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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 APPENDIX
*****ORAL ARGUMENTS REQUESTED*****

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

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

Stuart G. Friedman (P46039)
Suzanne Carol Schuelke (P31330)
Attorneys for Mr. Haupt
Friedman Legal Solutions, PLLC
26777 Central Park Blvd, Suite 300
Southfield, MI 48076
Tel: (248) 228-3322
Fax: (248) 359-8695
e-Mail: stu@crimapp.com (Stuart)
suzanne@crimapp.com (Suzanne)

Table of Contents

Label	Document Name	Page
1	Supreme Court Order for MOA 06-20-2025	1
2	Court of Appeals Reconsideration Denial after Remand 05-28-2024	3
3	Court of Appeals Opinion after Remand 04-25-2024	5
4	Supreme Court Order for Remand 11-28-2023	14
5	Supreme Court Order Holding in Abeyance March 2 2022	16
6	Court of Appeals denial Motion Reconsideration 11-01-2021	18
7	Court of Appeals First Opinion-09-23-2021	20
8	Haupt, Alex Registry of Actions through 03-10-2021	36
9	Judgment of Sentence	55
10	3-Grabel Motion Withdraw 04-09-2018	59
11	4-Grabel Withdrawal 06-21-2018	68
12	5-Status Conference 08-01-18	88
13	Motion Adjourn with Faretta Warnings -10-23-18.	95
14	Moore Withdraw Motion 06-10-19	119
15	14-Motion 07-02-2019	128
16	15-Motion Compel 07-12-2019	166
17	Jury Trial Aborted Vol I - July 23-19	174
18	MCR 6.005	194
19	State v. Griffin, 2025 Iowa App. LEXIS 380	198

RECEIVED by MSC 9/1/2025 7:07:38 PM

Table of Contents

Label	Document Name	Page
20	MJI Attorney Waiver Checklist	206
21	People v. Carson 2025 Mich. LEXIS 1402	211
22	People v. Grant, 2025 Mich. App. LEXIS 146	240
23	United States v. Dobbins, 2022 U.S. Dist. LEXIS 181836	246

RECEIVED by MSC 9/1/2025 7:07:38 PM

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Appendix 1: Supreme Court Order for MOA 06-20-2025

Order

Michigan Supreme Court
Lansing, Michigan

June 20, 2025

Megan K. Cavanagh,
Chief Justice

167315

Brian K. Zahra
Richard H. Bernstein
Elizabeth M. Welch
Kyra H. Bolden
Kimberly A. Thomas
Noah P. Hood,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 167315
COA: 351593
Clare CC: 17-005731-FH

ALEXANDER JAMES HAUPT,
Defendant-Appellant.

_____/

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 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 (2023); *People v Anderson*, 398 Mich 361, 367-368 (1976); MCR 6.005(D); (2) the defendant forfeited his right to counsel through his conduct and remarks, see *People v Kammeraad*, 307 Mich App 98, 130-137 (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 (1967); *Van v Jones*, 475 F3d 292, 312 (CA 6, 2007).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case who are not exempt from the motion requirement under MCR 7.312(H) may move the Court for permission to file briefs amicus curiae.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 20, 2025

Clerk

p0617

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Appendix 2: Court of Appeals Reconsideration Denial after Remand 05-28-2024

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Court of Appeals, State of Michigan

ORDER

PEOPLE OF MI V ALEXANDER JAMES HAUPT

Docket No. 351593

LC No. 17-005731-FH

Christopher M. Murray
Presiding Judge

Michael J. Kelly

Colleen A. O'Brien
Judges

The motion for reconsideration is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

May 28, 2024
Date

Chief Clerk

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Appendix 3: Court of Appeals Opinion after Remand 04-25-2024

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER JAMES HAUPT,

Defendant-Appellant.

UNPUBLISHED
April 25, 2024

No. 351593
Clare Circuit Court
LC No. 17-005731-FH

ON REMAND

Before: MURRAY, P.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

This matter is before us again on remand from the Supreme Court. See *People v Haupt*, 997 NW2d 175 (2023). In that order, the Court vacated those parts of our prior opinion dealing with defendant's right to counsel and disproportionate sentencing arguments, and remanded those issues for reconsideration in light of *People v Posey*, 512 Mich 317; 1 NW3d 101 (2023), and *People v King*, 512 Mich 1; 999 NW2d 670 (2023). *Haupt*, 997 NW2d 175. We affirm.

I. SIXTH AMENDMENT RIGHT TO COUNSEL

With respect to defendant's Sixth Amendment right to counsel argument, we held in the prior opinion that defendant alleged a structural error, *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004), but that his failure to have counsel for two hearings over a two-month period, in violation of *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976), and MCR 6.005(D), did not meet the fourth prong of the plain error test under *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999):

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

indicates that the trial court failed to comply with the substance of *Anderson* and MCR 6.005(D).

Nevertheless, even if the first three prongs of the plain error standard have been established, we conclude that reversal is not warranted under the fourth *Carines* prong. *Carines*, 460 Mich at 763-764. Defendant does not claim that he is actually innocent, and we are not convinced that the trial court's plain error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id*. "[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis," and reversal is not justified if the "underlying purposes" of the right at issue have been alternatively upheld.

In *People v Kammeraad*, 307 Mich App 98, 130; 858 NW2d 490 (2014), this Court 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 were employed to delay and frustrate the orderly process of the lower court's proceedings." *Id*. at 131, citing *State v Mee*, 756 SE2d 103, 114 (NC App, 2014). In other words, "willful conduct by a defendant that results in the absence of defense counsel constitutes a forfeiture of the right to counsel." *Kammeraad*, 307 Mich App at 131. Forfeiture is distinguishable from waiver. When a defendant forfeits the right to counsel, the court is not required to determine whether the defendant knowingly, understandingly, and voluntarily gave up his right. *Id*.

The defendant in *Kammeraad* forfeited his right to counsel by "refus[ing] to accept, recognize, or communicate with appointed counsel, . . . refus[ing] . . . self-representation, and . . . refus[ing] to otherwise participate in the proceedings." *Id*., at 131-132. Although in *Kammeraad* the defendant refused to get dressed and walk into the courtroom, requiring court officers to place him in a wheelchair, cover him up, and haul him in, *id*. at 112, we said that a forfeiture can be found on the basis of less outlandish conduct. A defendant might forfeit his right to counsel, for example, by refusing to accept appointed counsel while also failing " 'to retain counsel within a reasonable time,' " or by acting " 'abusive toward' " his retained or appointed counsel. *Id*. at 132, quoting *United States v McLeod*, 53 F3d 322, 325 (CA 11, 1995).

