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No. 163887

In the Michigan Supreme Court

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

ALEXANDER JAMES HAUPT,

Defendant-Appellant.

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

DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF
*****ORAL ARGUMENTS REQUESTED*****

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Statement of Questions Involved

I. Whether Defendant was deprived of his Sixth Amendment right to counsel when the trial court permitted appointed counsel to withdraw, failed to conduct a renewed inquiry into waiver, forced Defendant to proceed without representation despite no valid waiver or forfeiture, and conducted critical pretrial proceedings—including suppression motions, evidentiary rulings, and admission of prior testimony—while Defendant was unrepresented.

Defendant-Appellant answers: Yes
Plaintiff-Appellee answers: No
The Trial Court answered: No
The Court of Appeals answered: No

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Jurisdiction

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

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

On June 20, 2025 this Court ordered this application to be argued pursuant to MCR. 7.305(I)(1).

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Statement of Facts

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

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

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

A. Early Proceedings.

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

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

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

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

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

B. The Breakdown of Mr. Moore and Mr. Haupt's Relationship.

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

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

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

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

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

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

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

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

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

D. The Trial.

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

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

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

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

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

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

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

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

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

E. The Sentence

Defendant appeared with new counsel for sentencing and the Court then imposed a controlling sentence of 78 months to twenty years (ST, 21).

F. The Appeal.

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

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

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

> By order of May 3, 2022, the application for leave to appeal the September 23, 2021 judgment of the Court of Appeals was held in abeyance pending the decisions in People v Posey (Docket No. 162373), People v Stewart (Docket No. 162497), and People v King (Docket No. 162327). On order of the Court, Posey having been decided on July 31, 2023, 512 Mich ___ (2023), Stewart having been decided on July 31, 2023, 512 Mich ___ (2023), and King having been decided on July 28, 2023, 512 Mich ___ (2023), the application is again considered. Pursuant to MCR. 7.305(H)(1), in lieu of granting leave to appeal, we VACATE the judgment of the Court of Appeals to the extent that it is inconsistent with our decisions in King and Posey, and REMAND this case to that court for reconsideration in light of King and Posey. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court.

The matter was returned to the Court of Appeals which, upon application, allowed additional briefing. They denied Defendant all relief on April 25, 2024.

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In their denial the Court stated that the six weeks immediately preceding trial were not critical because the only hearings held without counsel were a search and seizure motion and a pretrial conference. Regarding the search and seizure issue the Court of Appeals held:

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

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The Court of Appeals had originally found that there was a violation of MCR 6.005, but found that there was a waiver/forfeiture of counsel by conduct:[1]

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

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

Defendant filed a Motion for Reconsideration which was denied on May 28, 2024.

Counsel again filed an application in this Court and on June 20, 2025 the Court granted a MOAA, stating:

> On order of the Court, the application for leave to appeal the April 25, 2024 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on the application. MCR 7.305(I)(1). The parties shall

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

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> file supplemental briefs in accordance with MCR. 7.312(E), addressing whether: (1) the defendant validly waived his right to counsel following defense counsels' motions to withdraw on October 23, 2018 and June 10, 2019, see *People v King*, 512 Mich 1, 11–12; 999 NW2d 670 (2023); *People v Anderson*, 398 Mich 361, 367–368; 247 NW2d 857 (1976); MCR 6.005 the defendant forfeited his right to counsel through his conduct and remarks, see *People v Kammeraad*, 307 Mich App 98, 130–137; 858 NW2d 490 (2014); and (3) if the defendant's waivers of his right to counsel were not valid and he did not forfeit his right to counsel, do the periods for which the defendant was without counsel constitute critical stages of the proceedings, see *King*, 512 Mich at 15–16; *United States v Wade*, 388 US 218, 225–227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Van v Jones*, 475 F3d 292, 312 (CA 6, 2007).

This is the Defendant's brief.

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Summary

This appeal presents the fundamental question of whether Defendant Haupt was deprived of his Sixth Amendment (and Michigan constitutional counterpart) right to counsel when the trial court permitted appointed counsel to withdraw without appointing a replacement, forcing Defendant to proceed unrepresented during critical stages of the prosecution. Defendant neither validly waived his right to counsel nor forfeited it through misconduct, and the proceedings conducted during this period were "critical stages" where the guiding hand of counsel was indispensable. Because the deprivation of counsel constituted structural error, reversal and remand for a new trial are required.

Defendant's fleeting statement in October 2018—that he could represent himself better than a court-appointed lawyer—was not a continuing waiver that excused the absence of counsel in June 2019. The original was only a partial colloquy and new counsel was appointed three days later. Defendant never reaffirmed this choice. The events that happened eight months later required waiver of counsel.

The Court of Appeals erred in declaring this a forfeiture of the right of counsel. Forfeiture requires egregious, obstructionist behavior such as threats of violence or intentional manipulation of proceedings. Here, Defendant's actions consisted of disagreements over plea strategy and private disputes with counsel. He did not repeatedly seek substitutions, delay trial, or disrupt proceedings.

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His insistence on exercising the right to trial, even against advice, cannot equate to forfeiture. Defendant's youth, intemperate remarks, and financial difficulties fall far short of the extraordinary misconduct necessary to extinguish the right to counsel.

Between June 10 and July 23, 2019, while unrepresented, Defendant faced multiple adversarial hearings involving complex legal issues. These proceedings carried substantial risks, foreclosed potential defenses, and significantly altered the course of trial. They are quintessential "critical stages "and hardly routine. The absence of counsel at these junctures compromised Defendant's ability to confront witnesses, challenge evidence, and present a defense. Forfeiture of counsel should be disfavored – a last-resort remedy reserved for extreme misconduct. The trial court here bypassed lesser alternatives, instead imposing the most drastic sanction of total loss of counsel, with predictable prejudice.

Because Defendant was left without representation during multiple critical proceedings, the error is structural and therefore not subject to harmless-error review. Automatic reversal is required.

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Argument

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

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

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

The Defendant was admittedly not advised of the dangers of proceeding without counsel and his opponent did to him what is likely to be expected in such a one-sided match – she wiped the floor with him in pretrial proceedings striking his witness list, allowing the preliminary examination of two critical witnesses who were temporarily unavailable at trial, and easily defeating a search and

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

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seizure motion in an area where the law was still developing and a properly prepared attorney could easily have convinced the Court of a contrary result. The Court of Appeals labeled these proceedings non-critical and reaffirmed their decision

Because the right to counsel is basic to our adversary system of criminal justice, it is part of the due process of law that is guaranteed by the Fourteenth Amendment to defendants in the criminal courts of the States.[3] Whether a waiver of a constitutional right was knowing, intelligent, and voluntary depends on the facts and circumstances of the case, including the background, experience, and conduct of the accused.[4]

The Sixth Amendment guarantees the right of the accused "to have the assistance of counsel for his defense."[5] But that amendment

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[3] *Argersinger v Hamlin*, 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972); *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[4] *Johnson v Zerbst*, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). See also *Von Moltke v Gillies*, 332 US 708, 722; 68 S Ct 316; 92 L Ed 309 (1948) ("It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings").

