MCL 780.621e], more than 1 felony offense or more than 1 misdemeanor offense must be treated as a single felony or misdemeanor conviction if the felony or misdemeanor convictions were contemporaneous such that all of the felony or misdemeanor offenses occurred within 24 hours and arose from the same

[13] "[O]nce a conviction is set aside pursuant to MCL 780.621(1)(a), that conviction shall not bar a court from setting aside a CSC-IV conviction pursuant to MCL 780.621(1)(d) in a subsequent ruling." *People v Koert*, ___ Mich App ___, ___ (2024).

transaction, provided that none of those felony or misdemeanor offenses constitute any of the following:

> (a) An assaultive crime.
>
> (b) A crime involving the use or possession of a dangerous weapon.
>
> (c) A crime with a maximum penalty of 10 or more years' imprisonment.
>
> (d) A conviction for a crime that if it had been obtained in this state would be for an assaultive crime." MCL 780.621b(1).

The "one bad night provision" (MCL 780.621b(1)) did not apply to mandate treating two convictions as a single conviction despite the convictions satisfying the requirement of occurring within 24 hours of each other and arising from the same transaction because one of the convictions occurring within 24 hours of the other conviction was for an offense that "carries a maximum penalty of more than 10 years' imprisonment." *People v Maryanovska*, 347 Mich App 526, 528 (2023) (concluding that "MCL 780.621b(1)(c) precludes application of the one-bad-night provision" to defendant's conviction that was punishable by more than 10 years' imprisonment even though she was not sentenced to more than 10 years' imprisonment, and accordingly, defendant "is not eligible to have her convictions set aside under MCL 780.621(1)(a)" because she "has four felony convictions in total").

See SCAO Form MC 227, *Application to Set Aside Conviction(s)*.

For information about setting aside a juvenile adjudication, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21.

## A. Deferred and Dismissed Convictions Considered Misdemeanor Convictions

"A conviction that was deferred and dismissed under any of the following, whether a misdemeanor or a felony, is considered a misdemeanor conviction under [MCL 780.621(1)] for purposes of determining whether a person is eligible to have any conviction set aside under [MCL 780.621 *et seq.*]:

> (a) [MCL 436.1703 (purchase, consumption, or possession of alcoholic liquor by minor)].
>
> (b) [MCL 600.1070(1)(b)(*i*) (drug treatment court) or MCL 600.1209 (veterans treatment court)].

(c) [MCL 762.13 (Holmes Youthful Trainee Act (HYTA)) or MCL 769.4a (certain domestic violence and spousal abuse convictions)].

(d) [MCL 333.7411 (certain controlled substance offenses)].

(e) [MCL 750.350a (parental kidnapping) or MCL 750.430 (practice of profession by health care professional while under the influence of alcohol or controlled substance)].

(f) Any other law or laws of this state or of a political subdivision of this state similar in nature and applicability to those listed in this subsection that provide for the deferral and dismissal of a felony or misdemeanor charge." MCL 780.621(2).

## B. Timing Requirements

**Multiple felonies.** "An application under [MCL 780.621] to set aside more than 1 felony conviction shall only be filed 7 or more years after whichever of the following events occurs last:

(a) Imposition of the sentence for the convictions that the applicant seeks to set aside.

(b) Completion of any term of felony probation imposed for the convictions that the applicant seeks to set aside.

(c) Discharge from parole imposed for the convictions that the applicant seeks to set aside.

(d) Completion of any term of imprisonment imposed for the convictions that the applicant seeks to set aside." MCL 780.621d(1).

**One or more serious misdemeanors or a single felony.** "An application under [MCL 780.621] to set aside 1 or more serious misdemeanor convictions, 1 first violation operating while intoxicated offense, or 1 felony conviction shall only be filed 5 or more years after whichever of the following events occurs last:

(a) Imposition of the sentence for the conviction or convictions that the applicant seeks to set aside.

(b) Completion of probation imposed for the conviction or convictions that the applicant seeks to set aside.

(c) Discharge from parole imposed for the conviction that the applicant seeks to set aside, if applicable.

> (d) Completion of any term of imprisonment imposed for the conviction or convictions that the applicant seeks to set aside." MCL 780.621d(2).

**Misdemeanors.** "An application under [MCL 780.621] to set aside 1 or more misdemeanor convictions, other than an application to set aside a serious misdemeanor, a first violation operating while intoxicated offense, or any other misdemeanor conviction for an assaultive crime, shall only be filed 3 or more years after whichever of the following events occurs last:

> (a) Imposition of the sentence for the conviction that the applicant seeks to set aside.
>
> (b) Completion of any term of imprisonment imposed for the conviction that the applicant seeks to set aside.
>
> (c) Completion of probation imposed for the conviction or convictions that the applicant seeks to set aside." MCL 780.621d(3).

**Prostitution offenses arising from human trafficking.**[14] "An application under [MCL 780.621(3)], seeking the setting aside of certain prostitution offenses committed as a direct result of the individual being a human trafficking victim,] may be filed at any time following the date of the conviction to be set aside." MCL 780.621d(6).

**Waiting period after denial.** "If a petition under [the SACA] is denied by the convicting court, a person shall not file another petition concerning the same conviction or convictions with the convicting court until 3 years after the date the convicting court denies the previous petition, unless the court specifies an earlier date for filing another petition in the order denying the petition." MCL 780.621d(5).

A court may allow a defendant to refile a motion to set aside a conviction before three years has elapsed from a previous denial of such a motion. *People v Butka*, ___ Mich ___, ___ (2024); MCL 780.621d(5). In *Butka*, after denying defendant's motion to set aside defendant's conviction, "the trial court invited defendant to file a new application to set aside the conviction in 18 months, stating that it eventually intended to grant an application to set aside defendant's conviction." *Butka*, ___ Mich at ___. "By inviting defendant to file a new application in 18 months, the trial court waived the statutory three-year waiting period" set forth in MCL 780.621d(5). *Butka*, ___ Mich at ___.[15]

[14] See Section 3.15 for more information.

## C. Application Content Requirements

"An application under [MCL 780.621] is invalid unless it contains the following information and is signed under oath by the person whose conviction is or convictions are to be set aside:

> (a) The full name and current address of the applicant.
>
> (b) A certified record of each conviction that is to be set aside.
>
> (c) For an application under [MCL 780.621(1)], a statement that the applicant has not been convicted of an offense during the applicable time period required under [MCL 780.621d(1), MCL 780.621d(2), or MCL 780.621d(3)].
>
> (d) A statement listing all actions enumerated in [MCL 780.621(2)] that were initiated against the applicant and have been dismissed.
>
> (e) A statement as to whether the applicant has previously filed an application to set aside this or other conviction and, if so, the disposition of the application.
>
> (f) A statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country.
>
> (g) If the person is seeking to have 1 or more convictions set aside under [MCL 780.621(3)], a statement that he or she meets the criteria set forth in [MCL 780.621(3)], together with a statement of the facts supporting his or her contention that the conviction was a direct result of his or her being a victim of human trafficking.
>
> (h) A consent to the use of the nonpublic record created under [MCL 780.623] to the extent authorized by [MCL 780.623]." MCL 780.621d(7).

## D. Affidavits and Proofs

"For an application under [MCL 780.621(1)], upon the hearing of the application the court may require the filing of affidavits and the taking of proofs as it considers proper." MCL 780.621d(11).

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[15] "[T]he trial court's waiving of the three-year waiting period, only to again deny defendant's application to set aside his conviction without any new circumstances that would merit a denial of the application, create[d] an impression of arbitrariness." *Butka*, ___ Mich at ___.

## E. Court Order

"For an application under [MCL 780.621], a court shall not enter an order setting aside a conviction or convictions unless all of the following apply:

> (a) The applicable time period required under [MCL 780.621d(1), MCL 780.621d(2), or MCL 780.621d(3)] has elapsed.
>
> (b) There are no criminal charges pending against the applicant.
>
> (c) The applicant has not been convicted of any criminal offense during the applicable time period required under [MCL 780.621d(1), MCL 780.621d(2), or MCL 780.621d(3)]." MCL 780.621d(4).

"If the court determines that the circumstances and behavior of an applicant under [MCL 780.621(1) or MCL 780.621(3)], from the date of the applicant's conviction or convictions to the filing of the application warrant setting aside the conviction or convictions, and that setting aside the conviction or convictions is consistent with the public welfare, the court may enter an order setting aside the conviction or convictions." MCL 780.621d(13).

MCL 780.621d(13) "plainly states that the circumstances and behavior of the applicant must justify setting aside the conviction *and* that setting aside the conviction must be consistent with the public welfare." *People v Butka*, ___ Mich ___, ___ (2024).[16] "This language indicates a two-element standard in which each element *must* be met." *Id*. at ___. "Each element is separate and distinct, and a trial court's discretionary analysis must account for each element." *Id*. at ___. Additionally, the Court noted that "'public' within the term 'public welfare,' as used in former MCL 780.621(14), refers to a community at large, as distinguished from an individual or a limited class of people." *Butka*, ___ Mich at ___. Further, "while granting defendant's application to set aside his conviction may not have been consistent with the welfare of the victims, the lower courts did not explain why granting defendant's application to set aside his conviction would not be consistent with the broader *public's* welfare." *Id*. at ___. Thus, the Court concluded that "the Court of Appeals erred by holding that the [victim] statements of two individuals comprise the public welfare," and "that the trial court abused its discretion

[16] *Butka* overturned *People v Boulding*, 160 Mich App 156 (1986), to the extent that its "*general* balancing test of the two elements [appearing in the former MCL 780.621(14)] against one another" was inconsistent with the statute's "language [that] indicates a two-element standard in which each element *must* be met." *Butka*, ___ Mich at ___.

when it denied defendant's application to set aside his conviction." *Id.* at ___ (reversing and remanding to the trial court for entry of an order in accordance with MCL 780.621).

"The nature of the offense itself does not preclude the setting aside of an offender's conviction." *People v Rosen*, 201 Mich App 621, 623 (1993). "That reason, standing alone, is insufficient to warrant denial of an application to set aside a conviction." *Id.* MCL 780.621d(13)[17].

**Convictions may be set aside in concurrent proceedings.** "[O]nce a conviction is set aside pursuant to MCL 780.621(1)(a), that conviction shall not bar a court from setting aside a CSC-IV conviction pursuant to MCL 780.621(1)(d) in a subsequent ruling." *People v Koert*, ___ Mich App ___, ___ (2024). In *Koert*, the defendant was previously convicted of CSC-IV, as well as two counts of delivery of less than five kilograms of marijuana; when he filed an application to set aside each of these convictions, "the trial court concluded that defendant's subsequent felony convictions precluded it from setting aside his CSC-IV conviction" and "granted defendant's application with respect to the marijuana convictions but denied it with respect to the CSC-IV charge." *Id.* at ___. However, on appeal, the *Koert* Court concluded that "the trial court was permitted to set aside defendant's marijuana convictions and his CSC-IV conviction in the same proceeding after the court ruled on the record effective immediately that the marijuana convictions were expunged." *Id.* at ___ (noting "that the Legislature did not intend that defendant be barred from having all three of his convictions set aside in concurrent proceedings," and that "the trial court's decision to set aside the marijuana convictions enabled it to subsequently set aside the CSC-IV conviction during the same proceeding").