This Court also recognized "the hybrid situation of 'waiver by conduct,' " also known as " 'forfeiture with knowledge,' " "which combines elements of forfeiture and waiver." *Kammeraad*, 307 Mich App at 133-134, quoting *United States v Goldberg*, 67 F3d 1092, 1101 (CA 3, 1995). Waiver by conduct/forfeiture with knowledge occurs when "a defendant is warned that he or she will lose counsel if the defendant engages in dilatory tactics, with any misconduct thereafter being treated as an implied request for self-representation." *Kammeraad*, 307 Mich App at 133.

Here, the trial court seemingly found that defendant had given up his right to counsel through his conduct. Although the court should have (again) advised

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> defendant of the charges against him, the sentencing consequences he faced, and the various risks of representing himself before allowing appointed counsel to withdraw, this failure is not outcome-determinative given defendant's conduct. As the trial court noted, defendant's actions delayed the case for over two years, in part by repeatedly terminating the services of his retained and appointed counsel. He initially waived his preliminary examination in 2017 because the prosecution made a plea offer, but defendant continually rejected plea offers that his attorneys recommended he should take. Just one week before his previously adjourned October 2018 trial, defendant moved to remand to district court for a preliminary hearing. He made his counsel's work impossible. He refused to communicate with his retained counsel, and his lack of communication continued with his appointed counsel. He threatened his retained counsel's professional license, while he accused his appointed attorney of lying and colluding with the prosecutor's office.
>
> During the less than two months that defendant represented himself with advisory counsel, two hearings took place: (1) a final pretrial hearing and (2) a hearing on defendant's motion to suppress evidence and motion to dismiss, and on the prosecutor's motion to use AM's preliminary examination testimony at trial. Consistent with his demonstrated lack of communication throughout the case, defendant did not reach out to advisory counsel for any advice or counsel during this time. Under these circumstances, the trial court did not violate defendant's constitutional right to counsel at a critical stage of the proceeding. Defendant has failed to show plain error. [*People v Haupt*, unpublished per curiam opinion of the Court of Appeals, issued September 23, 2021 (Docket No. 351593), p 3-5 (citations omitted).]

We must now reconsider this holding in light of *King*. In that decision, the Court held that a defendant's invalid waiver of counsel which deprived him of counsel at critical stages of the proceedings was not subject to waiver or forfeiture, and required automatic reversal. *King*, 512 Mich at 17 ("Defendant was not required to affirmatively invoke his Sixth Amendment right to counsel in order to preserve that right. Defendant was not required to object to the invalid waiver of the right to counsel, and the *Carines* forfeiture doctrine does not apply. Because defendant's waiver of his right to counsel was invalid, he was deprived of counsel during significant portions of the critical stages in the proceedings, including trial, and the error is subject to automatic reversal").

Under the Sixth Amendment, an accused has the right to counsel during all critical stages of a criminal prosecution. US Const, Am VI; see also *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). When this right is violated it constitutes a structural, constitutional error requiring automatic reversal. *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). Not all stages of a criminal proceeding constitute critical stages. *People v Lewis*, 501 Mich 1, 8 n 4; 903 NW2d 816 (2017) (recognizing that "neither [*People v*] *Arnold* [477 Mich 852; 720 NW2d 740 (2006)] nor *Russell* could have held that the complete denial of counsel at *any* critical stage of a criminal proceeding is structural error requiring automatic reversal, when the Supreme Court of the United States has held otherwise."). "Structural errors, as explained in *Neder* [*v United States*, 527 US 1, 7; 119 S Ct 1827; 144 L Ed 2d 35 (1999)], are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal." *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). This holds true because "structural errors deprive defendants of basic

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protections without which a criminal trial cannot reliably serve its function as a vehicle for a determination of guilt or innocence." *Id*. at 52. An error becomes a structural defect when it "infects the entire trial mechanism." *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). See also *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991). Harmless error analysis should not be applied where "deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding." *Satterwhite v Texas*, 486 US 249, 257; 108 S Ct 1792; 100 L Ed 2d 284 (1988).

For example, in *Lewis* the Court held that the deprivation of counsel at a preliminary examination was subject to a harmless-error analysis. *Lewis*, 501 Mich at 9. On the opposite end of *Lewis* is *King*. There, defendant was deprived of counsel minimally "during (1) pretrial preparations, including at least one pretrial hearing, (2) jury selection, (3) opening statements, (4) judge's instructions, and (5) direct and cross-examination of key witnesses." *King*, 512 Mich at 16. Unlike in *Lewis*, where the absence of counsel at the preliminary examination was subject to harmless-error analysis, because the defendant in *King* "was deprived of his right to counsel at critical *stages* of the criminal proceedings, *including at trial*, the error [was] subject to automatic reversal." *Id*. (emphasis added).[1]

In light of this precedent, we hold that defendant was not deprived of counsel at a critical stage of the proceeding such that it constituted a structural error requiring automatic reversal. As stated in our prior decision in this case, "During the less than two months that defendant represented himself with advisory counsel, two hearings took place: (1) a final pretrial hearing and (2) a hearing on defendant's motion to suppress evidence and motion to dismiss, and on the prosecutor's motion to use AM's preliminary examination testimony at trial." *Haupt*, unpub op at 4-5.

The critical stage analysis "applies to preliminary proceedings where rights may be sacrificed or defenses lost." *Duncan v Michigan*, 284 Mich App 246, 263-264; 774 NW2d 89 (2009) (quotation marks and citations omitted). In *Van v Jones*, 475 F3d 292 (CA 6 2007), the Sixth Circuit Court of Appeals lamented the lack of a "comprehensive and final one-line definition of 'critical stage,' " but stated "the Supreme Court and our court have offered six short definitional statements over time:

> 1) A critical stage presents a moment when "[a]vailable defenses may be irretrievably lost, if not then and there asserted."

---

[1] As stated by the Court in *King*, 512 Mich at 15-16:

> *Lewis* is categorically different from the instant case. The defendant in *Lewis* was only denied counsel during a preliminary examination. *Id*. at 3. Harmless-error analysis applied in *Lewis* because after defendant's preliminary examination, he was found guilty beyond a reasonable doubt in an otherwise fair trial. *Id*. at 11. Here, because defendant's invalid waiver of counsel occurred before his trial began, defendant was denied his right to counsel during most of the critical stages of the proceedings.