[5] US Const amend. VI; *Gideon*, 372 US 335.

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also "implies a right of self-representation."[6] The right to self-representation is "is not absolute."[7]

"[A]lthough the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, "is the standard, not the exception," in the absence of a proper waiver."[8] "[W]here the defendant chooses neither attorney representation nor self-representation, the default position for the court should be to mandate attorney representation."[9] The right of self-representation is given to the accused as a matter of self-autonomy. "To thrust counsel upon the accused, against his considered wish, ... violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master...."[10] As the right to self-representation and the right to counsel are "two faces of the same coin," the assertion of one necessarily requires the waiver of the other.[11]

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[6] *Faretta v California*, 422 US 806, 820; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

[7] *Indiana v Edwards*, 554 US 164; 128 S Ct 2379, 2384; 171 L Ed 2d 345 (2008).

[8] *Russell*, 471 Mich at 189–190.

[9] *Fischetti v Johnson*, 384 F3d 140, 146–147 (CA 3, 2004).

[10]

[11] *United States v Conder*, 423 F2d 904, 908 (CA 6, 1970) (quoting *United States v Plattner*, 330 F2d 271, 276 (CA 2, 1964)).

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Because the "dangers and disadvantages of self-representation during trial are so substantial," a court must make a "searching or formal inquiry" before permitting a waiver of the right to counsel;[12] The object of the inquiry is to establish that the defendant "knowingly, intelligently, and voluntarily" waived the right and "his choice is made with eyes open."[13]

A waiver of the right to counsel must satisfy several well-established requirements. In Michigan, this Court has held that a defendant must make the waiver "unequivocally,"[14] and that it must be "knowingly, intelligently, and voluntarily" undertaken.[15] In addition, the record must demonstrate that the defendant was made aware of the dangers and disadvantages of self-representation, ensuring that the choice was made "with eyes open"[16] Finally, the trial court must confirm that allowing self-representation will not disrupt, unduly inconvenience, or burden the court's administration of justice.[17]

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[12] *Hill v Curtin*, 792 F3d 670, 677 (CA 6, 2015) (en banc) (citation omitted).

[13] *Fowler v Collins*, 253 F3d 244, 249 (CA 6, 2001) (quoting *Faretta*, 422 US at 835).

[14] *Anderson*, 398 Mich at 367)

[15] *Anderson*, 398 Mich at 368

[16] *Id.*

[17] *Id.* See also Michigan Judicial Institute, *Attorney Waiver and Appointment for Indigents Checklist*, p 2 (last updated Sept. 6, 2022).

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In *People v Dennany*, 445 Mich 412, 437–438; 519 NW2d 128 (1994), this Court explained why it had chosen to set out the process required by MCR 6.005(D)-(E):

> The underpinnings for these requirements are based not only in the protection of a defendant's fundamental constitutional rights, *Faretta* and *Anderson, supra*, but on practical considerations as well:
>
> > " 'Whether the prospective *pro per* is a naïve character who sincerely believes he can represent himself better than can a lawyer, a cagey loser who is going to try to reduce the trial to a shambles in the hope that somehow reversible error will creep in, a free soul with a touch of ham, or simply someone who wants to have some fun with the judicial establishment, the trial judge must recognize that the first ground on appeal is probably going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision. Such are the facts of life. Therefore, pragmatically, and defensively, in addition to the legal necessity of establishing that a defendant voluntarily and intelligently reached this decision, the trial court should also protect itself-and the record.' " *Blunt, supra*, p 649, 473 NW2d 792, quoting from *People v Lopez, supra*, pp 571-572, 138

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> Cal Rptr 36. See also *Morton, supra*, pp 8-9, 437 NW2d 284.
>
> Obviously, the most effective way for a trial court to safeguard against the opening of an appellate parachute is to comply with the court rules and *Anderson*.

The trial courts and prosecutors are on notice that a court must establish a valid waiver of counsel in substantial compliance with the requirements of *Anderson* and MCR 6.005 when a defendant requests to represent himself. Lastly, The presence of standby counsel is not recognized as an exception to the Anderson or court rule requirements, and does not cure the erroneous deprivation of counsel.[18]

A. Summary of Defendant's relationship to Counsel prior to beginning self-representation including his 3 day self-representation in October of 2018.

Mr. Haupt's first attorney was Mr. Scott Grable. Defendant and/or his family paid him $25,000, (SC 08/01/18,3). On April 19, 2018 Mr. Grable appeared on his initial motion to withdraw. He had argued that he had a difficult time communicating with Mr. Haupt who did not respond to his attempts to make contact; Mr. Haupt was 20 at the time of this hearing. Mr. Haupt apologized, attributing his behavior to his youth and promised to do better at

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[18] *People v Lane*, 453 Mich 132, 138; 551 NW2d 382 (1996); *People v Willing*, 267 Mich App 208, 227–228; 704 NW2d 472 (2005).

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communicating. He also stated he had no problem with Mr. Grable (MT, 4/19/18, 4). When asked if he still wished to represent him, he stated: "Oh, 100% he's the best", ((MT, 4/19/18, 6).

On June 19, 2018, the day after Mr. Haupt turned 21, they were back for Mr. Grable's renewed motion to withdraw. In this case Mr. Grable had strongly recommended that Mr. Haupt accept the plea offer on the table. Mr. Haupt had strongly disagreed and wished to go to trial. Mr. Grable is asking to be granted permission to withdraw stated:

> I discussed it with Mr. Haupt. He's always been respectful of me when I can get him on the phone, so I want to make that very clear. I believe that he has abided all terms and conditions of bond. I don't want to misrepresent that. But I told him I think he's insane not to take this deal, and I said he's going to end up in prison, in my opinion. There's just too much risk involved here. I am not commenting that he's guilty or innocent. As the Court knows, cases are not always about guilt or innocence, they're about risk assessment, as the Court knows. So I told him, when I say "I think you're going to end up in prison", that wasn't a comment that I am suggesting he's guilty or not guilty; again a risk assessment analysis.
>
> He indicated to me that I'm -- that he felt that again, he wasn't loud, he wasn't abrasive, he wasn't in my face, but he felt that I was biased on this case, and he felt that he's going to get my bar license. Again, I don't think he said it in a way that I think I felt threatened or assaulted; that wasn't the case. But when somebody mentions something about my bar license -- I don't think it was inappropriate of him or

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> disingenuous. I think he has a right to make those comments. I don't think it should affect you, how you look at him. I don't think that it was said in a businesslike manner, but I don't think, with that relationship of somebody threatening my bar license---. you know, again, I don't think that it was inappropriate that he feels that way. I'm not worried that my bar license is being threatened, but I don't think this relationship can continue, and I believe -- I would ask the Court to allow me to withdraw on all files (MT, 6/19/18, 10-12)

Mr. Haupt then stated that he had confidence in Mr. Grable and did not wish him to withdraw stating:

> The relationship we built up over time just, to me, shows that, you know, occasionally, like myself, if he gets worked up, you know, we might spiral a little bit, but at the end of the day we do -- you know, the work is really good. I have full confidence in him. I just really was -- you know, took offense and it kind of hurt me, based on what he said. (MT, 6/19/18, 15)

The Court granted the Motion stating that it was clear the relationship was strained; the Court did not criticize either Mr. Haupt or Mr. Grable (MT, 6/19/18, 15).