See SCAO Form MC 228, *Order on Application to Set Aside Conviction(s)*.

## 3.13 Setting Aside of Certain Convictions Prohibited

"A person shall not apply to have set aside, and a judge shall not set aside, a conviction for any of the following:

> (a) A felony for which the maximum punishment is life imprisonment or an attempt to commit a felony for which the maximum punishment is life imprisonment.

[17] Formerly MCL 780.621(9) and MCL 780.621(14); following amendments by 2020 PA 190 and 2020 PA 191, both effective April 11, 2021, the relevant language is now codified in MCL 780.621d(13). The relevant statutory language is substantially similar in substance.

(b) A violation or attempted violation of [MCL 750.136b(3) (second-degree child abuse), MCL 750.136d(1)(b) (second-degree child abuse in the presence of another child), MCL 750.136d(1)(c) (second-degree child abuse in the presence of another child on a second or subsequent occasion), MCL 750.145c (child sexually abusive activity), MCL 750.145d (use of the internet or computer to make a prohibited communication), MCL 750.520c (second-degree criminal sexual conduct), MCL 750.520d (third-degree criminal sexual conduct), or MCL 750.520g (assault with intent to commit criminal sexual conduct)].

(c) A violation or attempted violation of . . . MCL 750.520e [(fourth-degree criminal sexual conduct)], if the conviction occurred on or after January 12, 2015.[18]

(d) The following traffic offenses:

(*i*) Subject to [exceptions for certain first-time offenders[19]], a conviction for operating while intoxicated committed by any person.

(*ii*) Any traffic offense committed by an individual with an indorsement on his or her operator's or chauffeur's license to operate a commercial motor vehicle that was committed while the individual was operating the commercial motor vehicle or was in another manner a commercial motor vehicle violation.

(*iii*) Any traffic offense that causes injury or death.

(e) A felony conviction for domestic violence, if the person has a previous misdemeanor conviction for domestic violence.

(f) A violation of former [MCL 750.462i or MCL 750.462j], or [MCL 750.462a–MCL 750.462h (human trafficking)] and [MCL 750.543a–MCL 750.543z (Michigan anti-terrorism act]."MCL 780.621c(1).

"The prohibition on the setting aside of the convictions under [MCL 780.621c(1)] upon application also applies to the setting aside of

[18]"A person who is convicted of a violation or an attempted violation of [MCL 750.520e], *before* January 12, 2015 may petition the convicting court to set aside the conviction if the individual has not been convicted of another offense other than not more than 2 minor offenses." MCL 780.621(1)(d) (emphasis added).

[19]See Section 3.14.

convictions without application under [MCL 780.621g[20]]." MCL 780.621c(2).

## 3.14 Operating While Intoxicated — First Violation

"The prohibition on setting aside a conviction for operating while intoxicated under [MCL 780.621c(1)(d)(*i*)] does not apply to a conviction for a first violation operating while intoxicated offense if the person applying to have the first violation operating while intoxicated offense conviction set aside has not previously applied to have and had a first violation operating while intoxicated offense conviction set aside under this act." MCL 780.621c(3).

**Factors for court to consider.** "In making a determination whether to grant the petition to set aside a first violation operating while intoxicated offense conviction the reviewing court may consider whether or not the petitioner has benefited from rehabilitative or educational programs, if any were ordered by the sentencing court, or whether such steps were taken by the petitioner before sentencing for the first violation operating while intoxicated offense conviction he or she is seeking to set aside." MCL 780.621c(4).

**Court may consider additional evidence.** "The reviewing court is not constrained by the record made at sentencing." MCL 780.621c(4).

**Grounds for denial.** "The reviewing court may deny the petition if it is not convinced that the petitioner has either availed himself or herself of rehabilitative or educational programming or benefited from rehabilitative or educational programming he or she has completed." MCL 780.621c(4).

**No automatic set aside.** The automatic set aside procedure in MCL 780.621g does not apply to first violation operating while intoxicated offenses. MCL 780.621c(3).

## 3.15 Prostitution-Related Offenses Committed by Human Trafficking Victims

"A person who is convicted of a violation of [MCL 750.448 (soliciting, accosting, or inviting to commit prostitution or immoral act), MCL 750.449 (admitting to place for purpose of prostitution), or MCL 750.450 (aiding, assisting, or abetting another person to commit or offer to commit an act prohibited under MCL 750.448, MCL 750.449, or MCL

[20] See Section 3.21.

750.449a)], or a local ordinance substantially corresponding to [MCL 750.448, MCL 750.449, or MCL 750.450], may apply to have that conviction set aside if the person committed the offense as a direct result of the person being a victim of a human trafficking violation." MCL 780.621(3).

## A. Timing and Contents of Application

"An application under [MCL 780.621(3)] may be filed at any time following the date of the conviction to be set aside." MCL 780.621d(6). "A person may apply to have more than 1 conviction set aside under [MCL 780.621(3)]." MCL 780.621d(6).

## B. Affidavits and Proofs

"If the person is seeking to have 1 or more convictions set aside under [MCL 780.621(3)], [the application is invalid unless it is signed under oath by the person and contains, in part,] a statement that he or she meets the criteria set forth in [MCL 780.621(3)], together with a statement of the facts supporting his or her contention that the conviction was a direct result of his or her being a victim of human trafficking."MCL 780.621d(7)(g).

## C. Court Order

"For an application under [MCL 780.621(3)], if the applicant proves to the court by a preponderance of the evidence that the conviction was a direct result of his or her being a victim of human trafficking, the court may, subject to the requirements of [MCL 780.621d(13)], enter an order setting aside the conviction." MCL 780.621d(12).

"If the court determines that the circumstances and behavior of an applicant under [MCL 780.621(3)], from the date of the applicant's conviction or convictions to the filing of the application warrant setting aside the conviction or convictions, and that setting aside the conviction or convictions is consistent with the public welfare, the court may enter an order setting aside the conviction or convictions." MCL 780.621d(13). MCL 780.621d(13) "plainly states that the circumstances and behavior of the applicant must justify setting aside the conviction *and* that setting aside the conviction must be consistent with the public welfare." *People v Butka*, ___ Mich ___, ___ (2024).[21] "This language indicates a two-element standard in which each

[21] *Butka* overturned *People v Boulding*, 160 Mich App 156 (1986), to the extent that its "*general* balancing test of the two elements [appearing in the former MCL 780.621(14)] against one another" was inconsistent with the statute's "language [that] indicates a two-element standard in which each element *must* be met." *Butka*, ___ Mich at ___.

element *must* be met." *Id.* at ___. "Each element is separate and distinct, and a trial court's discretionary analysis must account for each element." *Id.* at ___.

"The nature of the offense itself does not preclude the setting aside of an offender's conviction." *People v Rosen*, 201 Mich App 621, 623 (1993). "That reason, standing alone, is insufficient to warrant denial of an application to set aside a conviction." *Id.*

## 3.16 Submitting Application and Fingerprints to Department of State Police

"The applicant shall submit a copy of the application and 1 complete set of fingerprints to the department of state police." MCL 780.621d(8). "The department of state police shall compare those fingerprints with the records of the department, including the nonpublic record created under [MCL 780.623], and shall forward an electronic copy of a complete set of fingerprints to the Federal Bureau of Investigation for a comparison with the records available to that agency." MCL 780.621d(8).

### A. Report

"The department of state police shall report to the court in which the application is filed the information contained in the department's records with respect to any pending charges against the applicant, any record of conviction of the applicant, and the setting aside of any conviction of the applicant and shall report to the court any similar information obtained from the Federal Bureau of Investigation."MCL 780.621d(8). "The court shall not act upon the application until the department of state police reports the information required by [MCL 780.621d(8)] to the court." MCL 780.621d(8).

### B. Application Fee

"The copy of the application submitted to the department of state police under [MCL 780.621d(8)] must be accompanied by a fee of $50.00 payable to the state of Michigan that must be used by the department of state police to defray the expenses incurred in processing the application."MCL 780.621d(9).

## 3.17 Contest of Application by Attorney General or Prosecuting Attorney

"A copy of the application must be served upon the attorney general and upon the office of each prosecuting attorney who prosecuted the crime or crimes the applicant seeks to set aside, and an opportunity must be given

to the attorney general and to the prosecuting attorney to contest the application." MCL 780.621d(10).

"If a conviction was for an assaultive crime or a serious misdemeanor, the prosecuting attorney shall notify the victim of the assaultive crime or serious misdemeanor of the application under [MCL 780.772a or MCL 780.827a]." MCL 780.621d(10). "The notice must be by first-class mail to the victim's last known address." *Id.* "The victim has the right to appear at any proceeding under [MCL 780.621 *et seq.*] concerning that conviction and to make a written or oral statement." MCL 780.621d(10).

## 3.18 Effect of Entry of Order

"Upon the entry of an order under [MCL 780.621 or MCL 780.621e (misdemeanor marijuana convictions[22])] or upon the automatic setting aside of a conviction under [MCL 780.621g[23]], the applicant, for purposes of the law, is considered not to have been previously convicted, except as provided in [MCL 780.622] and [MCL 780.623[24]]." MCL 780.622(1).

### A. Sex Offenders Registration Act

Under MCL 780.622, "[i]f the conviction set aside under [MCL 780.621(1), MCL 780.621e, or MCL 780.621g] is for a listed offense as defined in [MCL 28.722(i)], the applicant is considered to have been convicted of that offense for purposes of [MCL 28.721 *et seq*]." MCL 780.622(3). "[E]xpungement pursuant to MCL 780.621 does not relieve a felony sex offender from the continuing duty to register pursuant to the provisions of the Sex Offenders Registration Act, MCL 28.721 *et seq*." *People v Van Heck*, 252 Mich App 207, 215 (2002).

### B. Rights and Obligations Not Affected

Setting aside a conviction under MCL 780.621 does not affect the applicant's double jeopardy rights, nor does it affect the victim's rights to prosecute or defend a civil action for damages. MCL 780.622(4)-(5).

Setting aside a conviction does not create an applicant's right to commence an action for damages for incarceration pursuant to the

[22] See Section 3.22.

[23] See Section 3.21.

[24] MCL 780.623 requires the Department of State Police to maintain a nonpublic record of information surrounding a conviction that has been set aside for use in limited circumstances, including as a consideration when determining a sentence for a subsequent felony offense or an offense punishable by imprisonment for more than one year. MCL 780.623(2); MCL 780.623(2)(c). See Section 3.19 for more information on the nonpublic record requirements and use.

sentence served before the conviction was set aside, nor does it entitle the applicant to remission of any money paid as a consequence of the set aside conviction.[25] MCL 780.622(2); MCL 780.622(6). Further, setting aside a conviction "does not relieve any obligation to pay restitution owed to the victim of a crime nor does it affect the jurisdiction of the convicting court or the authority of any court order with regard to enforcing an order for restitution." MCL 780.622(7).