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> 2) A critical stage is one "where rights are preserved or lost."
>
> 3) Counsel's assistance is guaranteed "whenever necessary to mount a meaningful defence."
>
> 4) Determination as to "whether a hearing is a 'critical stage' requiring the provision of counsel depends . . . upon an analysis 'whether potential substantial prejudice to defendant's rights inheres in the . . . confrontation and the ability of counsel to help avoid that prejudice.' "
>
> 5) A critical stage holds "significant consequences for the accused."
>
> 6) In *Lundberg* [*v Buchkoe*, 389 F2d 154, 158 (CA 6, 1968)], our court defined a "floor" for analysis as to whether a phase in a criminal proceeding may be considered critical. We do not label as a critical stage "proceedings where even the likelihood of later prejudice arising from the failure to appoint is absent." [*Id*. at 312 (citations omitted).]

The pretrial conference on June 25, 2019, was not a critical stage in the proceedings that required representation by counsel. Nothing that occurred during the conference substantially affected defendant's rights. See *United States v Benford*, 574 F3d 1228, 1233 (CA 9, 2009) (holding that the pretrial status conference in that case was not a "critical stage" because "[n]othing significant occurred," "there was no 'loss of significant rights,' " and it "plainly did not 'test[ ] the merits of the accused's case.' ") (citations omitted; second alteration in original). The prosecution reiterated a plea offer to defendant that he had previously rejected, and that he rejected again, and the court set a date by which defendant could make a counter-offer.

Nor was the joint hearing on defendant's motion to suppress evidence and motion to dismiss, and on the prosecutor's motion to use AM's preliminary examination testimony at trial, a critical stage of the proceedings so as to require automatic reversal under *King*. Defendant moved for dismissal based on alleged discovery violations by the prosecution, just weeks before the date set for trial. We are aware of no United States Supreme Court decision holding that a hearing on a discovery motion similar to defendant's motion to dismiss, like a motion to compel, is a critical stage of criminal proceedings. And defendant had counsel—both retained and appointed—for months prior. Appointed counsel Scott Moore was originally appointed to represent defendant in October 2018, and tried to work with defendant for months until requesting to withdraw because of defendant's actions. During that time, Moore received discovery from the prosecutor and participated in the remand to district court for a preliminary examination where he cross-examined AM and a detective.

With regard to the prosecution's motion for admission of AM's preliminary examination testimony at trial under MRE 804(b)(1), defense counsel Moore had the opportunity to and did cross-examine AM at the preliminary examination. It was that testimony that was ultimately read into evidence at trial. Accordingly, we hold that defendant suffered no significant consequences related to his right to confront this witness from lack of appointed counsel for this motion.

The same holds true for defendant's motion to suppress. Defendant argued in his motion and at the hearing that the initial search warrant authorizing a search of his cell phone for stalking was overbroad, and led to a second search warrant and the discovery of evidence, including explicit

pictures, that resulted in his charges for child sexually abusive activity and material. Before jury selection commenced on the first day of trial, the court denied defendant's motion to suppress.

In *McCray v Illinois*, 386 US 300, 307; 87 S Ct 1056; 18 L Ed 2d 62 (1967), the Supreme Court explained in a Sixth Amendment Confrontation Clause case that a suppression hearing implicates a lesser concern than trial itself:

> We must remember . . . that we are not dealing with the trial of the criminal charge itself. There the need for a truthful verdict outweighs society's need for the informer privilege. Here, however, the accused seeks to avoid the truth. The very purpose of a motion to suppress is to escape the inculpatory thrust of evidence in hand, not because its probative force is diluted in the least by the mode of seizure, but rather as a sanction to compel enforcement officers to respect the constitutional security of all of us under the Fourth Amendment. If the motion to suppress is denied, defendant will still be judged upon the untarnished truth. [Citation omitted.]

Two federal courts addressing habeas appeals have discussed whether suppression hearings are a critical stage of the criminal proceeding that counsel must attend to avoid automatic reversal. One of those courts determined such a hearing to be a critical stage of the proceeding, and held that because counsel was not present for it, the defendant should have been awarded a new trial. See *Henderson v Frank*, 155 F3d 159, 171-172 (CA 3, 1998). The other court upheld the denial of habeas relief because "no Supreme Court precedent has directly addressed the issue of whether the denial of counsel at a hearing on a motion to suppress is a 'complete denial of counsel' at a 'critical stage' of a criminal proceeding for the purposes of the Sixth Amendment." *Gomez v Thaler*, 526 F Appx 355, 359 (CA 5, 2013). Additionally, in *United States v Hamilton*, 391 F3d 1066 (CA 9, 2004), the Ninth Circuit Court of Appeals held that a suppression hearing constituted a critical stage of the proceedings, stating, " '[i]t is quite clear that a pretrial motion to suppress evidence is a critical stage of the prosecution requiring the presence of counsel for the accused,' because in many cases the crucial issue is the admissibility of evidence found in the defendant's possession." *Id*. at 1070, quoting *Olney v. United States,* 433 F2d 161, 163 (CA 9, 1970). There, "at the suppression hearing the district court permitted the government to conduct redirect examination of the searching officer concerning [the defendant] with neither [the defendant] nor his counsel present." *Hamilton*, 391 F3d at 1068.

We have no doubt that a suppression hearing could be a critical stage under certain circumstances where the absence of counsel affected and contaminated the entire proceedings. But not so here. Although defendant was without counsel to draft his motion to suppress or at the motion hearing, and upon first glance, a motion to suppress evidence directly supporting defendant's charges would appear to have significant consequences, the lack of representation did not result in the loss of a substantial right here. Unlike in *Hamilton*, 391 F3d at 1069, and *Henderson*, 155 F3d at 170, where witnesses were called and questioned during the respective suppression hearings, at defendant's motion to suppress hearing, no witnesses were called. Rather, the parties made oral argument, with defendant simply reading his motion into the record, and the court denied the motion on the first day of trial. Further, at trial outside the presence of the jury, reappointed defense counsel moved to suppress the evidence related to the sexual abuse charges obtained from the second search warrant. Although he argued for suppression on a different basis than defendant had, asserting that the second search warrant authorized a search of defendant's phone, not of the data and images extracted from the phone during the first search, he cited caselaw and made a robust and nuanced argument. Thus, defense counsel had a subsequent opportunity,

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which he took, to address the issues raised in defendant's motion to suppress, and in doing so prevented the irretrievable loss of defendant's defenses. Accordingly, we hold that defendant was not deprived of counsel at a critical stage of the proceeding such that it constituted a structural error requiring automatic reversal.