This first attorney withdrawal certainly does not appear that Mr. Haupt forfeited his right to counsel because of an intemperate statement. Although the more than six years Mr. Haupt has already spent in prison could be argued as proof that Mr. Grable was

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correct; it is also true that the decision whether or not to plead guilty belongs to the Defendant and not to the attorney.[19]

As is common when retained attorneys are allowed to withdraw, the Court gave Mr. Haupt time to find a new retained attorney. On August 1, 2018 Mr. Haupt appeared without counsel at the status conference set by the court saying that given what Mr. Grable had already been paid he was having a hard time coming up with the money. He made absolutely no mention of representing himself. The Court did not suggest that he might go with a court appointed attorney but instead was the very first to mention Mr. Haupt representing himself saying:

> THE COURT: The Court is not concerned about the costs involved.
>
> THE DEFENDANT: I understand. I'm just giving …..
>
> THE COURT: The Court is concerned that this is going to be set back on the trial docket. You can represent yourself if you don't hire somebody. (SC 08/01/18,3).

The Court then stated that the case would be set for the trial docket in approximately 60 days and there would be no adjournments, (SC

[19] See *People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995) (the decision whether to enter a guilty plea is the defendant's decision)

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08/01/18,4). There is no indication that Mr. Haupt would be representing himself except for the Court's statement.

Between this status conference and the next Court date of October 23, 2018 there are routine documents filed by the Court and Prosecutor, but nothing is filed either by the Defendant or by an attorney on behalf of the Defendant. It appears from the register of actions, that Defendant filed a Motion to Adjourn trial on October 23, 2018, the date of what was scheduled to be the final pre-trial.

At this hearing the prosecutor stated that Mr. Haupt was representing himself and suggested that the judge give him the standard *Faretta* warnings.

The Court then asked if he had money for an attorney and he stated that he did not. The Court then stated he had told him the last time he could get a Court appointed attorney and he stated (correctly) that the Court had not given him that option. The Court then said that he could have a Court appointed attorney and immediately asked him if he was waiving that right. Mr. Haupt stated he was, (PT 10/23/18, 7). The judge then asked him a series of questions. Of note, eleventh grade was his last completed education and he had never represented himself, (PT 10/23/18, 7).

While the Court did not meet every detail required by *Anderson*, 398 Mich at 367–368, and MCR 6.005 for a defendant to effectuate a valid waiver of the right to counsel, it was a substantial compliance and Defendant does not rely on the minor

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discrepancies, but rather that it was nearly eight months earlier than the date when the Court told Mr. Haupt that he had to represent himself.

When asked why he wanted to represent himself, Mr. Haupt foolishly stated that it is better representation than a public defender can provide, (PT 10/23/18, 8). While the judge allowed him to represent himself, three days later Mr. Scott Moore was appointed by the judge. Pretty clearly Mr. Haupt, wisely, changed his mind almost immediately after Court. This Court date is the sole date on which Mr. Haupt was given any type of suggestion that representing himself was unwise.

Nothing to this point indicates anywhere that he forfeited his right to counsel because of his behavior and remarks. Mr. Grable specifically stated that he was always respectful. Mr. Haupt was without counsel between June 19, 2018 and October 26, 2018, but this was a period where nothing of note took place once the then impending trail was adjourned. This period is important for the history, but not because it was a critical portion of the trial. It is the second period without representation that was the critical stage.

B. The Withdrawal of Court Appointed Counsel, Scott Moore.

Scott Moore was appointed on October 26, 2018 and represented Mr. Haupt between October 26, 2018 and June 10th of 2019. On June 10, 2019 Mr. Moore moved to withdraw at a status conference set for that date stating that Mr. Haupt had questioned

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his representation and even his truthfulness. Unlike with Mr. Grable, Mr. Haupt agreed stating that Mr. Moore was working with the prosecution, (SC, 6/9/19, 3-4).

At this point the judge stated that Mr. Moore was allowed to withdraw, but would remain in an advisory capacity. He then stated that Mr. Haupt would have to represent himself. He gave absolutely no warnings against self-representation and did not even suggest that a retained attorney was an option. Instead, he said

> THE COURT:
>
> -- okay? This is your second attorney. You hired an attorney and he withdrew, and he filed a motion to withdraw that I denied, and then a few months later again he wanted to withdraw. The Court allowed him. At that time you said you would represent yourself. Several months later you come back in asking for a court appointed attorney. When you asked to represent -- when you said you were representing yourself, you said you would do a better job than any court appointed attorney could.
>
> So at this point I'm not going to allow Mr. Moore to withdraw totally, but he's not going to have to represent you. He's going to be there for advisory purposes. So at this point, you are on your own, and you're going to have to represent yourself, and if you have any questions regarding or the law, Court Rules anything, Mr. Moore is the person you're going to have to go to (SC, 6/9/19, 6).

As is noted above, the Court's recollection was incorrect regarding when Mr. Haupt was formally representing himself. That

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period was only three days in October. In between Mr. Grable's withdrawal and October, he did not have an attorney, but there is no indication he was representing himself and indeed in August of 2018 had made an on-the-record affirmative statement he wanted to hire a lawyer.

In sum, nothing that occurred during Mr. Moore's withdrawal or partial advisory appointment can be construed as misconduct or manipulative delay by Mr. Haupt, nor as a knowing and intelligent continuation of his earlier waiver. The court's own misstatement of the record underscores that no fresh *Faretta/Anderson* inquiry was conducted, and that the supposed "choice" to proceed pro se was imposed rather than voluntarily renewed. Accordingly, this episode cannot support the notion of a continuing waiver of counsel and lends further weight to the argument that the subsequent waiver eight months later was invalid.

C. The Defendant's Did Not Validly Waive His Right to Counsel.

Defendant's statement that he would represent himself made in October of 2018 was not a valid waiver for self-representation that began nearly eight months later. While the Court was in substantial Anderson and MCR 6.005 compliance, the overarching issue is not the quality of this waiver but rather whether the eight month old order should be deemed to satisfy the need for a waiver in June of 2019.

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At the October 2018 hearing, the Defendant gave a bravado response that he could do better than a court appointed attorney. The judge did not question this patently untrue statement, but the fact that he appointed an attorney three days later is strong indication that once he had time for reflection, Mr. Haupt knew that he was not up to the task of representing himself.

Here, the waiver of counsel took place in October of 2018 and was promptly rescinded. The disputed second waiver took eight months later. It was not a continuation or reaffirmation of the prior waiver, it was a totally new one and necessitated new warnings. By way of comparison, Iowa notes that waivers in close proximity to one another can be aggregated to determine voluntariness. They have said that a three week break could be aggregated, but an eight week one could not.[20] Similarly, the Minnesota Supreme Court has held when the circumstances of the case have significantly changed, the Court must take a full new colloquy.[21] In *Rhoad*, the State followed amended charges which doubled the time the Defendant was facing. The Minnesota Court held that a new waiver was required.