## C. Employment Actions

"A conviction, including any records relating to the conviction and any records concerning a collateral action, that has been set aside under [the Setting Aside Convictions Act, MCL 780.621 *et seq.*,] cannot be used as evidence in an action for negligent hiring, admission, or licensure against any person." MCL 780.622(8).

## D. Habitual Offender Status

"A conviction that is set aside under [MCL 780.621, MCL 780.621e, or MCL 780.621g] may be considered a prior conviction by court, law enforcement agency, prosecuting attorney, or the attorney general, as applicable, for purposes of charging a crime as a second or subsequent offense or for sentencing under . . . MCL 769.10, [MCL] 769.11, and [MCL] 769.12." MCL 780.622(9).

## E. Driving Record

"An order setting aside a conviction for a traffic offense under [the Setting Aside Convictions Act, MCL 780.621 *et seq.*,] must not require that the conviction be removed or expunged from the applicant's driving record maintained by the secretary of state as required under the Michigan vehicle code," MCL 257.1 *et seq.* MCL 780.621c(5).

[25]However, see *Nelson v Colorado*, 581 US 128, 130 (2017), holding that "[w]hen a criminal conviction is invalidated by a reviewing court and no retrial will occur, . . . the State [is] obliged to refund fees, court costs, and restitution exacted from the defendant upon, and as a consequence of, the conviction[;]" the retention of such conviction-related assessments following the reversal of a conviction, where the defendant will not be retried, "offends the Fourteenth Amendment's guarantee of due process." It is unclear whether the reasoning of *Nelson* extends to convictions that are set aside, rather than vacated or reversed on appeal.

# 3.19 Nonpublic Record of Order Setting Aside a Conviction

## A. Sending Copy of Order to Arresting Agency and Department of State Police

Once an order to set aside a conviction is entered under MCL 780.621 or MCL 780.621e, the court must send a copy to the arresting agency and the Department of State Police. MCL 780.623(1).

## B. Retention and Availability of Nonpublic Record of Order and Other Records

"[T]he Department of State Police is required to retain a record of expunged convictions and their associated sentences, which may be accessed and used by a number of state authorities for a variety of reasons[.]" *People v Van Heck*, 252 Mich App 207, 215 (2002).

"The department of state police shall retain a nonpublic record of the order setting aside a conviction, or other notification regarding a conviction that was automatically set aside under [MCL 780.621g], and of the record of the arrest, fingerprints, conviction, and sentence of the person in the case to which the order or other notification applies." MCL 780.623(2). "Except as provided in [MCL 780.623(3)], this nonpublic record shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:

> (a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.
>
> (b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under [MCL 780.621 *et seq*].
>
> (c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.
>
> (d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.
>
> (e) Consideration by the department of corrections or a law enforcement agency if a person whose conviction has been set aside applies for employment with the department of corrections or law enforcement agency.

> (f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act[ (SORA), MCL 28.721 *et seq.*], has violated that act, or for use in a prosecution for violating that act.
>
> (g) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general for use in making determinations regarding charging, plea offers, and sentencing, as applicable." MCL 780.623(2).

## C. Providing Copy of Nonpublic Record to Person Whose Conviction Is Set Aside and Fee

"A copy of the nonpublic record created under [MCL 780.623(2)] must be provided to the person whose conviction is set aside under [MCL 780.621 *et seq.*] upon payment of a fee determined and charged by the department of state police in the same manner as the fee prescribed in [MCL 15.234 (the Freedom of Information Act (FOIA))]." MCL 780.623(3).

## D. Nonpublic Record Exempt From Disclosure

"The nonpublic record maintained under [MCL 780.623(2)] is exempt from disclosure under the [Freedom of Information Act (FOIA), MCL 15.231 *et seq*]." MCL 780.623(4).

## E. Prohibited Conduct

"Except as provided in [MCL 780.623(2)], a person, other than the person whose conviction was set aside or a victim, who knows or should have known that a conviction was set aside under [MCL 780.623] and who divulges, uses, or publishes information concerning a conviction set aside under [MCL 780.623] is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both." MCL 780.623(5).

## F. Limitation on Liability

"An entity is not liable for damages or subject to criminal penalties under this section for reporting a public record of conviction that has been set-aside by court order or operation of law, if that record was available as a public record on the date of the report." MCL 780.623(6).

## 3.20 Limitation on Setting Aside of Convictions

"Except as provided in [MCL 780.621, MCL 780.621e, and MCL 780.621g], a person may have only 1 conviction set aside under [the Setting Aside Convictions Act, MCL 780.621 *et seq*]." MCL 780.624.

## 3.21 Automatic Set Aside Procedure

Note that 2020 PA 193, which created the automatic set aside procedure, is effective April 11, 2021; however, the text of the statute provides that the automatic set aside process is "subject to any necessary appropriation," and does not begin until "2 years after the effective date" of 2020 PA 193. MCL 780.621g(1)-(4). Accordingly, all of the following automatic set aside procedures are subject to any necessary appropriation and do not begin until two years after April 11, 2021.[26]

"An individual whose conviction is set aside under [MCL 780.621g] impliedly consents to the creation of the nonpublic record under [MCL 780.623]." MCL 780.621g(9).

### A. Limitations on Automatic Set Asides

**Number of offenses that may be set aside.** "Except as otherwise provided in this subsection, not more than 2 felony convictions and 4 misdemeanor convictions total that are recorded and maintained in the department of state police database may be set aside under this section during the lifetime of an individual. The limit on the number of misdemeanor convictions that may be set aside under this subsection does not apply to the setting aside of convictions described under [MCL 780.621g(1) or MCL 780.621g(3)]." MCL 780.621g(5).

**Ineligible offenses.** "[MCL 780.621g(2) and MCL 780.621g(4)] do not apply to a conviction recorded and maintained in the department of state police database for the commission of or attempted commission of any of the following:

(a) An assaultive crime.

(b) A serious misdemeanor.

(c) A crime of dishonesty.

(d) Any other offense, not otherwise listed under this subsection, that is punishable by 10 or more years' imprisonment.

[26]For information about automatic set aside of juvenile adjudications, which was effective December 30, 2023, see the Michigan Judicial Institute's *Juvenile Justice Benchbook*, Chapter 21.

> (e) A violation of the laws of this state listed under . . . MCL 777.1 to [MCL] 777.69, the elements of which involve a minor, vulnerable adult, injury or serious impairment, or death.
>
> (f) Any violation related to human trafficking." MCL 780.621g(10).

## B. Misdemeanors

"Beginning [April 11, 2023] and subject to any necessary appropriation, a misdemeanor conviction for an offense for which the maximum punishment is imprisonment for not more than 92 days is set aside under this section without the filing of an application under [MCL 780.621] if 7 years have passed from the imposition of the sentence. Each court shall notify the arresting law enforcement agency of each conviction on or before the tenth day of each month that is set aside under this subsection for the preceding month. Each law enforcement agency need not retain and shall make nonpublic the notification that the conviction has been set aside, and the record of the arrest, fingerprinting, conviction, and sentence of the person in the case to which the notification applies." MCL 780.621g(1).

"Beginning [April 11, 2023] and subject to any necessary appropriation and [MCL 780.621g(10)[27]], a conviction for a misdemeanor offense for which the maximum punishment is imprisonment for not more than 92 days that is recorded and maintained in the department of state police database is set aside under this section without the filing of an application under [MCL 780.621] if 7 years have passed from the imposition of the sentence." MCL 780.621g(3).

"Beginning [April 11, 2023] and subject to any necessary appropriation and [MCL 780.621g(5)-(7) and MCL 780.621g(10)[28]], a conviction for a misdemeanor offense for which the maximum punishment is imprisonment for 93 days or more that is recorded and maintained in the department of state police database is set aside under this section without the filing of an application under [MCL 780.621] if 7 years have passed from the imposition of the sentence." MCL 780.621g(4).

**Additional requirements to set aside misdemeanor convictions punishable for 93 days or more.** "A conviction is not set aside under [MCL 780.621g(4)] unless all of the following apply:

[27] MCL 780.621g(10) sets out offenses to which the set aside procedure does not apply. See Section 3.21(A).

[28] For discussion of the limits imposed by MCL 780.621g(5) and MCL 780.621g(10), see Section 3.21(A).

> (a) The applicable time period required under [MCL 780.621g(4)] has elapsed.
>
> (b) There are no criminal charges pending in the department of state police database against the applicant.
>
> (c) The applicant has not been convicted of any criminal offense that is recorded and maintained in the department of state police database during the applicable time period required under [MCL 780.621g(4)]." MCL 780.621g(6).

MCL 780.621g(4) does "not apply to an individual who has more than 1 conviction for an assaultive crime or an attempt to commit an assaultive crime that is recorded and maintained in the department of state police database." MCL 780.621g(7).

## C. Felonies

"Beginning [April 11, 2023] and subject to any necessary appropriation and [MCL 780.621g(5)-(7) and MCL 780.621g(10)[29]], a felony conviction that is recorded and maintained in the department of state police database is set aside under this section without the filing of an application under section 1 if both of the following apply:

> (a) Ten years have passed from whichever of the following events occurs last:
>
> (*i*) Imposition of the sentence for the conviction.
>
> (*ii*) Completion of any term of imprisonment with the department of corrections for the conviction.
>
> (b) The conviction or convictions are otherwise eligible to be set aside under [MCL 780.621]." MCL 780.621g(2).

**Additional requirements to set aside felony convictions.** "A conviction is not set aside under [MCL 780.621g(2)] unless all of the following apply:

> (a) The applicable time period required under [MCL 780.621g(2)] has elapsed.
>
> (b) There are no criminal charges pending in the department of state police database against the applicant.

[29]For discussion of the limits imposed by MCL 780.621g(5) and MCL 780.621g(10), see Section 3.21(A).

> (c) The applicant has not been convicted of any criminal offense that is recorded and maintained in the department of state police database during the applicable time period required under [MCL 780.621g(2)]." MCL 780.621g(6).

MCL 780.621g(2) does "not apply to an individual who has more than 1 conviction for an assaultive crime or an attempt to commit an assaultive crime that is recorded and maintained in the department of state police database." MCL 780.621g(7).

## D. Obligations of Other Departments

"The department of technology, management, and budget shall develop and maintain a computer-based program for the setting aside of convictions under this section. In fulfilling its duty under this subsection, the department of technology, management, and budget may contract with a private technical consultant as needed." MCL 780.621g(11).