II. SENTENCING ISSUES

Defendant also argues that even if the guidelines were properly scored, his sentence of 78 months to 20 years for producing child sexually abusive activity is unreasonable and disproportionate. In our prior opinion we rejected the argument, citing this Court's opinion in *People v Posey (Posey I)*, 334 Mich App 338; 964 NW2d 862 (2020), aff'd in part and vacated in part by 512 Mich 317 (2023), and stating:

> Here, defendant's sentence is at the bottom of the sentencing guidelines range of 78 to 130 months. Therefore, we must affirm defendant's sentences "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence[s]." Because we have concluded that the challenge to the scoring of the sentencing guidelines lacks merit, and defendant does not allege that inaccurate information was relied upon in determining his sentence, MCL 769.34(10) directs that the sentence be affirmed.
>
> "A defendant can only overcome the presumption of proportionality by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate," such as a sentence that constitutes cruel and unusual punishment. Defendant appears to be suggesting that the unusual circumstances that would allow this Court to conclude that his within-guidelines sentence was disproportionate are (1) the numerous plea offers offered by the prosecution that included various sentences of less than one year and no more than five months, and his consensual sexual relationship with AM, who he asserts "did not look like a child" and whose pictures "were not sold as child pornography." However, defendant repeatedly chose not to accept a plea offer that he now deems to include what is "illustrative of a fair sentence," and he acknowledges that consent is not a defense to the charges in this case. Defendant has failed to show unusual circumstances and has failed to overcome the presumption that his within-guidelines sentence was proportionate. [*Haupt*, unpub op at 14 (citations omitted).]

Our Supreme Court subsequently vacated in part this Court's decision in *Posey I*, holding that appellate courts must review all sentences, even those within the guidelines range, for reasonableness, "which requires the reviewing court to consider whether the sentence is proportionate to the seriousness of the matter." *Posey (Posey II)*, 512 Mich at 352. Thus, we have now been directed to review defendant's within-guidelines sentence for reasonableness.

Generally, "the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017). A trial court abuses its discretion when the sentence imposed by the trial court is disproportionate to the seriousness of the circumstances involving the offense and the offender. *Milbourn*, 435 Mich at

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636. If the trial court selects a sentence that falls within the range recommended under the advisory guidelines, that sentence is presumptively proportionate. *Posey II*, 512 Mich at 357.

Our Court recently set forth the guidelines we must apply in reviewing a within-guidelines sentence for proportionality:

> "An appropriate sentence should give consideration to the reformation of the offender, the protection of society, the discipline of the offender, and the deterrence of others from committing the same offense." *People v Boykin*, 510 Mich 171, 183; 987 NW2d 58 (2022). With respect to sentencing and the guidelines, the key test is not whether a sentence departs from or adheres to the guidelines range. *Steanhouse*, 500 Mich at 472. The key test is whether the sentence is proportionate to the seriousness of the matter. *Id*. In regard to proportionality, the *Milbourn* Court "observed that the Legislature has determined to visit the stiffest punishment against persons who have demonstrated an unwillingness to obey the law after prior encounters with the criminal justice system." *Milbourn*, 435 Mich at 668. "The premise of our system of criminal justice is that, everything else being equal, the more egregious the offense, and the more recidivist the criminal, the greater the punishment." *People v Babcock*, 469 Mich 247, 263; 666 NW2d 231 (2003). [*People v Posey (Posey III) (On Remand)*, ___ Mich App ___, ___; ___ NW3d ___ (2023) (Docket No. 345491); slip op at 2-3.]

"In order to overcome the presumption that the sentence is proportionate, a defendant must present unusual circumstances that would render the presumptively proportionate sentence disproportionate." *People v Burkett*, 337 Mich App 631, 637; 976 NW2d 864 (2021) (quotation marks and citation omitted).

Because the Supreme Court vacated our prior opinion with regard to defendant's sentence only insofar as it is inconsistent with *Posey II*, *Haupt*, 997 NW2d 175, we need only consider the proportionality argument defendant raised on appeal. Here, defendant's sentence is at the bottom of the sentencing guidelines range of 78 to 130 months. Defendant suggests that the unusual circumstances that would allow this Court to conclude that his within-guidelines sentence was disproportionate are (1) the numerous plea offers offered by the prosecution that included various sentences of less than one year and no more than five months, and his consensual sexual relationship with AM, who he asserts "did not look like a child" and whose pictures "were not sold as child pornography." However, as we stated in our prior opinion, defendant repeatedly chose not to accept a plea offer that he now deems to include what is "illustrative of a fair sentence," and he acknowledges that consent is not a defense to the charges in this case. Accordingly, defendant has failed to show unusual circumstances and has failed to overcome the presumption that his within-guidelines sentence was proportionate.

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

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Appendix 4: Supreme Court Order for Remand 11-28-2023

Order

Michigan Supreme Court
Lansing, Michigan

November 28, 2023

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

163887

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163887
COA: 351593
Clare CC: 17-005731-FH

ALEXANDER JAMES HAUPT,
Defendant-Appellant.

_____/

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.

We do not retain jurisdiction.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 28, 2023

Clerk

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Appendix 5: Supreme Court Order Holding in Abeyance March 2 2022

Order

Michigan Supreme Court
Lansing, Michigan

May 3, 2022

Bridget M. McCormack,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

163887

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163887
COA: 351593
Clare CC: 17-005731-FH

ALEXANDER JAMES HAUPT,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the September 23, 2021 judgment of the Court of Appeals is considered and, it appearing to this Court that the cases of *People v Posey* (Docket No. 162373), *People v Stewart* (Docket No. 162497), and *People v King* (Docket No. 162327), are pending on appeal before this Court and that the decisions in those cases may resolve issues raised in the present application for leave to appeal, we ORDER that the application be held in ABEYANCE pending the decisions in those cases.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 3, 2022

Clerk

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Appendix 6: Court of Appeals denial Motion Reconsideration 11-01-2021

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Court of Appeals, State of Michigan

ORDER

People of MI v Alexander James Haupt

Docket No. 351593

LC No. 17-005731-FH

Christopher M. Murray
Presiding Judge

Michael J. Kelly

Colleen A. O'Brien
Judges

The motion for reconsideration is DENIED.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

November 2, 2021
Date

Chief Clerk

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Appendix 7: Court of Appeals First Opinion-09-23-2021

If this opinion indicates that it is "FOR PUBLICATION," it is subject to revision until final publication in the Michigan Appeals Reports.

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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXANDER JAMES HAUPT,

Defendant-Appellant.

UNPUBLISHED
September 23, 2021

No. 351593
Clare Circuit Court
LC No. 17-005731-FH

Before: MURRAY, C.J., and M. J. KELLY and O'BRIEN, JJ.

PER CURIAM.