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[20] See *State v Baker*, 829 NW2d 193 (Iowa Ct App, 2013) (three week); *State v Griffin*, ___NW3d___; 2025 Iowa App. LEXIS 380, at *12 (Ct App, Apr. 23, 2025) (eight week).

[21] *State v Rhoads*, 813 NW2d 880, 887 (Minn, 2012).

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While the Sixth Circuit does not require a renewed waiver at every proceeding, they do when there is a substantial change in circumstances.[22] The *McBride* Court held that a: "valid waiver remains in effect at subsequent proceedings in the absence of an explicit revocation by the defendant or a change of circumstances that would suggest that the district court should make a renewed inquiry of the defendant."[23]

To be clear, Defendant is not suggesting that Michigan should depart from its current practice of seeking an abbreviated reaffirmation of the waiver at each proceeding, but believes that the cases from jurisdictions that do not require such a reaffirmation of the right are instructive as to when a new waiver is required.

In an early but influential Eighth Circuit case (relied on by both the *McBride* and *Rhoad* courts), the Eighth Circuit held that fresh waiver was not required between pleadings when there was an "unreasonable lapse of time" or other changes in circumstances.[24] Here, there was a revocation of the right to self-representation.

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[22] *United States v McBride*, 362 F3d 360, 367 (CA 6, 2004) (explaining that federal circuits have held **a** valid waiver-of-counsel remains in effect at subsequent proceedings in the absence of a substantial change in circumstances); *Fletcher v Dickhaut*, 834 F Supp 2d 10, 18 (D Mass, 2011) ("Federal circuit courts are unanimous in holding that "a defendant's waiver of counsel at trial carries over to subsequent proceedings absent a substantial change in circumstances").

[23] *McBride*, 362 F3d at 367.

[24] *Davis v United States*, 226 F2d 834, 840 (CA 8, 1955).

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Counsel was appointed three days after the October event. Eight months later, after a falling out with his new counsel, the Defendant says that he does not want Mr. Moore to continue to represent him. This was not a continuation of an old waiver, but a completely new one. It required the full inquiry.

The trial court treated retained counsel Mr. Grabel's withdrawal which was not over difficulty working with the Defendant (which he conceded was fixed) but based on the fact that the Defendant insisted on exercising his right to a trial, rather than a plea – a strategy decision which is constitutionally committed to the Defendant.

There is no question that Mr. Haupt did not voluntarily waive counsel on June 10th, 2019. The Court's was angry at the Defendant, and told him that he had to represent himself. The judge not only didn't tell him the dangers of self-representation, he did not even give him the choice of hiring his own attorney.

While he did not specifically object to the Court's order, one of the hallmarks of *King* is that expecting an unrepresented person to know when to objection is unreasonable, even when applied to forfeiture. This Court's ruling in *People v King*,[25] stands for the proposition that a defendant does not waive a defective waiver of

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

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counsel by failing to object to the quality of the Court's waiver taking procedure.

D. Defendant Did Not Forfeit His Right to Counsel Through his Conduct and Remarks.

Mr. Haupt did not forfeit his right to counsel. The distinction between waiver and forfeiture in this context was explained by one commentator as follows: [26]

> Waiver of the right to counsel is distinguished with the forfeiture of the right to counsel. /forfeiture is the opposite of the express waiver *Faretta* envisioned. Waiver requires "an intentional and voluntary relinquishment of a known right," typically resulting from "an affirmative, verbal request. By contrast, when a defendant forfeits a right, he relinquishes it regardless of whether he knows of that right or means to give it up.

Although the Court's behavior can be seen to be effectively a belief that Mr. Haupt had forfeited his right to counsel, the facts simply do not show this.

Mr. Grable withdrew, over Defendant's objection, because Defendant did not want to plead guilty and was intemperate in the language he used when they argued, threatening Mr. Grable's law

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[26] Carolyn T. A. Hartwick, Losing the Right to Counsel: Exploring and Reforming Waiver by Conduct and Forfeiture in State Courts, 172 U Pa L Rev 1401, 1409-10 (2024) (quoting *United States v Goldberg*, 67 F3d 1092 (CA 3, 1995).

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license. Even in his withdrawal, Mr. Grable stated that the Defendant was always respectful towards him and that he was not concerned about his statements.

Mr. Haupt was without an attorney between June and October of 2018 because he did not have the money to hire one and the Court never told him of his right to court appointed counsel even when he stated that his issue was money. In August of 2018 the Court told him that cost was not the Court's concern.

Mr. Haupt was represented by Mr. Moore between October and June and there is no indication, at least from the record, of any ongoing disputes. At the June hearing in which Mr. Moore was allowed to withdraw and appointed standby counsel it is clear that the relationship between Mr. Moore and Mr. Haupt had completely and totally broken down but there is no indication that Mr. Haupt did anything more disrespectful than privately argue with Mr. Moore.

i. Kammerand's Mission Creep.

In *People v Kammeraad,*[27] the Court of Appeals noted that "the right to assistance of counsel, cherished and fundamental though it may be, may not be put to service as a means of delaying or trifling with the court." *Kammeraad* recognized that a defendant may forfeit his right to counsel through "purposeful tactics and conduct that

[27] *Kammeraad*, 307 Mich App at 130

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were employed to delay and frustrate the orderly process of the lower court's proceedings." In justifying this rule, *Kammerad* relied on *United States v McLeod* which found that the defendant forfeited the right to counsel by threatening to harm his counsel, verbally abusing him, and ordering him to engage in unethical conduct.[28]

The Court of Appeals accepted that Mr. Haupt fell into this category. However, their opinion regarding a forfeiture cannot be sustained. Contrary to the Court of Appeals, Mr. Haupt did not repeatedly change counsel. He would have been very happy to keep Mr. Grable as counsel, it was Mr. Grable that withdrew, primarily over a disagreement about whether he should plead guilty. He had an issue only with Mr. Moore.

The Court of Appeals also says that rejecting plea offers recommended by his counsel was a delaying technique. [29] Perhaps Defendant should have listened to counsel, but failure to do so is not the same as forfeiture and is a fundamental right of the Defendant.

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[28] *United States v McLeod*, 53 F3d 322, 325–26 (CA 11, 1995)

[29] But see *Com v Means*, 454 Mass 81; 907 NE2d 646, 660 n.21 (2009) ("Because dilatory tactics, even when extreme, can readily be addressed by a waiver by conduct warning, we are not so persuaded [that dilatory conduct alone can justify forfeiture]."); *cf.People v Shanks*, 37 NY3d 244; 176 NE3d 682, 689 (2021) (stating the right to counsel "would be almost meaningless" if every defendant who attempted to delay proceedings forfeited it, but acknowledging that a defendant who refused to cooperate with a series of attorneys might forfeit the right to assigned counsel).