"The department of state police shall create and maintain an electronically accessible record of each conviction recorded and maintained in the department of state police database that was set aside under this section that must be provided to or accessible by each court in this state. An electronic record created as required under this section may only be used as authorized under [MCL 780.623] and by a court for purposes of updating locally maintained court records." MCL 780.621g(13).

"The implementation of the section is subject to appropriation. The department of state police and the department of technology, management, and budget shall begin work to implement the section immediately upon appropriation." MCL 780.621g(14).

## E. Reinstatement

"The setting aside of a conviction without an application under [MCL 780.621g] is subject to reinstatement under [MCL 780.621h]." MCL 780.621g(12) and MCR 6.451.

MCL 780.621h provides a reinstatement procedure:

> "(1) Upon the occurrence of 1 of the circumstances under subsection (2) or (3), a conviction that was set aside by operation of law under [MCL 780.621g] shall be reinstated by the court as provided in this section.
>
> (2) If it is determined that a conviction was improperly or erroneously set aside under [MCL 780.621g] because

> the conviction was not eligible to be set aside under [MCL 780.621g] or any other provision of [the Setting Aside Convictions Act, MCL 780.621 *et seq.*], the court shall, on its own motion, reinstate the conviction.
>
> (3) Upon a motion by a person owed restitution, or on its own motion, the court shall reinstate a conviction that was set aside under [MCL 780.621g] for which the individual whose conviction was set aside was ordered to pay restitution if the court determines that the individual has not made a good-faith effort to pay the ordered restitution." See also MCR 6.451 ("A conviction that was set aside by operation of law under MCL 780.621g must be reinstated by the court only as provided in MCL 780.621h").

When reinstating a conviction, "[t]he court must:

> (A) provide notice and an opportunity to be heard before reinstating a conviction for failure to make a good faith effort to pay restitution under MCL 780.621h(3),
>
> (B) order the reinstatement on a form approved by the State Court Administrative Office,
>
> (C) serve any order entered under this rule on the prosecuting authority and the individual whose conviction was automatically set aside." MCR 6.451(A)-(C).

"An order for reinstatement of a conviction that was improperly or erroneously set aside as provided in MCL 780.621h(2) must advise the individual whose conviction is being reinstated that he or she may object to the reinstatement by requesting a hearing. The request must be filed with the court on a form approved by the State Court Administrative Office." MCR 6.451.

Note that MCR 6.451 governs both felony and misdemeanor offenses. MCR 6.001(B).

The relevant forms are:

- SCAO Form MC 527a, *Notice of Hearing on Reinstating Conviction(s) for Failure to Pay Restitution*;
- SCAO Form MC 527b, *Order After Hearing on Reinstating Conviction(s) for Failure to Pay Restitution*;
- SCAO Form MC 528a, *Order Reinstating Conviction(s) for Improper or Erroneous Set Aside and Objection to Order*;

- SCAO Form MC 528b, *Order After Hearing on Objection to Reinstating Conviction(s) for Improper or Erroneous Set Aside*.

## 3.22 Setting Aside Misdemeanor Marijuana Convictions

"Beginning on January 1, 2020,[30] a person convicted of 1 or more misdemeanor marihuana offenses may apply to set aside the conviction or convictions under [MCL 780.621e(1)]." MCL 780.621e(1).

For a detailed discussion of the procedure for setting aside misdemeanor marijuana offense convictions, see the Michigan Judicial Institute's *Controlled Substances Benchbook*, Chapter 8.

# *Part C: Prosecutor's Postjudgment Responsibilities*

## 3.23 Evidence of Defendant's Innocence

A prosecutor's special responsibilities are set forth in MRPC 3.8; relevant to postjudgment proceedings, the rule requires a prosecutor who "knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant is innocent of the crime for which the defendant was convicted" to "promptly disclose that evidence to an appropriate court or authority[.]" MRPC 3.8(f)(1). Further, "if the conviction was obtained in the prosecutor's jurisdiction," the prosecutor must "promptly disclose that evidence to the defendant unless a court authorizes delay," and must "undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant is innocent of the crime." MRPC 3.8(f)(2)(*i*)-(*ii*).

"When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction is innocent of the crime for which defendant was prosecuted, the prosecutor shall seek to remedy the conviction." MRPC 3.8(g).

However, "[a] prosecutor's independent judgment, made in good faith, that the new evidence is not of such nature as to trigger the obligations of [MRPC 3.8(f) and MRPC 3.8(g)], though subsequently determined to have been erroneous, does not constitute a violation of [MRPC 3.8]." MRPC 3.8(h).

[30]Note, however, that 2020 PA 192 was not effective until April 11, 2021.

# Chapter 4: Habeas Corpus

# 4.1 Habeas Corpus, In General

"The object of the writ of habeas corpus is 'to determine the legality of the restraint under which a person is held.'" *Moses v Dep't of Corrections*, 274 Mich App 481, 485 (2007), quoting *Phillips v Warden, State Prison of Southern Mich*, 153 Mich App 557, 565 (1986). "The writ of habeas corpus deals with radical defects that render a judgment or proceeding absolutely void." *Moses*, 274 Mich App at 485.

# 4.2 Habeas Corpus in Michigan

"A civil action or appropriate motion in a pending action may be brought to obtain . . . habeas corpus[.]" MCR 3.301(A)(1)(b). The "special rules [in MCR 3.300 *et seq.* (extraordinary writs)] govern the procedure for seeking the writs or relief formerly obtained by the writs, whether the right to relief is created by statute or common law." MCR 3.301(A)(2). "If the right to relief is created by statute, the limitations on relief in the statute apply, as well as the limitations on relief in these rules." *Id.*

"The provisions of [MCL 600.4301 to MCL 600.4379] shall be construed to apply to every writ of habeas corpus authorized to be issued under any statute of this state, insofar as they are consistent with the statute granting the right to habeas corpus." MCL 600.4301.

"A prisoner's right to file a complaint for habeas corpus relief is guaranteed by Const 1963, art 1, § 12." *Moses v Dep't of Corrections*, 274 Mich App 481, 484 (2007).

# 4.3 Habeas Corpus to Inquire Into Cause of Detention

"MCR 3.303 governs the procedure to be followed in an action for habeas corpus to inquire into the cause of detention." *Phillips v Warden, State Prison of Southern Mich*, 153 Mich App 557, 561 (1986).

## A. Jurisdiction/Power to Issue Writ

"An action for habeas corpus to inquire into the cause of detention of a person may be brought in any court of record except the probate court." MCR 3.303(A)(1).

"The writ of habeas corpus to inquire into the cause of detention, or an order to show cause why the writ should not issue, may be issued by the following:

(1) The [S]upreme [C]ourt, or a justice thereof.

(2) The [C]ourt of [A]ppeals, or a judge thereof.

> (3) The circuit courts, or a judge thereof.
>
> (4) The municipal courts of record, including but not limited to the recorder's court of the city of Detroit, common pleas court, or a judge thereof.
>
> (5) The district courts, or a judge thereof." MCL 600.4304.

See, e.g., *Walls v Dir of Institutional Servs Maxie Boy's Training Sch*, 84 Mich App 355, 360 (1978) (Court of Appeals ordered a writ of habeas corpus directing the release of a juvenile under its authority found in MCL 600.4304(2)).

## B. Venue

"The action must be brought in the county in which the prisoner is detained." MCR 3.303(A)(2). "If it is shown that there is no judge in that county empowered and available to issue the writ or that the judicial circuit for that county has refused to issue the writ, the action may be brought in the Court of Appeals." MCR 3.303(A)(2). See *Moses*, 274 Mich App at 484 (Court of Appeals has "jurisdiction to entertain an action for habeas corpus to inquire into the cause of detention where[] . . . the judge in the county where the prisoner was detained refuses to issue the writ").

## C. Persons Detained on Criminal Charges

"A prisoner detained in a county jail for a criminal charge, who has not been sentenced to detention by a court of competent jurisdiction, may be removed from detention by a writ of habeas corpus to inquire into the cause of detention only if the writ is issued by the court in which the prisoner would next appear if the criminal process against the prisoner continued, or by the judicial circuit for the county in which the prisoner is detained." MCR 3.303(A)(3).[1]

## D. Right to Bring Action

"An action for habeas corpus may be brought by the prisoner or by another person on the prisoner's behalf." MCR 3.303(B).

"An action for habeas corpus to inquire into the cause of detention may be brought by or on the behalf of any person restrained of his [or her] liberty within this state under any pretense whatsoever, except as specified in [MCL 600.4310[2]]." MCL 600.4307.

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[1] "[MCR 3.303(A)(3)] does not limit the power of the Court of Appeals or Supreme Court to issue the writ." MCR 3.303(A)(3).

"As a general rule, every person committed, detained, confined or restrained of his [or her] liberty for any criminal or supposed criminal matter may seek a writ of habeas corpus to inquire into the cause of the restraint." *Triplett v Deputy Warden*, 142 Mich App 774, 780 (1985), citing MCL 600.4307. "However, the writ of habeas corpus deals only with radical defects rendering a judgment or proceeding absolutely void." *Triplett*, 142 Mich App at 780. "A judgment which is merely erroneous, rather than void, is subject to review and may not be collaterally attacked in a habeas corpus proceeding." *Id.* at 780-781.

## E. Persons Not Entitled to Writ

"An action for habeas corpus to inquire into the cause of detention may not be brought by or on behalf of the following persons:

> (1) Persons detained by virtue of any process issued by any court of the United States, or any judge thereof, in cases where such courts or judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of suits in such courts;
>
> (2) Persons committed for treason or felony, or for suspicion thereof, or as accessories before the fact to a felony, where the cause is plainly and specially expressed in the warrant of commitment;
>
> (3) Persons convicted, or in execution, upon legal process, civil or criminal;
>
> (4) Persons committed on original process in any civil action on which they were liable to be arrested and imprisoned, unless excessive and unreasonable bail is required." MCL 600.4310.

"In general, MCL 600.4310(3) prohibits habeas corpus relief to '[p]ersons convicted, or in execution, upon legal process, civil or criminal.'" *Moses*, 274 Mich App at 485-486 (alteration in original). "But relief 'is open to a convicted person in one narrow instance, . . . where the convicting court was without jurisdiction to try the defendant for the crime in question.'" *Id.* at 486, quoting *People v Price*, 23 Mich App 663, 669-670 (1970) (ellipsis in original). "Moreover, to qualify for habeas corpus relief, the jurisdictional defect must be radical, rendering the conviction absolutely void." *Moses*, 274 Mich App at 486. "'A radical defect in jurisdiction contemplates . . . an act or omission by state authorities that clearly contravenes an express legal

[2]See Section 4.3(E) for information on persons prohibited from bringing an action.

requirement in existence at the time of the act or omission.'" *Id.*, quoting *Price*, 23 Mich App at 671 (ellipses in original). "Nevertheless, habeas relief may be denied in the exercise of a court's discretion where full relief may be obtained in other more appropriate proceedings." *Moses*, 274 Mich App at 486. "Thus, while [a] plaintiff may not use a habeas proceeding as a substitute for an appeal or to review the merits of his [or her] criminal conviction, [a] plaintiff may assert a radical defect in the jurisdiction of the court in which his [or her] conviction was obtained." *Id.* ("habeas relief requiring the [Department of Corrections] to release plaintiff might be appropriate because plaintiff raise[d] a jurisdictional challenge to the authority of the state to prosecute him in any state court").