A jury convicted defendant of producing child sexually abusive activity, MCL 750.145c(2)(a); two counts of distributing or promoting child sexually abusive activity, MCL 750.145c(3)(a); possession of child sexually abusive material, MCL 750.145c(4)(a); four counts of using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(d); and MCL 752.797(3)(f); and obstruction of justice, MCL 750.505. The trial court sentenced defendant to concurrent prison terms of 78 months to 20 years for the convictions of producing child sexually abusive activity and using a computer to commit the crime, 19 months to 7 years for the convictions of distributing or promoting child sexually abusive activity and using a computer to commit the crimes, 13 months to 4 years for the conviction of possession of child sexually abusive material and 19 months to 7 years for the conviction of using a computer to commit the crime, and 13 months to 5 years for the conviction of obstruction of justice.[1] Defendant appeals as of right. We affirm.

I. BASIC FACTS

As part of an investigation of a September 9, 2017 stalking complaint filed against defendant by his former girlfriend, AM, Sergeant Aaron Miller seized a cell phone from defendant. On September 12, 2017, Detective Donald VanBonn submitted an affidavit to search defendant's

[1] The sentences were ordered to be served concurrently with the sentences imposed for defendant's convictions in Clare Circuit Court No. 17-005730-FH pursuant to a *nolo contendere* plea to charges of interfering with electronic communications, MCL 750.540, and domestic violence, MCL 750.812, involving the same victim involved in this case.

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cell phone for evidence related to the stalking allegations. The magistrate concluded that there was probable cause for the warrant and authorized police to search defendant's phone for specific evidence relating to the stalking complaint, including evidence of electronic communications between defendant and AM. In part, the warrant authorized a search of the metadata, file data, setting data, photographic and video data, and communication data for evidence of excessive amounts of communications between defendant and AM and for ownership of the phone.

Detective VanBonn extracted the digital data from the cell phone and loaded it into a software program called Cellebrite, which sorted the data into relevant categories such as contacts, call logs, calendars, e-mail, and photos, and each category of evidence was placed together. Cellebrite enabled the police to search for items outlined in the search warrant. On the basis of his experience and training, Detective VanBonn was aware that stalkers often take photos of their victims without their consent and that evidence of stalking might be found in the photo gallery of a phone. While searching the cell phone data for evidence related to stalking, Detective VanBonn observed what he believed to be child sexually abusive material. He terminated the search at that point. He submitted an affidavit for a second search warrant to search the device for evidence related to child sexually abusive material. The magistrate concluded that there was probable cause for the warrant on the basis of the attached affidavit and issued a warrant authorizing the police to search the cell phone data for evidence of child sexually abusive material. A search of the cell phone pursuant to the second warrant uncovered 42 images of AM naked or performing sexual acts, including vaginal-penile penetration and fellatio, that were taken by the cell phone on or within 24 hours of December 19, 2016, when AM was 17 years old, at the location where AM lived with her parents. The search also uncovered text messages and e-mails indicating that defendant took the images at the request of a third party and sold the images on at least two occasions. Additionally, the search uncovered an audio file containing a recording in which defendant tried to coerce AM to withdraw a pending criminal complaint that she had filed against him after he physically assaulted her and took her cell phone from her when she attempted to call police.

II. SIXTH AMENDMENT RIGHT TO COUNSEL

Defendant argues that the trial court denied him his Sixth Amendment right to counsel by allowing appointed counsel to withdraw without appointing substitute counsel. Defendant did not object when the court allowed counsel to withdraw and serve only in an advisory capacity, or when the court told defendant that he would have to represent himself. Therefore, this issue is unpreserved. See *People v Cain*, 498 Mich 108, 114-115; 869 NW2d 829 (2015). Although defendant's claim that he was denied the right of counsel at a critical stage of criminal proceedings constitutes a claim of structural error, *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004), a defendant is still not entitled to relief unless he or she can satisfy the four requirements set out in *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), see *Cain*, 498 Mich at 116, 117 n 4. The first three *Carines* prongs require establishing that (1) an error occurred, (2) the error was "plain"—i.e., clear or obvious, and (3) the error affected substantial rights—i.e., the outcome of the lower court proceedings was affected. *Carines*, 460 Mich at 763. If the first three prongs are satisfied, the fourth *Carine*s prong calls upon an appellate court to "exercise its discretion in deciding whether to reverse," and (4) relief is warranted only when the court determines that the plain, forfeited error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

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A criminal defendant who faces incarceration has a constitutional right to counsel at all critical stages of the criminal process under the Sixth Amendment, which is applicable to the states through the Fourteenth Amendment. *People v Williams*, 470 Mich 634, 640-641; 683 NW2d 597 (2004). Before allowing a criminal defendant to proceed pro se, the trial court must determine whether the request is unequivocal, whether the defendant is knowingly, intelligently, and voluntarily waiving the right to legal counsel, and whether the defendant's self-representation will disrupt, unduly inconvenience, or otherwise burden the court and the administration of justice. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). In addition, the trial court must comply with MCR 6.005(D), which provides:

> 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.
>
> (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.

"[I]f the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *Russell*, 471 Mich at 191-192. "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *Russell*, 471 Mich at 191 (quotation marks and citation omitted).

The only period when defendant was without appointed counsel and proceeding *in propria persona* with advisory counsel was from the day appointed counsel was allowed to withdraw on June 10, 2019, until the day trial was to commence on July 23, 2019, when counsel was reappointed to represent defendant at trial. When appointed counsel was allowed to withdraw, defendant did not object to the withdrawal, but he also did not request to represent himself. The record indicates that the trial court failed to comply with the substance of *Anderson* and MCR 6.005(D).[2]

Nevertheless, even if the first three prongs of the plain error standard have been established, we conclude that reversal is not warranted under the fourth *Carines* prong. *Carines*, 460 Mich at 763-764. Defendant does not claim that he is actually innocent, and we are not convinced that the trial court's plain error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* "[T]he fourth *Carines* prong is meant to be applied on a case-specific and fact-intensive basis," *Cain*, 498 Mich at 121, and reversal is not justified if the "underlying purposes" of the right at issue have been alternatively upheld. *Id.* at 119.

[2] The trial court did, however, go over these considerations when addressing defendant's decision in 2018 to represent himself, a decision defendant subsequently changed.

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In *People v Kammeraad*, 307 Mich App 98, 130; 858 NW2d 490 (2014), this Court 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 were employed to delay and frustrate the orderly process of the lower court's proceedings." *Id*. at 131, citing *State v Mee*, 756 SE2d 103, 114 (NC App, 2014). In other words, "willful conduct by a defendant that results in the absence of defense counsel constitutes a forfeiture of the right to counsel." *Kammeraad*, 307 Mich App at 131. Forfeiture is distinguishable from waiver. When a defendant forfeits the right to counsel, the court is not required to determine whether the defendant knowingly, understandingly, and voluntarily gave up his right. *Id*.