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The Court also stated that he made a Motion to Remand only one week before a scheduled (later adjourned) trial but fails to mention that due a shortage of funds he had not had counsel since the withdrawal of Mr. Grable and apparently made it at the time he was scheduled to be in Court.

Although *Kammeraad* said that it did not need to be a severe as the facts in that case for a forfeiture to occur, Mr. Haupt's actions seem to involve nothing more than a tendency to speak before thinking things through. There is not a single act of inappropriate in-Court behavior and nothing that speaks to him wanting delays.

Despite saying this, the Court of Appeals found that the trial court should have given Mr. Haupt the warning against self-representation; this despite the fact that he never told the Court he wanted to represent himself. Like, the Eighth Circuit's ruling in *United States v Smith,*[30] record in this case "shows the total absence of the kind of serious obstructionist misconduct that has led us to deny or revoke requests for self-representation in prior cases."

Kammeraad should be juxtaposed with the unpublished decision in *People v Grant,*[31] Defendant Grant's appeal centered on his lack of representation and the trial court's handling of repeated attorney withdrawals and denials of appointed counsel. Defendant

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[30] *United States v Smith*, 830 F3d 803 (CA 8, 2016).

[31] *People v Grant*, ___NW2d___; 2025 Mich. App. LEXIS 146, at *1-8 (Ct App, Jan. 9, 2025).

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Grant initially retained private counsel in July 2022, but after paying $8,000 and suffering a "breakdown in communication," counsel was allowed to withdraw in September 2022. He was briefly appointed a public defender, but later retained another attorney who also withdrew on the eve of trial following a major dispute over strategy, particularly Grant's refusal to accept a plea. When Defendant Grant explained that he had lost his job, was supporting two college-aged children, and could not afford new counsel, the trial court denied his requests for appointed counsel, insisting instead that he "get another job" and even suggesting work at "Burger King if necessary" to afford an attorney [*2-6]. Despite Defendant Grant's repeated statements that he did not want to represent himself, the trial court forced him to proceed in propria persona, appointing only advisory counsel. At trial, when Defendant Grant attempted to tell the jury that self-representation was not his choice, the court reprimanded him in front of the panel, insisting the decision was his. Defendant Grant was ultimately convicted of carrying a concealed weapon and possessing a silencer [*7-8].

The Court held that Defendant Grant neither waived nor forfeited his constitutional right to counsel. A valid waiver requires that the defendant unequivocally assert the right to self-representation and that the trial court substantially comply with the requirements in *People v Anderson*, 398 Mich 361, 367–368; 247 NW2d 857 (1976), and MCR 6.005. Substantial compliance requires a short colloquy in which the court ensures that the waiver is knowing,

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intelligent, and voluntary, and that the defendant understands the risks of proceeding without counsel.[32] Here, although the trial court repeatedly told Defendant Grant he would have to proceed without an attorney, the court never conducted the required colloquy or made the findings required by *Anderson*. Defendant Grant's statements that he did not wish to represent himself, but felt he had no choice, were inherently equivocal. Accordingly, the Court concluded that no valid waiver occurred.[33]

The Court also rejected the prosecution's argument that Defendant Grant forfeited his right to counsel by engaging in dilatory conduct. Forfeiture of the right to counsel is permitted only in rare circumstances involving exceptionally egregious misconduct, such as a refusal to participate in proceedings or to accept any representation.[34] While Defendant Grant bore some responsibility for initial delays caused by attorney turnover, the record showed that he consistently attempted to secure representation—applying for a public defender, contacting numerous private attorneys, and even offering to provide documentation of his finances. The trial court, however, declined to investigate his eligibility for appointed

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[32] See *People v Williams*, 470 Mich 634, 656; 683 NW2d 597 (2004); *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996).

[33] *Grant*, 2025 Mich App LEXIS 146, at *9-11.

[34] See *People v Kammeraad*, 307 Mich App 98, 126–127, 133–137; 858 NW2d 490 (2014).

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counsel and instead relied on assumptions about his finances, including his ability to afford a round of golf, to conclude he was not indigent. Given the incomplete and inconsistent record, the Court found insufficient evidence to support a finding of forfeiture. Because Defendant Grant neither waived nor forfeited his right to counsel, the Court vacated his convictions and remanded for further proceedings.[35] While this case is unpublished and only advisory, its facts parallel this case in most respects. The apparent differences do not take a different result. Grant objected loudly where as Mr. Haupt stay quiet when the Court backed him into a corner, but *King* makes it clear that he did not need to object. Given his youth and inexperience, his response is understandable. Grant tried the case whereas Mr. Haupt only handled pretrial matters, but critical issues were litigated at two different hearings and the scheduled first day of trial. Grant was given warnings, whereas Mr. Haupt was not.

ii. Criticisms of the Kammeraad Style Approach

The waiver of counsel by forfeiture approach has been subject to criticism. The Fourth Circuit has rejected the forfeiture of the right to counsel approach in this situation. While some circuits have held that a defendant can forfeit the right to counsel we have never endorsed that notion * * * And even those circuits holding that

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[35] *Grant*, 2025 Mich App LEXIS 146, at *12-16

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a defendant may forfeit his right to counsel have done so only in truly egregious circumstances."[36]

Whether this Court adopts the Fourth Circuit's approach or not, a court should consider lesser sanctions before effectively granting the state summary disposition against the accused. The University of Pennsylvania Law Review discusses this point at length. In discussing alternatives to waiver by conduct and forfeiture, the author examines two proposals advanced by commentators but finds each inadequate.

One proposal urges courts to rely exclusively on contempt sanctions instead of depriving defendants of counsel. Contempt, the argument goes, is already a familiar tool to punish violent, disruptive, or dilatory behavior, and it provides defendants clearer notice of consequences than the complex doctrines of waiver by conduct or forfeiture.[37] Yet, as the article explains, contempt alone is insufficient: it cannot prevent harassment or violence toward counsel, may perversely reward delay where defendants face heavy sentences, and fails to address the scarcity of court time and attorney resources.[38] Moreover, contempt does not better align with Sixth Amendment jurisprudence than the existing doctrines, since waiver

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[36] *United States v Ductan*, 800 F3d 642, 651 (CA 4, 2015).

[37] 172 U. Pa. L. Rev., at 1421–22.

[38] *Id.* at 1422–23.

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by conduct and forfeiture already account for knowledge and wrongdoing in analytically coherent ways[39]

The second proposal focuses on defendants who refuse to choose between their rights to counsel and self-representation—for example, those demanding hybrid representation or substitution of appointed counsel without cause. The suggested solution is to treat such obstruction as forfeiture of the right to self-represent and to compel defendants to proceed with existing counsel.[40] This approach, the author acknowledges, may better preserve judicial efficiency and avoid rewarding dilatory conduct, particularly on the eve of trial.[41] However, it risks ignoring defendants' autonomy, discouraging legitimate complaints about counsel, and undermining the personal nature of Sixth Amendment rights. Forcing unwanted representation, the article concludes, compromises "respect for the individual" and contravenes the principle that it is the defendant who ultimately bears the consequences of conviction.[42] Thus, while both proposals highlight real concerns, neither provides a doctrinally or practically sound replacement for waiver by conduct and forfeiture.