## F. Refusal to Consider Habeas Corpus Constitutes Malfeasance

"Any judge who wilfully or corruptly refuses or neglects to consider an application, action, or motion for habeas corpus, is guilty of malfeasance in office." MCL 600.4313. See *Stowers v Wolodzko*, 386 Mich 119, 136 (1971) (Michigan Supreme Court has "recognized that interference with attempts of persons incarcerated to obtain their freedom may constitute false imprisonment" and recognized that the state has "protected the individual's rights" through MCL 600.4313).

## G. Complaint

"The complaint must state:

> (1) that the person on whose behalf the writ is applied for (the prisoner) is restrained of his or her liberty;
>
> (2) the name, if known, or the description of the prisoner;
>
> (3) the name, if known, or the description of the officer or person by whom the prisoner is restrained;
>
> (4) the place of restraint, if known;
>
> (5) that the action for habeas corpus by or on behalf of the prisoner is not prohibited;
>
> (6) the cause or pretense of the restraint, according to the plaintiff's best knowledge and belief; and
>
> (7) why the restraint is illegal." MCR 3.303(C).

## H. Issuance of the Writ or Order to Show Cause

"On the filing of the complaint, the court may issue

> (a) a writ of habeas corpus directed to the person having custody of the prisoner, or that person's superior, ordering him or her to bring the prisoner before the court forthwith; or
>
> (b) an order to show cause why the writ should not be issued, unless it appears that the prisoner is not entitled to relief." MCR 3.303(D)(1).[3]

See also MCL 600.4316, which states that "[a]ny court or judge empowered to grant the writ of habeas corpus shall, upon proper application, grant the preliminary writ (or an order to show cause) without delay, unless the party applying therefor is not entitled to the writ[;]" *Phillips*, 153 Mich App at 561, citing MCR 3.301(D)(1).

## I. Certification of Record

"When proceedings in another court or agency are pertinent to a determination of the issue raised in a habeas corpus action, the court may order the transcript of the record and proceedings certified to the court within a specified time." MCR 3.303(E). "The order must identify the records to be certified with sufficient specificity to allow them to be located." *Id.*

## J. Issuance Without Application or Before Filing

"A judge of a court of record, except the probate court, may issue a writ of habeas corpus or order to show cause if

> (a) the judge learns that a person within the judge's jurisdiction is illegally restrained, or
>
> (b) an application is presented to the judge before or after normal court hours." MCR 3.303(F)(1).

"If the prisoner is being held on criminal charges, the writ or order may only be issued by a judge of a court authorized to issue a writ of habeas corpus under [MCR 3.303(A)(3)]." MCR 3.303(F)(2).

"If a complaint is presented to a judge under [MCR 3.303(F)(1)(b)], it need not be filed with the court before the issuance of a writ of habeas

[3] "Duplicate original writs may be issued." MCR 3.303(D)(3).

corpus." MCR 3.303(F)(3). "The complaint must subsequently be filed with the court whether or not the writ is granted." *Id*.

## K. Endorsement of Allowance of Writ

"Every writ issued must be endorsed with a certificate of its allowance and the date of the allowance." MCR 3.303(G). "The endorsement must be signed by the judge issuing the writ, or, if the writ is issued by a panel of more than 1 judge, by a judge of the court." *Id*.

## L. Form of Writ

"A writ of habeas corpus must be substantially in the form approved by the state court administrator." MCR 3.303(H). See SCAO Form MC 203, *Writ of Habeas Corpus*.

## M. Service of Writ

### 1. Person to Be Served

"The writ or order to show cause must be served on the defendant in the manner prescribed in MCR 2.105." MCR 3.303(I)(1). "If the defendant cannot be found, or if the defendant does not have the prisoner in custody, the writ or order to show cause may be served on anyone having the prisoner in custody or that person's superior, in the manner and with the same effect as if that person had been made a defendant in the action." *Id*.

### 2. Tender of Fees

"If the Attorney General or a prosecuting attorney brings the action, or if a judge issues the writ on his or her own initiative, there is no fee." MCR 3.303(I)(2). "In other actions, to make the service of a writ of habeas corpus effective, the person making service must give the fee provided by law or [MCR 3.303] to the person having custody of the prisoner or to that person's superior." MCR 3.303(I)(2).

"If the prisoner is in the custody of a sheriff, coroner, constable, or marshal, the fee is that allowed by law to a sheriff for bringing up a prisoner." MCR 3.303(I)(2).

"If the prisoner is in the custody of another person, the fee is that, if any, allowed by the court issuing the writ, not exceeding the fee allowed by law to a sheriff for similar services." MCR 3.303(I)(2).

## N. Sufficiency of Writ

"The writ or order to show cause may not be disobeyed because of a defect in form." MCR 3.303(J). "The writ or order to show cause is sufficient if the prisoner is designated by name, if known, or by a description sufficient to permit identification." *Id*. "The writ or order may designate the person to whom it is directed as the person having custody of the prisoner." *Id*. "Anyone served with the writ or order is deemed the person to whom it is directed and is considered a defendant in the action." *Id*.

## O. Time for Answer and Hearing

"If the writ is to be answered and the hearing held on a specified day and hour, the answer must be made and the prisoner produced at the time and place specified in the writ." MCR 3.303(K)(1).

"If an order to show cause is issued, it must be answered as provided in [MCR 3.303(N)], and the hearing must be held at the time and place specified in the order." MCR 3.303(K)(2).

## P. Notice of Hearing Before Discharge

"When the answer states that the prisoner is in custody on process under which another person has an interest in continuing the custody, an order of discharge may not be issued unless the interested person or that person's attorney has had at least 4 days' notice of the time and place of the hearing." MCR 3.303(L)(1).

"When the answer states that the prisoner is detained on a criminal charge, the prisoner may not be discharged until sufficient notice of the time and place of the hearing is given to the prosecuting attorney of the county within which the prisoner is detained or, if there is no prosecuting attorney within the county, to the Attorney General." MCR 3.303(L)(2).

## Q. Custody of Child

"A complaint seeking a writ of habeas corpus to inquire into a child's custody must be presented to the judicial circuit for the county in which the child resides or is found." MCR 3.303(M)(1).

"If the action for habeas corpus is brought by a parent, foster-parent, or other relative of the child, to obtain custody of a child under the age of 16 years from a parent, foster-parent, or other relative of the child, issuance of the writ of habeas corpus is not mandatory." MCL 600.4319. Rather, "[a]n order to show cause, not a writ of habeas corpus, must be issued initially if the action is brought by a parent,

foster parent, or other relative of the child, to obtain custody of a child under the age of 16 years from a parent, foster parent, or other relative of the child." MCR 3.303(M)(2). "The court may direct the [F]riend of the [C]ourt to investigate the circumstances of the child's custody." *Id.*

## R. Answer

"The answer must state the reason why the prisoner is detained and a copy of the written authority for such detention, if any, must be attached." *Phillips*, 153 Mich App at 561-562, citing MCR 3.303(N)(1)(a) and MCR 3.303(N)(2).

### 1. Contents of Answer

"The defendant or person served must obey the writ or order to show cause or show good cause for not doing so, and must answer the writ or order to show cause within the time allowed." MCR 3.303(N)(1). "Failure to file an answer is contempt."[4] *Id.* "The answer must state plainly and unequivocally

> (a) whether the defendant then has, or at any time has had, the prisoner under his or her control and, if so, the reason; and
>
> (b) if the prisoner has been transferred, to whom, when the transfer was made, and the reason or authority for the transfer." MCR 3.303(N)(1).

### 2. Attachments

"If the prisoner is detained because of a writ, warrant, or other written authority, a copy must be attached to the answer, and the original must be produced at the hearing." MCR 3.303(N)(2). "If an order under [MCR 3.303(E)] requires it, the answer must be accompanied by the certified transcript of the record and proceedings." MCR 3.303(N)(2).

### 3. Verification

"The answer must be signed by the person answering, and, except when the person is a sworn public officer and answers in his or her official capacity, it must be verified by oath." MCR 3.303(N)(3).

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[4] For information on contempt, see the Michigan Judicial Institute's *Contempt of Court Benchbook* and quick reference materials (i.e. checklists, flowcharts, and tables).

### S. Answer May Be Controverted

"In a reply or at a hearing, the plaintiff or the prisoner may controvert the answer under oath, to show either that the restraint is unlawful or that the prisoner is entitled to discharge." MCR 3.303(O).

## 4.4 Person Served Has Duty to Bring Body of Prisoner Except in Circumstances of Sickness or Infirmity

"If a writ of habeas corpus is issued, the person on whom it is served shall bring the body of the person in his [or her] custody according to the command of the writ, except as provided in [MCL 600.4328]." MCL 600.4325. "If, from the sickness or infirmity of the prisoner directed to be produced by any writ of habeas corpus, the prisoner cannot, without danger, be brought before the court or judge, the party having custody of the prisoner may state that fact in his [or her] answer." MCL 600.4328. "The court or judge, if satisfied of the truth of the allegation, and if the answer is otherwise sufficient, shall proceed to dispose of the matter on the record." *Id.*

## 4.5 Arrest

MCL 600.4331 "force[s] a nonresponding defendant to answer the writ . . . by arresting him [or her] and holding him [or her] in close custody until he [or she] complies with the writ." *Phillips v Warden, State Prison of Southern Mich*, 153 Mich App 557, 564 (1986).

### A. Refusal or Neglect to Obey

"If the person upon whom the writ of habeas corpus was duly served refuses or neglects to obey the writ without sufficient excuse, the court or judge before whom the writ was to be answered, upon due proof of the service thereof, shall direct the arrest of such person." MCL 600.4331(1).

### B. Arrest and Close Custody

"The sheriff of any county within this state, or other officer, who is directed to make the arrest, shall apprehend such person, and bring him [or her] before the court or judge." MCL 600.4331(2). "The person shall be committed to close custody in the jail of the county in which the court or judge is, without being allowed the liberties thereof, until the person complies with the writ." *Id.*

### C. Proceeding Against Sheriff

"If the person ordered arrested is the sheriff of any county, the order may be directed to any coroner or other person, to be designated therein, who has thereby full power to arrest the sheriff." MCL 600.4331(3). "Such sheriff upon being brought up may be committed to the jail of any county other than his [or her] own." *Id.*

### D. Prisoner to be Brought Before Court

"The person directed to make the arrest shall also bring the prisoner named in the writ of habeas corpus before the court or judge which issued the writ." MCL 600.4331(4).

### E. Power of County

"In making the arrest the sheriff or other person so directed may call to his [or her] aid the power of the county as in other cases." MCL 600.4331(5).