The defendant in *Kammeraad* forfeited his right to counsel by "refus[ing] to accept, recognize, or communicate with appointed counsel, . . . refus[ing] . . . self-representation, and . . . refus[ing] to otherwise participate in the proceedings." *Id*., at 131-132. Although in *Kammeraad* the defendant refused to get dressed and walk into the courtroom, requiring court officers to place him in a wheelchair, cover him up, and haul him in, *id*. at 112, we said that a forfeiture can be found on the basis of less outlandish conduct. A defendant might forfeit his right to counsel, for example, by refusing to accept appointed counsel while also failing " 'to retain counsel within a reasonable time,' " or by acting " 'abusive toward' " his retained or appointed counsel. *Id*. atn132, quoting *United States v McLeod*, 53 F3d 322, 325 (CA 11, 1995).

This Court also recognized "the hybrid situation of 'waiver by conduct,' " also known as " 'forfeiture with knowledge,' " "which combines elements of forfeiture and waiver." *Kammeraad*, 307 Mich App at 133-134, quoting *United States v Goldberg*, 67 F3d 1092, 1101 (CA 3, 1995). Waiver by conduct/forfeiture with knowledge occurs when "a defendant is warned that he or she will lose counsel if the defendant engages in dilatory tactics, with any misconduct thereafter being treated as an implied request for self-representation." *Kammeraad*, 307 Mich App at 133.

Here, the trial court seemingly found that defendant had given up his right to counsel through his conduct. Although the court should have (again) advised defendant of the charges against him, the sentencing consequences he faced, and the various risks of representing himself before allowing appointed counsel to withdraw, this failure is not outcome-determinative given defendant's conduct. As the trial court noted, defendant's actions delayed the case for over two years, in part by repeatedly terminating the services of his retained and appointed counsel. He initially waived his preliminary examination in 2017 because the prosecution made a plea offer, but defendant continually rejected plea offers that his attorneys recommended he should take. Just one week before his previously adjourned October 2018 trial, defendant moved to remand to district court for a preliminary hearing. He made his counsel's work impossible. He refused to communicate with his retained counsel, and his lack of communication continued with his appointed counsel. He threatened his retained counsel's professional license, while he accused his appointed attorney of lying and colluding with the prosecutor's office.

During the less than two months that defendant represented himself with advisory counsel, two hearings took place: (1) a final pretrial hearing and (2) a hearing on defendant's motion to suppress evidence and motion to dismiss, and on the prosecutor's motion to use AM's preliminary examination testimony at trial. Consistent with his demonstrated lack of communication throughout the case, defendant did not reach out to advisory counsel for any advice or counsel during this time. Under these circumstances, the trial court did not violate defendant's

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constitutional right to counsel at a critical stage of the proceeding. Defendant has failed to show plain error.

III. ADJOURNMENT

Defendant requested an adjournment when advisory counsel was reappointed to represent defendant on the day trial was to begin on the ground that counsel was not prepared for trial. The trial court granted a one-day adjournment, and defense counsel told the court that the one-day agreement was acceptable to defendant. Defendant not only failed to preserve this issue, but he waived any error by expressly agreeing to the length of the adjournment. *People v Kowalski*, 489 Mich 488, 50; 803 NW2d 200 (2011). "A defendant waives an issue by expressly approving of the trial court's action." *People v Miller*, 326 Mich App 719, 726; 929 NW2d 821 (2019). "Waiver extinguishes any error, leaving nothing for this Court to review." *Id*. Thus, this issue is unpreserved and waived on appeal. See *id*.[3]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Relatedly, defendant argues that as a result of the trial court's one-day adjournment, counsel had effectively no time to prepare for trial, constituting the sort of complete denial of counsel described in *US v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Defendant did not preserve this issue by raising it in a motion for a new trial or a *Ginther*[4] hearing. *People v Heft*, 299 Mich App 69, 80; 829 NW2 266 (2012). Therefore, this Court reviews the argument for errors apparent on the record. *People v Hoang*, 328 Mich App 45, 63; 935 NW2d 396 (2019).

When the ineffective assistance of counsel falls within one of the rare situations described in *Cronic*, 466 US at 658-660, an attorney's performance is so deficient that prejudice is presumed. *Kammeraad*, 307 Mich App at 125. Among other situations, prejudice is presumed "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id*., quoting *Cronic*, 466 US at 659 (quotation marks omitted). This is what defendant argues happened here. But in order to invoke the *Cronic* standard, "the attorney's failure must be complete." *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

A brief time to prepare for trial can result in ineffective assistance of counsel where it is "demonstrate[d] that counsel failed to function in any meaningful sense as the Government's adversary." *Cronic*, 466 US at 688. Defendant's reliance on *Cronic* is sorely misplaced, because his argument regarding the one-day adjournment does not involve a *complete* failure to challenge

---

[3] Even if the issue was not waived, defendant fails to show plain error affecting his substantial rights. *Carines*, 460 Mich at 763. Counsel was originally appointed to represent defendant on October 26, 2018, and tried to work with defendant for nearly eight months until requesting to withdraw because of defendant's actions. During that time, counsel received discovery from the prosecutor and participated in the remand to district court for a preliminary examination. Counsel also made himself available to defendant while he served as advisory counsel from June 10, 2019 until July 23, 2019, when he was reappointed to represent defendant at trial. When trial commenced the following day, counsel did not say that he was not prepared to proceed.

[4] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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the prosecution's case. In fact, the record reveals the opposite. Counsel cross-examined AM at the preliminary examination, subjected Detective VanBonn to voir dire regarding his qualification as an expert in the analysis of cell phones, and objected to his qualification as an expert witness. He objected to VanBonn's testimony that defendant had offered to sell the images of AM, vigorously challenged the chain of custody as to the cell phone seized from defendant, and subjected Sergeant Miller to voir dire in challenging the chain of custody. Counsel objected to admission of the report of the analysis of data obtained from defendant's cell phone, and cross-examined Detective VanBonn at length regarding the differences between the description of the case for defendant's cell phone in the affidavit for the search warrant and the phone case of the phone that was retrieved from the Faraday box and searched.