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[39] *Id.* at 1423.

[40] *Id.* at 1424.

[41] *Id.* at 1425.

[42] *Id.* at 1426–27.

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The author acknowledges that outright forfeiture of the right to counsel is doctrinally troubling and practically risky. Instead of declaring forfeiture too broadly, the Comment proposes a series of solutions designed to constrain the sanction and align it with Sixth Amendment values.

First, the author argues that courts should treat forfeiture as an *extraordinary remedy*—to be imposed only in "vanishingly rare" cases involving violent or seriously threatening conduct, and even then only after a hearing with robust due process protections. This hearing would allow the court to probe the defendant's reasons for misconduct, determine whether grievances with counsel were legitimate, and decide whether lesser sanctions or substitution of counsel might resolve the issue. It would also serve as an opportunity to issue an on-the-record warning that future misconduct could result in waiver by conduct, ensuring that defendants understand the consequences before losing counsel.[43]

Second, the Comment lays out guidelines for trial courts: judges should engage in express, detailed colloquies when misconduct arises; consider whether the defendant's behavior stems from frustration, ignorance, or mental illness; and show patience with unintentional delay before imposing the ultimate sanction. Courts should also consider whether to later *renew* the right to counsel, even after a finding of relinquishment, since the sanction

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[43] *Comment*, 172 U Pa L Rev 1401, *1437–39, *1448–49.

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need not be permanent. In short, the proposed solution is a flexible framework—grounded in warnings, individualized inquiry, and hearings—that preserves the integrity of proceedings without casually extinguishing the defendant's right to.[44]

This case highlights both the individual injustice suffered by Mr. Haupt and the broader need for guidance to the bench and bar. The *Kammeraad* framework should be clarified to state that forfeiture is a remedy of last resort, strongly disfavored, and available only after lesser sanctions have been attempted and proven inadequate. Because *Kammeraad* involved truly extreme conduct, other courts have struggled to identify where the boundaries lie, leading to premature resort to forfeiture. Here, rather than employing incremental measures to address Mr. Haupt's conduct, the court lost patience and imposed the most severe sanction without first exploring alternatives. Even if the court believed that a temporary loss of counsel might impress upon Mr. Haupt the dangers of his path, the reality is that this period without representation severely compromised his defense. As the next section demonstrates, these proceedings may well have been the most critical stage of the case against him. Clarifying that forfeiture is disfavored and that courts must attempt lesser remedies before invoking it will not only remedy the injustice here but also provide much-needed guidance to

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[44] *Id.* at *1439–40, *1448–49.

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trial courts and ensure that the constitutional right to counsel is meaningfully protected across future cases.

E. The Period From June 10, 2018 to July 23, 2018 Encompassed a Number of Critical Stages of the Proceedings.

Contrary to the implication below, these were not just routine pretrial hearings. Suppression of evidence motions were presented and the People filed and were granted a motion to strike the witness and exhibit list, a motion to allow the use of preliminary examination testimony in lieu of calling the complainant, a motion to compel discovery, and immediately prior to trial a motion in limine to redact the examination transcript to eliminate her acknowledgment that she had sent the relevant pictures to him.

A criminal defense attorney would have been far more capable of addressing these arguments than a pro se youth such as Mr. Haupt and this certainly transforms this situation into a situation where the guiding hand of counsel could have altered this case.

As a Pennsylvania federal judge recently explained: "The Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the proceedings." (internal quotations omitted). Critical stages of a prosecution are "those when a defendant faces significant consequences and the guiding hand of

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counsel is necessary to assure a meaningful defense."[45] That Court declined to focus on the label attached to the proceeding (there a resentencing proceeding), but instead said that the a critical stage is any place where "significant questions of law and fact with which the guiding hand of counsel would be necessary to adequately address, and because such hearings involve potentially significant changes to a defendant's sentence." Here, the prosecution used these hearings to block defense witnesses and to read hearsay testimony from a preliminary examination, even when a new charge (the obstruction of justice charge) was added after the examination and was never subject to cross-examination.

The Court of Appeals found that nothing critical happened during this stage, but can it truly be said that that a suppression motion, striking the defendant's witness and exhibit list in toto, and permitting the state to use the Complainant's preliminary examination testimony in lieu of live testimony at trial were not critical proceedings?

The Court of Appeal's opinion suggested that none of these proceedings were a critical stage is without consideration of the facts of the case. The question is not the name of a proceeding on the

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[45] *United States v Hough*, No. 2:03-CR-00174, 2024 WL 957865, at *7 (WD Pa, March 6, 2024), aff'd in part, app dis in part No. 24-1579, 2024 WL 5495453 (CA 3, November 29, 2024). See also *Richardson v Superintendent Coal Twp SCI*, 905 F3d 750, 764–65 (CA 3, 2018).

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transcript cover page, but what actually transpires.[46] As the Indiana Court of Appeals recognized:[47]

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

In *United States v Wilson*,[48] the Court further noted:[49]

> A "critical stage" is any "trial-like confrontation, in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice." *United States v Leonti*, 326 F3d 1111, 1117 (CA 9, 2003). It includes all circumstances in which "certain rights might be sacrificed or lost," or where "[a]vailable defenses may be irretrievably lost." *Wade*, 388 US at 225. The

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

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

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

[49] *Id.* at 1266–67.

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> essence of a critical stage is "not its formal resemblance to a trial but the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." *Leonti*, 326 F3d at 1117. In determining whether the right to counsel applies, "the test utilized by the Court has called for examination of the event in order to determine whether the accused required aid in coping with legal problems or assistance in meeting his adversary." *United States v Ash*, 413 US 300, 313; 93 S Ct 2568; 37 L Ed 2d 619 (1973).

In *Van v Jones*, the Sixth Circuit synthesized six definitions of a "critical stage" in criminal proceedings: it is (1) a moment when defenses may be irretrievably lost if not asserted; (2) a point where rights are preserved or lost; (3) any proceeding where counsel is necessary to mount a meaningful defense; (4) a confrontation carrying potential substantial prejudice that counsel could help avoid; (5) a stage with significant consequences for the accused; and (6) never a proceeding where the likelihood of later prejudice is absent.[50]

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[50] *Van*, 475 F3d at 312, citing *Hamilton v State of Ala*, 368 US 52, 53; 82 S Ct 157; 7 L Ed 2d 114 (1961); *White v State of Md*, 373 US 59, 60; 83 S Ct 1050; 10 L Ed 2d 193 (1963); *Wade*, 388 US at 225, 227; *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970); *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *Lundberg v Buchkoe*, 389 F2d 154, 158 (CA 6, 1968).