### F. Arrest in Support of Writ

"If any person attempts wrongfully to carry the prisoner out of the county or state after service of a writ of habeas corpus or order to show cause, the person serving the writ or order to show cause, or other officer, shall arrest the person so resisting, and bring him [or her] together with the prisoner before the court or judge issuing the writ or order to show cause." MCL 600.4334.

## 4.6 Issuance of Warrant for Prisoner in Lieu of Habeas Corpus

"On the showing required by MCL 600.4337, the court may issue a warrant in lieu of habeas corpus." MCR 3.303(D)(2).

"Whenever it appears by satisfactory proof, that anyone is held in illegal confinement or custody, and that there is good reason to believe that he [or she] will be carried out of the state, or suffer some irreparable injury, before he [or she] can be relieved by the issuing of a writ of habeas corpus, any court or judge authorized to issue such writs may issue a warrant, reciting the facts, and directed to any sheriff, constable or other person, and commanding the officer or person to take the prisoner, and forthwith to bring him [or her] before the court or judge, to be dealt with according to law." MCL 600.4337.

## 4.7 Arrest of Person Having Custody of Prisoner

### A. Warrant

"When the proof mentioned in [MCL 600.4337[5]] is sufficient to justify an arrest of the person having the prisoner in his [or her] custody, as for a criminal offense committed in the taking or detaining of the prisoner, the warrant shall also contain an order for the arrest of such person for that offense." MCL 600.4340.

### B. Execution of Warrant

"Any officer or person to whom the warrant is directed shall execute the warrant by bringing the prisoner therein named, and the person who detains him [or her], if so commanded by the warrant, before the court or judge issuing the warrant." MCL 600.4343. "The person detaining the prisoner shall make answer as if a writ of habeas corpus had been issued in the first instance." *Id*.

### C. Procedure

"If the person having the prisoner in his [or her] custody is brought before the court or judge, as for a criminal offense, he [or she] shall be examined, committed, bailed or discharged by the court or judge in the like manner as in other criminal cases of like nature." MCL 600.4346.

## 4.8 Prisoner

### A. Custody

"The court or judge issuing the writ of habeas corpus may commit the prisoner to the custody of such individual or individuals as the court or judge considers proper." MCL 600.4349.

### B. Discharge

"If no legal cause is shown for the restraint, or for the continuation thereof, the court or judge shall discharge the person restrained from the restraint under which he [or she] is held." MCL 600.4352(1). See *Hinton v Parole Bd*, 148 Mich App 235, 244 (1986) ("[i]f a legal basis for detention is lacking, a judge must order the release of the detainee from confinement").

[5]See Section 4.6 for information on the proof mentioned in MCL 600.4337.

### 1. Enforcement of Order

"Obedience to any order for the discharge of any prisoner may be enforced by the court or judge granting such order, by arrest in the same manner as is herein provided for disobedience to a writ of habeas corpus, and with like effect in all respects." MCL 600.4352(2). "The person guilty of disobedience to an order for the discharge of any prisoner is liable to the party aggrieved in the sum of $1,000.00 damages, in addition to any special damages the party may have sustained." *Id*.

### 2. Obedience by Sheriff or Other Custodian

"No sheriff or other officer is liable to any civil action for obeying any such order of discharge." MCL 600.4352(3).

## C. Remanding

"The court or judge shall forthwith remand the person restrained if the person restrained is detained in custody, either:

> (1) By virtue of process issued by any court or judge of the United States, in a case where such court or judge has exclusive jurisdiction; or
>
> (2) By virtue of the final judgment or decree of any competent court of civil or criminal jurisdiction, or of any execution issued upon such judgment or decree; or
>
> (3) For any contempt specially and plainly charged in the commitment by some court, officer or body having authority to commit for the contempt so charged; and
>
> (4) The time during which such party may be legally detained has not expired." MCL 600.4355.

## D. Discharge of Prisoner in Civil Cases

"If the prisoner is in custody by virtue of civil process from any court legally constituted, or issued by any officer in the course of judicial proceedings before him [or her], authorized by law, the prisoner shall be discharged only if 1 of the following situations exists:

> (1) Where the jurisdiction of the court or officer has been exceeded, either as to matter, place, sum or person;
>
> (2) Where, though the original imprisonment was lawful, the party is entitled to be discharged;

> (3) Where the process is void;
>
> (4) Where the process, though in proper form, has been issued in a case not allowed by law;
>
> (5) Where the person having the custody of the prisoner is not the person empowered by law to detain him [or her]; or
>
> (6) Where the process is not authorized by any judgment, order or decree of any court, nor by any provision of law." MCL 600.4358.

## E. When Bailed

"Because a habeas corpus action must be decided promptly with no more than the brief delay provided by [MCR 3.303(Q)(2)[6]], release of a prisoner on bail will not normally be considered until after determination that legal cause exists for the detention." MCR 3.303(P). "Thereafter, if the prisoner is entitled to bail, the court issuing the writ or order may set bail." *Id.*

## F. Remanding or Commitment of Prisoner

"If the prisoner is not entitled to his [or her] discharge, and is not bailed, the court or judge shall place him [or her] under the restraint from which he [or she] was taken, if the person under whose restraint he [or she] was is legally entitled thereto." MCL 600.4361. "If not so entitled, the court or judge shall commit the prisoner to the custody of such officer or person as by law is entitled thereto." *Id.*

## G. Recommitment of Prisoner

### 1. Causes

"No person who has been discharged by the order of any court or judge upon habeas corpus shall be again restrained for the same cause." MCL 600.4364. "It is not the same cause if:

> (1) He [or she] was discharged from a commitment on a criminal charge, and is afterwards committed for the same offense, by the legal order or process of the court wherein he [or she] is bound by recognizance to appear, or in which he [or she] is indicted or convicted for the same offense; or

[6] See Section 4.10 for information on the brief delay provided by MCR 3.303(Q)(2).

> (2) After a discharge for defect of proof, or for any material defect in the commitment, in a criminal case, the prisoner is again arrested on sufficient proof, and committed by legal process for the same offense; or
>
> (3) In a civil suit the party was discharged for any illegality in the judgment or process and is afterwards imprisoned by legal process for the same cause of action; or
>
> (4) In any civil suit in which process may lawfully issue against the body, he [or she] was discharged from commitment on original process, and is afterwards committed on execution in the same cause, or on original process in any other suit, after such first suit was discontinued." *Id.*

"MCL 600.4364 is simply a codification of the common law rule that an order of discharge on habeas corpus is res judicata of all issues and facts necessarily involved in determining that [a] plaintiff was illegally held in custody, until reversed in some proper proceeding." *Phillips v Warden, State Prison of Southern Mich*, 153 Mich App 557, 564 n 3 (1986).

### 2. Violation/Penalty

"If any person knowingly:

> (1) violates [MCL 600.4364], or
>
> (2) causes [MCL 600.4364] to be violated, or
>
> (3) aids or assists in the violation of [MCL 600.4364]; he [or she] is guilty of a misdemeanor, and is liable to the party aggrieved in the sum of $1,000.00 damages." MCL 600.4367.

"Every person convicted of . . . [MCL 600.4367] shall be punished by a fine not exceeding $1,000.00, or by imprisonment in the county jail not exceeding 6 months, or by both such fine and imprisonment, in the discretion of the court." MCL 600.4376.

## H. Concealment

"Any one having under his [or her] power any person who would be entitled to a writ of habeas corpus to inquire into the cause of his [or her] detention, or for whose relief any such writ, warrant, or order to show cause was issued, who shall, with intent to elude the service of the writ, or to avoid the effect thereof, place any such prisoner under

the power of another, or conceal him [or her], or change the place of his [or her] confinement, is guilty of a misdemeanor." MCL 600.4370.

"Every person who knowingly aids or assists in the violation of [MCL 600.4370] is guilty of a misdemeanor." MCL 600.4373.

"Every person convicted of . . . [MCL 600.4370 or MCL 600.4373] shall be punished by a fine not exceeding $1,000.00, or by imprisonment in the county jail not exceeding 6 months, or by both such fine and imprisonment, in the discretion of the court." MCL 600.4376.

## 4.9 Refusal to Deliver Copy of Authority for Detention of Prisoner

"Any officer or other person who refuses or neglects for 6 hours to deliver a copy of any order, warrant, process or other authority by which he [or she] detains any person, to any one who demands such copy and tenders the lawful fees therefor, is liable to the person so detained in the sum of $200.00 damages." MCL 600.4379.

## 4.10 Hearing and Judgment

"The court shall proceed promptly to hear the matter in a summary manner and enter judgment." MCR 3.303(Q)(1).

"In response to the writ of habeas corpus or order to show cause, the defendant may request adjournment of the hearing." MCR 3.303(Q)(2). "Adjournment may be granted only for the brief delay necessary to permit the defendant

> (a) to prepare a written answer (unless waived by the plaintiff); or
>
> (b) to present to the court or judge issuing the writ or order testimonial or documentary evidence to establish the cause of detention at the time for answer." MCR 3.303(Q)(2).

"In the defendant's presence, the court shall inform the prisoner that he or she has the right to an attorney and the right to remain silent." MCR 3.303(Q)(3).

"From the time the prisoner is produced in response to the writ or order until judgment is entered, the judge who issued the writ or order has custody of the prisoner and shall make certain that the prisoner's full constitutional rights are protected." MCR 3.303(Q)(4).

"The hearing on the return to a writ of habeas corpus or an order to show cause must be recorded verbatim, unless a court reporter or recorder is not available." MCR 3.303(Q)(5). "If the hearing is conducted without a verbatim record being made, as soon as possible the judge shall prepare and certify a narrative written report." *Id*. "The original report is part of the official record in the action, and copies must be sent forthwith to the parties or their attorneys." *Id*.

"If the prisoner is restrained because of mental disease, the court shall consider the question of the prisoner's mental condition at the time of the hearing, rather than merely the legality of the original detention." MCR 3.303(Q)(6).

## 4.11 Habeas Corpus to Bring Prisoner to Testify or for Prosecution

### A. Applicability of Court Rules

MCR 3.304 is the court rule addressing habeas corpus to bring a prisoner to testify or for prosecution. However, MCR 3.303(G) (endorsement of allowance of writ), MCR 3.303(I) (service of writ), MCR 3.303(J) (sufficiency of writ), and MCR 3.303(K)(1) (answering and producing prisoner at the hearing) also apply to these proceedings. MCR 3.304(G). See Sections 4.3(K), 4.3(M), 4.3(N), and 4.3(O), respectively, for information on these court rules.

### B. Court's Authority

"The judges of every court of record have the power to issue a writ of habeas corpus for the purpose of bringing before that court, or another court or body authorized to examine witnesses, any prisoner who may be detained in any jail or prison within this state, to be examined as a witness." MCL 600.4385(1).