Outside the presence of the jury, counsel moved to suppress evidence obtained during the execution of the second search warrant. Counsel vigorously argued that the search warrant for evidence of child sexually abusive material exceeded the scope of the original search warrant for evidence of stalking, while also arguing that the search warrant did not describe with particularity the evidence to be seized within the scope of probable cause in the search warrant. He argued that the second search warrant authorized a search of the phone, but did not authorize a search of the images that had been extracted during the first search. Counsel argued that Detective VanBonn exceeded the scope of the second warrant. Counsel provided a thorough opening statement, and also moved for a directed verdict of all charges. Counsel was knowledgeable about the facts and clearly subjected the prosecution's case to meaningful adversarial testing. Defendant's argument under *Cronic* fails.[5]

V. PRIOR RECORDED TESTIMONY

With respect to defendant's argument that the trial court erred by admitting AM's preliminary examination testimony at trial, we review the evidentiary ruling for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). A court abuses its discretion when its decision falls outside the range of principled outcomes. *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). But when "the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). We review for clear error the trial court's findings of fact. MCR 2.613(C). Clear error occurs when the reviewing court is left with a definite and firm conviction that a mistake has been made. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). We also review for an abuse of discretion the trial court's determination that the prosecutor employed due diligence. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). And we review de novo whether the admission of this evidence violated defendant's Sixth Amendment right of confrontation. *People v Bruner*, 501 Mich 220, 226; 912 NW.2d 514 (2018).

MRE 804(b)(1) creates a hearsay exception, when the declarant is unavailable, for "[t]estimony given as a witness at another hearing of the same or a different proceeding, if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." A declarant is unavailable when the declarant "is absent from the hearing and the proponent of a statement has been unable to

[5] Defendant does not argue that defense counsel's conduct was deficient under *Strickland*.

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procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown." MRE 804(a)(5). The test for due diligence is "one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." *Bean*, 457 Mich at 684.

The prosecutor established that AM was on active military duty training at the time of trial, which was sufficient to establish her unavailability. See *People v Boyles*, 11 Mich App 417, 421-423; 161 NW2d 448 (1968). Due diligence is an attempt to do everything reasonable, not everything possible, to obtain the presence of a witness. *Bean*, 457 Mich at 684. Although the prosecutor did not subpoena AM's commanding officer to testify as to her military orders as defendant suggests should have been done, the prosecutor was not required to exhaust all avenues to secure the witness's presence. Nothing in the record supports that AM could have been returned for trial. The trial court did not abuse its discretion by finding that the prosecutor employed due diligence and by admitting AM's preliminary examination testimony. MRE 804(a)(5); MRE 804(b)(1).[6]

Further, admission of AM's preliminary examination testimony did not violate defendant's right to confront the witnesses against him. The Confrontation Clause prohibits "the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). Testimony given at a preliminary examination is a testimonial statement. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). "The right of confrontation insures that the witness testifies under oath at trial, is available for cross-examination, and allows the jury to observe the demeanor of the witness." *People v Yost*, 278 Mich App 341, 370; 749 NW2d 753 (2008) (quotation marks and citations omitted). "The Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Owens*, 484 US at 559. AM was unavailable for trial and defense counsel cross-examined her at the preliminary examination, which is all that the Confrontation Clause requires.

VI. MOTION TO SUPPRESS

For his next argument defendant asserts that the trial court erred by denying his motion to suppress the evidence obtained from his cell phone pursuant to the second search warrant because (1) the affidavit for the initial search warrant failed to show probable cause for the search of the device, and (2) the initial search warrant authorizing a search of defendant's cell phone related to stalking lacked particularity and was overbroad, leading to the discovery of the evidence that provided probable cause for the second search warrant related to child sexually abusive material. He also argues that the good-faith exception to the exclusionary rule did not apply.

[6] Defendant did not request an adjournment to procure AM's appearance at trial. Further, the trial court did not err by failing to give a missing witness instruction, as that instruction is appropriate only when the trial court finds that the prosecution failed to exercise due diligence to secure the witness's presence at trial. *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004).

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We review de novo questions of constitutional law, *People v Hughes*, ___ Mich ___; ___ NW2d ___ (2021) (Docket No. 158652); slip op at 8, and a trial court's ultimate decision on a motion to suppress. *People v Mahdi*, 317 Mich App 446, 457; 894 NW2d 732 (2016). The trial court's factual findings on a motion to suppress are reviewed for clear error. *Id*.

The Fourth Amendment protection against unreasonable searches and seizures applies to cell phones. *Hughes*, ___ Mich at ___; slip op at 8-11. Unlike many other personal items, a person retains a privacy interest in the contents of his or her phone against searches even after the phone is validly seized. *Id*. at ___; slip op at 13-21. Therefore, "as with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be 'reasonably directed at uncovering' evidence of the criminal activity alleged in the warrant." *Id*. at ___; slip op at 21-22 (citation omitted). "Probable cause to issue a search warrant exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). "When reviewing courts assess a magistrate's conclusion that probable cause to search existed, courts are to consider the underlying affidavit in a common-sense and realistic manner." *People Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992). In addition, reviewing courts must also pay deference to a magistrate's determination that probable cause existed. This deference "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *Id*. at 603. The magistrate's decision must be based only upon facts alleged in the supporting affidavit. *People v Sloan*, 450 Mich 160, 167-169; 538 NW2d 380 (1995), overruled in part on other grounds in *People v Wager*, 460 Mich 118, 123; 594 NW2d 487 (1999).

The affidavit for the initial search warrant included AM's statements to police about the various places that defendant had followed her on the evening of September 8, 2017. When a traffic stop was made on defendant's vehicle, he admitted to following AM and to wanting to discover the identity of the man that she was with. The affidavit further said:

> During contact with [AM], she allowed Sgt. Miller to view her text messages from Alexander. Sgt. Miller read several text messages that had come from Alexander during the evening where he asks her to stop at various places to speak with him. Sgt. Miller observed only two responses from [AM], one of which being a picture of her and another male. Sgt. Miller spoke with Alexander about the text messages. Alexander advised Sgt. Miller that [AM] was texting and calling him. Alexander accused her of erasing her messages. Sgt. Miller asked Alexander if he still had the messages on his phone. Alexander advised that he did, however, he advised Sgt. Miller he did not want him checking the texts between he and [AM]. Alexander did have Sgt. Miller check his call log, as he claimed [AM] had called him during the incident that began in Mount Pleasant. Sgt. Miller noted several calls Alexander made to [AM's] phone during the past few hours. The call timer showed these calls were all made in a close proximity of each other, and they only lasted a few seconds. Alexander's phone log showed seven outgoing calls made to [AM] around the time this event was called in.
>
> Your affiant believes the issuance of this search warrant will lead to the recovery of the items listed in section 2 of this affidavit and search warrant[.] Wherefore, Affiant has probable cause to believe and does believe that evidence of a crime is located in the place sought to be searched.