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From these formulations, the majority extracted two lessons. First, determining whether a stage is critical necessarily requires considering the consequences of counsel's absence, which risks collapsing into a prejudice inquiry the Sixth Amendment does not permit. Second, the test is not whether actual prejudice occurred but whether there was sufficient possibility of prejudice to require counsel's presence.[51] Applying this framework, the Court held that Michigan consolidation hearings are not critical stages. Declaring such hearings critical would create "an intolerable structural trap" for state courts: a defense lawyer could simply fail to attend, handing his client "a get out of jail free card" in the form of automatic reversal, "at no real cost to the possibility of a successful defense on the merits."[52]

Judge Cook concurred, underscoring that Michigan's procedural rules eliminated any real possibility of prejudice in Van's case. Because Van's offenses were legally related to his co-defendant's and more seriously, consolidation was mandatory under MCR 6.121. Thus, counsel's presence at the hearing "could not have affected the decision to consolidate," confirming that it was not a critical stage.[4]

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[51] *Van*, 475 F3d at 313.

[52] Id. at 315-16.

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Judge Karen Nelson Moore dissented. She argued that the majority's approach improperly engaged in a case-specific prejudice analysis, which "does an end run around the rule that prejudice is presumed" when counsel is denied at a critical stage.[5] Instead, courts must take a "distant perspective" and ask whether the type of proceeding generally exposes an unrepresented defendant to an unacceptable risk of prejudice. She reasoned that consolidation hearings are adversarial, trial-like settings where defendants face "the guiding hand of counsel" on one side but stand unprotected without their own representation.[6] Because joint trials risk guilt by association, exclusion of exculpatory evidence, or mutually antagonistic defenses, she concluded that consolidation hearings are critical stages. As such, Van's lack of counsel required per se reversal, and she would have granted habeas relief.[7]

Van is still good law in the Sixth Circuit.[53] The three opinions in *Van* reflect competing frameworks for defining a "critical stage." The majority, wary of creating "an intolerable structural trap," treated consolidation hearings as too low-stakes to warrant automatic reversal, emphasizing the danger that absent counsel could hand defendants "a get out of jail free card."[3] Judge Cook

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[53] In *United States v Durachinsky*, No. 23-4019, 2025 WL 1833941, at *5 (CA 6, April 2, 2025), the Sixth Circuit recently favorably cited *Van* for the proposition that: "A complete absence of counsel at a critical stage of the proceedings is a per se violation of the Sixth Amendment that requires no showing of prejudice or error."

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concurred on narrower grounds, stressing that under Michigan's court rules consolidation was inevitable; because "the presence of counsel could not have affected the decision to consolidate," no substantial risk of prejudice existed.[54] Judge Moore, in dissent, insisted that this reasoning "does an end run around the rule that prejudice is presumed" when counsel is absent at a critical stage.[55] For her, the correct inquiry requires a "distant perspective": consolidation hearings are adversarial and trial-like, presenting an "unacceptable risk of prejudice" without the guiding hand of counsel.[56] Thus, while the majority and concurrence viewed the hearing as procedurally inconsequential, the dissent regarded it as structurally significant, demanding per se reversal.[57]

This panel's decision subtly transformed critical stage of the proceeding into a harmless error standard. The Court believed that the same result would have endured and therefore the stages weren't "critical." A lawyer at the given proceedings could have done a better job at challenging the warrant and could have secured

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[54] *Id.* at 316.

[55] *Id*. at 317.

[56] *Id*. at 318, quoting *Wade*, 388 US at 225; *Powell v State of Ala*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932).

[57] Id. at 318, citing *Zafiro v United States*, 506 US 534, 538–39; 113 S Ct 933; 122 L Ed 2d 317 (1993).

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the testimony of two critical witnesses who conveniently found reasons not to be present a trial.

i. Search and Seizure Issue

A motion to suppress evidence hearing is clearly a critical stage where counsel must be present.[58]

The search and seizure in this case could easily have been decided differently with the guiding hand of counsel identifying and developing the issues. A motion to suppress requires knowledge of pleading requirements, the rules of evidence, and an ever-developing doctrine of Fourth Amendment law. While it is entirely possible that an attorney could have lost it, a skilled attorney could have won it. The Court of Appeals effectively applied a harmless error analysis even though they nominally called it a "critical stage analysis."

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[58] See *United States v Dobbins*, ___F Supp 3d___; 2022 U.S. Dist. LEXIS 181836, at *2-3 (SD Ill, Oct. 4, 2022) (citing *United States v Johnson*, 859 F2d 1289 (CA 7, 1988))(("The Seventh Circuit has indicated that "a pretrial suppression hearing is a critical stage" of a criminal proceeding"). See also F. Lomonte, *Feature Cameras Might Alter Courtroom Behavior Maybe That's the Point*, 47 Litigation 22, 24 (2021) (collecting US Supreme Court cases finding the right of the press and public to attend any critical stage in a criminal case including "a First Amendment right to attend not just criminal trials but also any **critical** stage in criminal proceedings, including **motion hearings**, jury selection, and sentencing").

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The search in this case mirrored the invalidated search in *People v Carson*,[59] articulating the position which appellate counsel has been pressing — that a cell phone, tablet, or computer is a uniquely personal device which contains massive amounts of personal data. A search warrant authorizing a review of "any and all data" on the defendant's cell phone violated the Fourth Amendment's particularity requirement because it permitted an unrestrained rummaging through vast quantities of private digital information, a practice the Court deemed constitutionally intolerable given the privacy stakes identified in *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014), and *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020). Law enforcement may only seek to review evidence tied to the crime or course of criminality they are investigating. They may not simply assert that criminals often use mobile devices; such an unfocused search of an entire phone based on such generalities cannot be sustained.

Under Michigan law, a search warrant must particularly describe the place to be searched and the persons or things to be seized.[60] MCL 780.654 states: "each warrant shall designate and describe the house or building or other location or place to be searched and the property or thing to be seized. The warrant shall

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[59] *People v Carson*, ___NW3d___; 2025 Mich. LEXIS 1402 (July 31, 2025)

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

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also state the grounds or the probable or reasonable cause for its issuance, or in lieu thereof, a copy of the affidavit may be attached thereto." The police cannot circumvent this command by include wide open boilerplate in this warrant request. If the search warrant application and warrant is interpreted in this open ended fashion, it annuls the Fourth Amendment's "probable cause" protections.[61]

While boilerplate in a search warrant is not per se meaningless, it must be viewed with a greater degree of skepticism. First, generic assertions about what particularly type of criminal does what only works if there is evidence that the individual is an offender

Again, the issue is not whether the issue would have prevailed, but whether the guiding hand of counsel could have assisted the accused in presenting a more credible motion. Given the movement in the law in this area, it is almost certain this is the case.

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

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ii. Evading Witnesses

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

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

If he had the guiding hand of counsel, he could have subpoenaed the mother prior to trial and request the Complainant's presence via the procedure outlined in Issue IV of the Defendant's original brief.[62]

The regulation sets forth three reasons where the military will block a subpoena to testify in private litigation: (a) the testimony involves official information; (b) the witness. would testify as an expert; or, (c) where the appearance would interfere seriously with the accomplishment of a mission. When such a subpoena is issued, the service person should refer the matter to their supervisor who will then forward it to the appropriate Staff Judge Advocate or legal adviser. Under Rule 7-11, these individuals will then decide whether the actions will "interfere seriously with the accomplishment of the military mission." If so, these individuals will contact the requesting party and attempt to make alternate arrangements. If they cannot be

[62] Army Regulation 27-40 Sec. 7-8 et seq.