### C. Jurisdiction

"A court of record may issue a writ of habeas corpus directing that a prisoner in a jail or prison in Michigan be brought to testify

> (1) on the court's own initiative; or
>
> (2) on the ex parte motion of a party in an action before a court or an officer or body authorized to examine witnesses." MCR 3.304(A).

"A writ of habeas corpus may also be issued to bring a prisoner to court for prosecution." MCR 3.304(A). "[MCR 3.304(C)–MCR 3.304(G)] apply to such a writ." MCR 3.304(A).

## D. Contents of Motion

"The motion must be verified by the party and must state

> (1) the title and nature of the action in which the testimony of the prisoner is desired; and
>
> (2) that the testimony of the prisoner is relevant and necessary to the party in that proceeding." MCR 3.304(B).

## E. Transfer of Prisoner/Direction to Surrender Custody for Transportation

"The judge may order in the writ that the prisoner be placed in the custody of a designated officer for transportation to the place of examination and return, instead of requiring the person having custody of the prisoner to produce the prisoner at the place of examination." MCL 600.4385(2). See also MCR 3.304(C).

## F. Form of Writ

"A writ of habeas corpus to produce a prisoner to testify or for prosecution must be substantially in the form approved by the state court administrator." MCR 3.304(D). See SCAO Form MC 203, *Writ of Habeas Corpus*.

## G. Answer and Hearing

"If the prisoner is produced or delivered to the custody of a designated officer as ordered, the person served with the writ need not answer the writ, and a hearing on the writ is unnecessary." MCR 3.304(E).

## H. Remand

"When a prisoner is brought on a writ of habeas corpus to testify or for prosecution, the prisoner must be returned to the original custodian after testifying or prosecution." MCR 3.304(F).

### I. Liability of Officer for Disobedience to Writ

"Whenever any writ of habeas corpus is issued pursuant to [MCL 600.4385], the officer on whom the writ is served shall obey the writ in the manner and within the time prescribed by statute or court rule." MCL 600.4387. "Every officer who neglects or refuses so to do, is liable in the sum of $500.00 to:

> (1) the people of this state, if the writ was issued upon the application of the attorney general, or a prosecuting attorney; or
>
> (2) the party upon whose application the writ was issued." *Id.*

## 4.12 Federal Habeas Corpus

"The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) requires a prisoner who challenges (in a federal habeas court) a matter 'adjudicated on the merits in State court' to show that the relevant state-court 'decision' (1) 'was contrary to, or involved an unreasonable application of, clearly established Federal law,' or (2) 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Wilson v Sellers*, 584 US ___, ___ (2018), quoting 28 USC 2254(d). "Deciding whether a state court's decision 'involved' an unreasonable application of federal law or 'was based on' an unreasonable determination of fact requires the federal habeas court to 'train its attention on the particular reasons-both legal and factual-why state courts rejected a state prisoner's federal claims,' and to give appropriate deference to that decision[.]" *Wilson*, 584 US at ___ (citations omitted). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Harrington v Richter*, 562 US 86, 101 (2011), quoting *Yarborough v Alvarado*, 541 US 652, 664 (2004).

"Clearly established Federal law for purposes of [28 USC 2254(d)] includes only the holdings, as opposed to the dicta, of [the United States Supreme Court's] decisions." *White v Woodall*, 572 US 415, 419 (2014) (citations and quotations omitted). "And an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice." *Id.* (citations and quotations omitted). "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 US at 103. AEDPA's requirements reflect a "presumption that state courts know and follow the law." *Woodford v Visciotti*, 537 US 19, 24 (2002). "Section 2254(d)

reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington,* 562 US at 102-103 (citation and quotation omitted).

# Glossary

## A

### Absconding

- For purposes of MCL 771.4b, *absconding* "means the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCL 771.4b(9)(a).

### Applicant

- For purposes of MCL 780.622, *applicant* "includes an individual who has applied under [the Setting Aside Convictions Act, MCL 780.621 *et seq.*,] to have his or her conviction or convictions set aside and an individual whose conviction or convictions have been set aside without an application under [MCL 780.621g]." MCL 780.622(10).

### Assaultive crime

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *assaultive crime* "includes any of the following:

  (*i*) A violation described in . . . MCL 770.9a.

  (*ii*) A violation of . . . MCL 750.81 to MCL 750.90g, not otherwise included in subparagraph (*i*).

  (*iii*) A violation of [MCL 750.110a, MCL 750.136b, MCL 750.234a, MCL 750.234b, MCL 750.234c, MCL 750.349b, and MCL 750.411h], or any other violent felony.

  (*iv*) A violation of a law of another state or of a political subdivision of this state or of another state that substantially corresponds to a violation described in subparagraph (*i*), (*ii*), or (*iii*)." MCL 780.621(4)(a).

# C

### Conviction

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *conviction* means "a judgment entered by a court upon a plea of guilty, guilty but mentally ill, or nolo contendere, or upon a jury verdict or court finding that a defendant is guilty or guilty but mentally ill." MCL 780.621a(a).

### Court

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *court* or *judicial officer* "includes a judge, a magistrate, or a district court magistrate authorized in accordance with the law to perform the functions of a magistrate." MCR 6.003(4).

### Crime of dishonesty

- As used in MCL 780.621g (automatic set aside of conviction), *crime of dishonesty*, "includes a felony violation of chapters XXVA and XLI, felony violations of sections [MCL 750.]174, [MCL 750.]174a, [MCL 750.]175, [MCL 750.]176, [MCL 750.]180, and [MCL 750.]181 . . . MCL 750.159f to [MCL] 750.159x, [MCL] 750.248 to [MCL] 750.265a, [MCL] 750.174, [MCL] 750.174a, [MCL] 750.175, [MCL] 750.176, [MCL] 750.180, and [MCL] 750.181, and a violation of . . . MCL 752.791 to [MCL] 752.797." MCL 780.621g(15).

# D

### Dangerous weapon

- As used in MCL 780.621b, *dangerous weapon* "means that term as defined in . . . MCL 750.110a." MCL 780.621b(2). MCL 750.110a(1)(b) defines *dangerous weapon* as "1 or more of the following:

  (*i*) A loaded or unloaded firearm, whether operable or inoperable.

  (*ii*) A knife, stabbing instrument, brass knuckles, blackjack, club, or other object specifically designed or customarily carried or possessed for use as a weapon.

  (*iii*) An object that is likely to cause death or bodily injury when used as a weapon and that is used as a weapon or carried or possessed for use as a weapon.

(*iv*) An object or device that is used or fashioned in a manner to lead a person to believe the object or device is an object or device described in subparagraphs (*i*) to (*iii*)."

**Domestic violence**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *domestic violence* means "that term as defined in . . . MCL 400.1501." MCL 780.621(4)(b). MCL 400.1501(d) defines *domestic violence* as "the occurrence of any of the following acts by an individual that is not an act of self-defense:

  (*i*) Causing or attempting to cause physical or mental harm to a family or household member.

  (*ii*) Placing a family or household member in fear of physical or mental harm.

  (*iii*) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.

  (*iv*) Engaging in activity toward a family or household member that would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

# F

**Family or household member**

- As used in MCL 400.1501, *family or household member* "includes any of the following:

  (*i*) A spouse or former spouse.

  (*ii*) An individual with whom the person resides or has resided.

  (*iii*) An individual with whom the person has or has had a dating relationship.

  (*iv*) An individual with whom the person is or has engaged in a sexual relationship.

  (*v*) An individual to whom the person is related or was formerly related by marriage.

  (*vi*) An individual with whom the person has a child in common.

(*vii*) The minor child of an individual described in subparagraphs (*i*) to (*vi*)." MCL 400.1501(e).

**Felony**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *felony* means "either of the following, as applicable:

  (*i*) For purposes of the offense to be set aside, *felony* means a violation of penal law of this state that is punishable by imprisonment for more than 1 year or that is designated by law to be a felony.

  (*ii*) For purposes of identifying a prior offense, *felony* means a violation of a penal law of this state, of another state, or of the United States that is punishable by imprisonment for more than 1 year or is designated by law to be a felony." MCL 780.621(4)(c).

**First violation operating while intoxicated offense**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *first violation operating while intoxicated offense*, "means a violation of any of the following committed by an individual who at the time of the violation has no prior convictions for violating . . . MCL 257.625:

  (*i*) [MCL 257.625(1), MCL 257.625(2), MCL 257.625(3), MCL 257.625(6), or MCL 257.625(8)].

  (*ii*) A local ordinance substantially corresponding to a violation listed in subparagraph (*i*).

  (*iii*) A law of an Indian tribe substantially corresponding to a violation listed in subparagraph (*i*).

  (*iv*) A law of another state substantially corresponding to a violation listed in subparagraph (*i*).

  (*v*) A law of the United States substantially corresponding to a violation listed in subparagraph (*i*)." MCL 780.621(4)(d).

# H

**Human trafficking violation**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *human trafficking violation* means "a violation of . . . MCL 750.462a to [MCL] 750.462h, or former [MCL 750.462i or MCL 750.462j]."MCL 780.621(4)(e).

# I

### Indian tribe

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *Indian tribe* means "an Indian tribe, Indian band, or Alaskan native village that is recognized by federal law or formally acknowledged by a state." MCL 780.621(4)(f).

### Indigent criminal defense system

- As used in MCL 780.991(3)(a), *indigent criminal defense system* means "either of the following:

  (*i*) The local unit of government that funds a trial court.

  (*ii*) If a trial court is funded by more than 1 local unit of government, those local units of government, collectively." MCL 780.983(h).

# M

### Major controlled substance offense

- As used in MCL 771A.6, *major controlled substance offense* means "either or both of the following:

  (a) A violation of [MCL 333.7401(2)(a)].

  (b) A violation of [MCL 333.7403(2)(a)(*i*)-MCL 333.7403(2)(a)(*iv*)].

  (c) Conspiracy to commit an offense listed in [MCL 761.2(a) or MCL 761.2(b)]." MCL 761.2.

### Minor offense

- As used in MCL 780.621(1)(d), *minor offense* means "a misdemeanor or ordinance violation to which all of the following apply:

  (*i*) The maximum permissible term of imprisonment doe not exceed 90 days.

  (*ii*) The maximum permissible fine is not more than $1,000.00.

  (*iii*) The person who committed the offense is not more than 21 years old." MCL 780.621(1)(d).

**Misdemeanor**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *misdemeanor* means "a violation of any of the following:

  (*i*) A penal law of this state, another state, an Indian tribe, or the United States that is not a felony.

  (*ii*) An order, rule, or regulation of a state agency that is punishable by imprisonment for not more than 1 year or a fine that is not a civil fine, or both.

  (*iii*) A local ordinance of a political subdivision of this state substantially corresponding to a crime listed in subparagraph (*i*) or (*ii*) that is not a felony.

  (*iv*) A violation of the law of another state or political subdivision of another state substantially corresponding to a crime listed under subparagraph (*i*) or (*ii*) that is not a felony.