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reached, they will refer the matter to the Litigation Division of the Army. Additionally, if the issue had been properly developed, counsel could have requested the court to instruct the jury that it should be presumed that their absence would have been favorable to the accused.[63] Because, Mr. Haupt had not properly developed the record, attempted to have the witnesses subpoenaed, or had the skill set to oppose the State's motions, the State was able to effectively shut down his right of both cross-examination and to present a defense. At minimum, counsel could have requested the Court to allow him to take a video deposition to preserve their testimony for trial where they were subject to trial style cross-examination.[64] There the new charges could be addressed, and all the in discovery which had been discovered in the intervening months could have been used to formulate those questions.

These proceedings were indeed critical. To be clear, the problem at this point is not whether these errors were reversible, but

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

[64] See *People v New*, 427 Mich 482, 504; 398 NW2d 358 (1986) (Levin, J.) (noting ability of court to order deposition in criminal case to preserve testimony). See also *People v Weinke*, 50 NE3d 688 (Ill App Ct, 2016) (upholding the taking of such a statement and its use at trial); *State v Zaporta*, 237 Conn 58; 676 A2d 814 (1996); *United States v Wag-Aero, Inc*, 888 F Supp 101, 102 (ED Wis, 1995) (noting discretion in federal court to order such a deposition); *United States v Rodriguez-Sifuentes*, 637 Fed Appx 1016, 1017 (CA 9, 2016) (reversing and ordering a new trial because of improper denial of defense motion to depose his common law wife in Mexico for use at his upcoming trial).

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whether the guiding hand of counsel could have benefited the Defendant.

iii. Other Critical Actions

Here, the problem was compounded by the fact that the Defendant was not afforded the liberality typically associated with pro se litigants. The People successfully moved to strike his witness list and his exhibit list and at the scheduled beginning of trial, when he was still not represented, objected to his father "telling him what to say" when he was trying to say that he had not been notified of a hearing. The Court informed the elder Mr. Haupt that he could not help even though he was not attempting to speak directly to the Court. (TT Vol I, 6). The People also filed a Motion in Limine to redact the Complainant's testimony as to the fact that she had sent him the photos at issue which the Court granted, (TT Vol I, 10-11).

F. Conclusion

The right to counsel is one of the most important rights in a criminal proceeding. In order to waive the right to counsel, the trial court must determine that the defendant's request to represent himself is unequivocal.[65] Second, the trial court must determine that the defendant is asserting his right "knowingly, intelligently, and

[65] *King at 677*. See also *Anderson*, 398 Mich 361.

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voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation…"[66]

While the right to self-representation is also a constitution right, ambiguities in any waiver must be resolved in favor of a non-waiver. As this Court noted twenty years ago: "In sum, although the right to counsel and the right of self-representation are both fundamental constitutional rights, representation by counsel, as guarantor of a fair trial, "is the standard, not the exception,"[21] in the absence of a proper waiver."[67]

A warning of the dangers of the dangers and disabilities is essential to an effective waiver. Warnings of the pitfalls of proceeding to trial without counsel must be "rigorously conveyed."[68] Finally, the trial court must determine that the defendant's self-representation will not unduly burden the administration of the court's business.[69]

Mr. Haupt did not unequivocally waive his right to counsel and agree to represent himself, and his conviction should be reversed because of the structural error that he was not represented

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[66] MCL 763.1.

[67] *Russell*, 471 Mich at 189–90

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

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

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by a lawyer at critical pre-trial stages.[70] Because the trial court failed to make the express findings in support of a waiver as required under *Anderson*, we are left with post-hoc rationalizations.

The trial court further erred by failing to ever warn, discuss, or mention the dangers and risks of proceeding *pro per*.[71] The trial court fell far short of the substantial compliance requirement, neither discussing the substance of *Anderson* or MCR 6.005(D), nor making any express findings in support of the alleged waiver of counsel. *Russell*, 471 Mich at 191. Having done so eight months earlier, is clearly insufficient when Mr. Haupt almost immediately decided he wanted an attorney and where he never again said that he wished to represent himself. Here, the trial court should either have appointed new counsel to represent Mr. Haupt or simply kept Mr. Moore as the lawyer.

The Court noted that the presence of standby counsel does not obviate the error.[72] It is also worth noting that *King* was not a trial. In *King*, the defendant was experienced with the criminal justice system.[73] He discharged counsel because counsel would not file his

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

[71] *Russell*, 471 Mich at 190

[72] *King*, 999 NW2d at 680

[73] *Id.* at 673.

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motions. *Id.* The Court discharged counsel, but that counsel was appointed as standby counsel. The Defendant started the trial *pro se* but ultimately pled guilty pursuant to a *Cobbs* agreement,[74] which was negotiated by standby counsel. The Defendant was ultimately sentenced in accordance with the agreement and appealed. This Court affirmed the Defendant's conviction but the Supreme Court finding that the defective waiver of counsel was valid. The Court remanded the matter to the trial court (not the Court of Appeals for further proceedings). On remand, the Defendant went to trial (receiving a conviction).[75]

Allowing Mr. Haupt to represent himself in light of the above errors by the trial court deprived Mr. Haupt of his right to counsel and constitutes structural error that entitles Mr. Haupt to a new trial. Although partial failure to comply with *Anderson* and MCR 6.005(D) may not always require reversal,[76] when a defendant is left unrepresented in the six weeks immediately prior to trial, the admission of evidence, the effects of that deprivation pervade the entire proceeding and require reversal.[77]

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

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

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

[77] *People v Willing*, 267 Mich App 208; 704 NW2d 472 (2005); see also *Glasser v United States*, 315 US 60, 76; 62 S Ct 457; 86 L Ed 680 (1942) ("The

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The error here is of the type that is "so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the particular case.[78] As this Court has stated:[79]

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

This case must be remanded for a new trial.

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right to have the assistance of counsel [at trial] is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."); *People v Grove*, 455 Mich 439, 446; 566 NW2d 547 (1997).

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

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

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Relief

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

Respectfully submitted,

/s/Stuart G. Friedman

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Dated September 1, 25

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Certification

The attached Brief contains 14209 words. The cover page, table of contents, statement of questions, table of authorities, this certification, request for oral arguments, and proof of service are excluded. This brief was produced using Microsoft Office 365 (2023 Edition for Macintosh).

Respectfully submitted,

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Dated September 1, 25

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Proof of Service

STATE OF MICHIGAN)

) SS.

COUNTY OF OAKLAND)

The undersigned declarant being first duly sworn, deposes and says that on August 30, 2025, (s)he did e-Serve a copy of the attached SUPPLEMENTAL BRIEF on opposing counsel via the Court's electronic filing system.

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

Respectfully submitted,

/s/Stuart G. Friedman

Declarant

DATED: August 30, 2025