  (*v*) A violation of the law of the United States substantially corresponding to a crime listed under subparagraph (*i*) or (*ii*) that is not a felony." MCL 780.621(4)(g). See MCL 780.621(2) for deferred and dismissed convictions that are considered misdemeanor convictions under MCL 780.621(1) for purposes of determining whether a person is eligible to have any conviction set aside under MCL 780.621 *et seq.*

**Misdemeanor marihuana offense**

For purposes of MCL 780.621e (setting aside certain convictions), *misdemeanor marihuana offense* "means a violation of [MCL 333.7403(2)(d), MCL 333.7404(2)(d)], or a marihuana paraphernalia violation of [MCL 333.7453] . . . or a violation of a local ordinance substantially corresponding to [MCL 333.7403(2)(d), MCL 333.7404(2)(d)], or the prohibition regarding marihuana paraphernalia of [MCL 333.7453]." MCL 780.621e(7).

# O

**Operating while intoxicated**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *operating while intoxicated* means "a violation of any of the following that is not a first violation operating while intoxicated offense:

  (*i*) [MCL 257.625 and MCL 257.625m].

(*ii*) A local ordinance substantially corresponding to a violation listed in subparagraph (*i*).

(*iii*) A law of an Indian tribe substantially corresponding to a violation listed in subparagraph (*i*).

(*iv*) A law of another state substantially corresponding to a violation listed in subparagraph (*i*).

(*v*) A law of the United States substantially corresponding to a violation listed in subparagraph (*i*)." MCL 780.621(4)(h).

# P

**Partially indigent**

- As used in the Michigan Indigent Defense Commission Act, *partially indigent* "means a criminal defendant who is unable to afford the complete cost of legal representation, but is able to contribute a monetary amount toward his or her representation." MCL 780.983(k).

**Party**

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *party* "includes the lawyer representing the party." MCR 6.003(1).

**Prisoner**

- As used in connection with habeas corpus, *prisoner* means "the person on whose behalf the writ is issued, such as an inmate of a penal or mental institution, the child whose custody is sought, and other persons alleged to be restrained of their liberty." MCL 600.4322.

**Probationer**

- As used in MCL 771A.1 *et seq.*, *probationer* means "an individual placed on probation for committing a felony." MCL 771A.2(b).

**Prosecutor**

- For purposes of subchapters 6.000—6.800 of the Michigan Court Rules, *prosecutor* "includes any lawyer prosecuting the case." MCR 6.003(3).

# S

**Serious misdemeanor**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *serious misdemeanor* means "that term as defined in . . . MCL 780.811." MCL 780.621(4)(i). MCL 780.811(1)(a) defines *serious misdemeanor* as "1 or more of the following:

  (*i*) A violation of [MCL 750.81], assault and battery, including domestic violence.

  (*ii*) A violation of [MCL 750.81a], assault; infliction of serious injury, including aggravated domestic violence.

  (*iii*) Beginning January 1, 2024, a violation of [MCL 750.81c(1)], threatening a department of health and human services' employee with physical harm.

  (*iv*) A violation of [MCL 750.115], breaking and entering or illegal entry.

  (*v*) A violation of [MCL 750.136b(7)], child abuse in the fourth degree.

  (*vi*) A violation of [MCL 750.145], contributing to the neglect or delinquency of a minor.

  (*vii*) A misdemeanor violation of [MCL 750.145d], using the internet or a computer to make a prohibited communication.

  (*viii*) Beginning January 1, 2024, a violation of [MCL 750.147a(2) or MCL 750.174a(3)(b)], embezzlement from a vulnerable adult of an amount of less than $200.00.

  (*ix*) Beginning January 1, 2024, a violation of [MCL 750.174a(3)(a)], embezzlement from a vulnerable adult of an amount of $200.00 to $1,000.00.

  (*x*) A violation of [MCL 750.233], intentionally aiming a firearm without malice.

  (*xi*) A violation of [MCL 750.234], discharge of a firearm intentionally aimed at a person.

  (*xii*) A violation of [MCL 750.235], discharge of an intentionally aimed firearm resulting in injury.

  (*xiii*) A violation of [MCL 750.335a], indecent exposure.

  (*xiv*) A violation of [MCL 750.411h], stalking.

(*xv*) A violation of [MCL 257.601b(2)], injuring a worker in a work zone.

(*xvi*) Beginning January 1, 2024, a violation of [MCL 257.601d(1)], moving violation causing death.

(*xvii*) Beginning January 1, 2024, a violation of [MCL 257.601d(2)], moving violation causing serious impairment of a body function.

(*xviii*) A violation of [MCL 257.617a], leaving the scene of a personal injury accident.

(*xix*) A violation of [MCL 257.625], operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual.

(*xx*) Selling or furnishing alcoholic liquor to an individual less than 21 years of age in violation of [MCL 436.1701], if the violation results in physical injury or death to any individual.

(*xxi*) A violation of [MCL 324.80176(1) or MCL 324.80176(3)], operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood alcohol content, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to any individual.

(*xxii*) A violation of a local ordinance substantially corresponding to a violation enumerated in subparagraphs (*i*) to (*xxi*).

(*xxiii*) A violation charged as a crime or serious misdemeanor enumerated in subparagraphs (*i*) to (*xxii*) but subsequently reduced to or pleaded to as a misdemeanor. As used in this subparagraph, 'crime' means that term as defined in [MCL 780.752(1)(b)]."

# T

### Technical probation violation

- For purposes of MCL 771.4b, *technical probation violation* "means a violation of the terms of a probationer's probation order that is not listed below, including missing or failing a

drug test, [MCL 771.4b(9)(b)(*ii*)] notwithstanding. Technical probation violations do not include the following:

(*i*) A violation of an order of the court requiring that the probationer have no contact with a named individual.

(*ii*) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

(*iii*) The consumption of alcohol by a probationer who is on probation for a felony violation of . . . MCL 257.625.

(*iv*) Absconding." MCL 771.4b(9)(b).

- For purposes of subchapters 6.000-6.800 of the Michigan Court Rules, *technical probation violation* "means any violation of the terms of a probation order, including missing or failing a drug test, excluding the following:

  (a) A violation of an order of the court requiring that the probationer have no contact with a named individual.

  (b) A violation of a law of this state, a political subdivision of this state, another state, or the United States or of tribal law, whether or not a new criminal offense is charged.

  (c) The consumption of alcohol by a probationer who is on probation for a felony violation of MCL 257.625.

  (d) Absconding, defined as the intentional failure of a probationer to report to his or her supervising agent or to advise his or her supervising agent of his or her whereabouts for a continuous period of not less than 60 days." MCR 6.003(7).

**Traffic offense**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *traffic offense* means "a violation of the Michigan [V]ehicle [C]ode[ (MVC)], [MCL 257.1 *et seq.*], or a local ordinance substantially corresponding to [the MVC], which violation involves the operation of a vehicle and at the time of the violation is a felony or misdemeanor." MCL 780.621a(b).

# V

## Victim

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *victim* means "that term as defined in . . . [MCL 780.752, MCL 780.781, and MCL 780.811]." MCL 780.621(4)(j). Except as indicated in a footnote below, MCL 780.752(1)(m), MCL 780.781(1)(j), and MCL 780.811(1)(h) contain substantially similar definitions of the term *victim*:

  > "(*i*) An individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime, except as provided in [MCL 780.752(1)(m)(*ii*), MCL 780.752(1)(m)(*iii*), MCL 780.752(1)(m)(*iv*), or MCL 780.752(1)(m)(*v*)].
  >
  > (*ii*) The following individuals other than the defendant[1] if the victim is deceased, except a provided in subparagraph (*v*):
  >
  > > (A) The spouse of the deceased victim.
  > >
  > > (B) A child of the deceased victim if the child is 18 years of age or older and sub-subparagraph (A) does not apply.
  > >
  > > (C) A parent of the deceased victim if sub-subparagraphs (A) and (B) do not apply.
  > >
  > > (D) The guardian or custodian of a child of the deceased victim if the child is less than 18 years of age and sub-subparagraphs (A) to (C) do not apply.
  > >
  > > (E) A sibling of the deceased victim if sub-subparagraphs (A) to (D) do not apply.
  > >
  > > (F) A grandparent of the deceased victim if sub-subparagraphs (A) to (E) do not apply.
  >
  > (*iii*) A parent, guardian, or custodian of the victim, if the victim is less than 18 years of age, who is neither the defendant[2] nor incarcerated, if the parent, guardian, or custodian so chooses.
  >
  > (*iv*) A parent, guardian, or custodian of a victim who is mentally or emotionally unable to participate in the legal process if he or she is neither the defendant[3] nor incarcerated.[4]

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[1] MCL 780.781(1)(j)(*ii*) uses the term "juvenile" instead of "defendant."

[2] MCL 780.781(1)(j)(*iii*) uses the term "juvenile" instead of "defendant."

(*v*) For the purpose of submitting or making an impact statement only, if the victim as defined in subparagraph (*i*) is deceased, is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process, or consents to the designation as a victim of the following individuals other than the defendant:[5]

(A) The spouse of the victim.

(B) A child of the victim if the child is 18 years of age or older.

(C) A parent of the victim.

(D) The guardian or custodian of a child of the victim if the child is less than 18 years of age.

(E) A sibling of the victim.

(F) A grandparent of the victim.

(G) A guardian or custodian of the victim if the victim is less than 18 years of age at the time of the commission of the crime and that guardian or custodian is not incarcerated."

- As used in MCL 780.623, *victim* means "any individual who suffers direct or threatened physical, financial, or emotional harm as the result of the offense that was committed by the applicant." MCL 780.623(7).

**Violent felony**

- As used in the Setting Aside Convictions Act, MCL 780.621 *et seq.*, *violent felony* "means that term as defined in . . . MCL 791.236." MCL 780.621(4)(k). MCL 791.236(20) defined *violent felony* as "an offense against a person in violation of . . . MCL 750.82, [MCL] 750.83, [MCL] 750.84, [MCL] 750.86, [MCL] 750.87, [MCL] 750.88, [MCL] 750.89, [MCL] 750.316, [MCL] 750.317, [MCL] 750.321, [MCL] 750.349, [MCL] 750.349a, [MCL] 750.350, [MCL] 750.397, [MCL] 750.520b, [MCL] 750.520c, [MCL] 750.520d, [MCL] 750.520e, [MCL] 750.520g, [MCL] 750.529, [MCL] 750.529a, [or MCL] 750.530."

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[3] MCL 780.781(1)(j)(*iv*) uses the term "juvenile" instead of "defendant."

[4] MCL 780.811(1)(h)(*iv*) contains slightly different language for this subdivision: "A parent, guardian, or custodian of a victim who is so mentally incapacitated that he or she cannot meaningfully understand or participate in the legal process if he or she is not the defendant and is not incarcerated."

[5] MCL 780.781(1)(j)(*v*) uses the term "juvenile" instead of "defendant."

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