The affidavit also described the property to be searched for and seized:

Affiant is seeking specific evidence related to a case being investigated by Sgt. Aaron Miller, involving a stalking complaint MCL 750.411H. This complaint involves the male subject, Alexander Haupt, and his ex-girlfriend ,[ ]AM]. Sgt. Miller is seeking electronic communication that has taken place between Alexander and [AM].

Investigators wish to seek specific evidence related to this case. I believe the GPS locations, web history, search terms and internet search history, photos/videos, communications on digital devices and cellular devices may contain relevant evidence, such as pictures, videos, voice, or text communications.

Evidence of ownership: Affiant knows that ownership and control of a digital device can be placed at issue through simple denial i.e. "that is not my phone." Your affiant knows through training and experience some of the best ways to establish control and ownership are by searching the calendar, contacts, photo gallery, communications, setting, and social networking activity. The calendar often contains appointments specific to an individual such as birthdays and doctor's appointments. Contacts often contain friends and associates specific to an individual such as mom, dad, dentist, etc . . . . A photo gallery often contains selfie photos that clearly depict the owner/holder of the phone. Communications via text messages, emails, and voicemails, often identify the sender/recipient buy [sic] name, additionally the context of the communications often the sender and/or recipient. Settings often contain user names, addresses, and phone numbers, Wi-Fi network tables, associated wireless devices (such as known Wi-Fi networks and Bluetooth devices), associated connected devices (such as backup syncing), stored passwords, and user dictionaries that can identify the owner/user of the device. Applications used for social media/messaging such as, but not limited to: Facebook messenger, KIK, snapchat, Instagram, and tinder often provide personal identifying statements to other contacts as well as photographic and video evidence. Therefore, Affiant is seeking all the above information to establish ownership and control of device.

Evidence of Communications: Your Affiant knows through training and experience that associates communicate together via phone calls, text messages, emails, and social network posts. These communications often contain direct and indirect statements about crimes. Furthermore, Affiant knows that communications rarely explicitly mention intent to commit a crime. Instead they often allude to such an intent: "gonna go hustle" for instance may be a declaration of an intent to commit a theft crime, but without contexts it is meaningless. Through Affiants training and experience, Affiant knows it is possible for cellular phone users to use a variety of messaging platforms including SMS, MMS, iChat, WhatsApp, KIK and others. Therefore, your Affiant seeks to search all of the communications evidence on the device to understand not only what was said, but what was intended and to whom it was said.

Your Affiant is seeking specific evidence related to this case. In additional to the previous information, Affiant believes cookies, bookmarks, web history,

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> search terms and intent search history, photos/video, communications on this cellular device may contain relevant evidence such as evidence of excessive amount of attempted communications. Therefore, Affiant is seeking permission to search all the metadata, file data, setting data, photographic and video data, and communication data on this cellular device.

The affidavit contained sufficient evidence for the magistrate to conclude that probable cause existed that a crime had been committed and that there was a fair probability that a search of particular data from defendant's cell phone would reveal evidence that defendant had been stalking AM. *Kazmierczak*, 461 Mich at 417-418. A reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Adams*, 485 Mich at 1039.

With respect to a search warrant, a search or seizure is unreasonable when conducted pursuant to an invalid warrant. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004). In additional to his probable cause argument above, defendant argues that the initial search warrant was invalid because it was overly broad and allowed officers to "search for evidence of other crimes for which there is no probable cause showing and no warrant."

Defendant relies primarily on *Hughes* in which the issue was whether, when the police obtain a warrant to search digital data from a cell phone for evidence of a crime, they are later permitted to review the same data for evidence of another crime without obtaining a second warrant. *Hughes*, ___ Mich at ___; slip op at 1. The Court concluded that

> in light of the particularity requirement embodied in the Fourth Amendment and given meaning in the United States Supreme Court's decision in *Riley v California*, 573 US 373; 134 S Ct 2473; 189 L Ed 2d 430 (2014) (addressing the "sensitive" nature of cell-phone data)—that a search of digital cell-phone data pursuant to a warrant must be reasonably directed at obtaining evidence relevant to the criminal activity alleged in *that* warrant. Any search of digital cell-phone that is not so directed, but instead is directed at uncovering evidence of criminal activity not identified in the warrant, is effectively a warrantless search that violates the Fourth Amendment absent some exception to the warrant requirement. Here, the officer's review of defendant's cell-phone data for incriminating evidence relating to an armed robbery was not reasonably directed at obtaining evidence regarding drug trafficking—the criminal activity alleged in the warrant—and therefore the search for that evidence was outside the purview of the warrant and thus violative of the Fourth Amendment. [*Id.*, slip op at 1-2.]

Here, the police did obtain a second warrant to review the same data for evidence of another crime. Defendant's reliance on *Hughes* pertains to the initial search warrant directed at obtaining evidence of stalking. He contends that the search warrant was overbroad and lacking in particularity because the warrant stated only that there " 'might' be evidence of stalking."

The Fourth Amendment only allows search warrants "particularly describing the place to be searched, and the persons or things to be seized." US Const, Am IV. "The purpose of the particularity requirement in the description of items to be seized is to provide reasonable guidance to the executing officers and to prevent their exercise of undirected discretion in determining what is subject to seizure." *People v Unger*, 278 Mich App 210, 245; 749 NW2d 272 (2008) (quotation

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marks and citation omitted). Whether a particular warrant satisfied the particularity requirement depends on "the circumstances and the types of items involved." *Id*.

Regarding the particularity requirement, *Hughes* explained 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.[7] The trial court did not err by denying defendant's motion to suppress.[8]

VII. OBSTRUCTION OF JUSTICE CONVICTION

We also reject defendant's argument that the evidence was insufficient to support his conviction of obstruction of justice. "Challenges to the sufficiency of the evidence are reviewed de novo." *People v Wang*, 505 Mich 239, 251; 952 NW2d 334 (2020). "In evaluating defendant's claim regarding the sufficiency of the evidence, this Court reviews the evidence in a light most favorable to the prosecutor to determine whether any trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt." *Id*. (quotation marks and citation omitted). All conflicts in the evidence are resolved in favor of the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), and circumstantial evidence and reasonable inferences drawn therefrom can constitute satisfactory proof of the crime, *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "Circumstantial evidence is evidence of a fact, or a chain of facts or circumstances, that, by indirection or inference, carries conviction to the mind and logically or reasonably establishes the fact to be proved." *Wang*, 505 Mich at 251 (quotation marks, citations, and alterations omitted).

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[7] To the extent that defendant argues that the officers exceeded the scope of the warrant by reviewing images on the phone that predated another criminal complaint filed by AM on June 30, 2017, the search of images on defendant's phone was directed toward evidence specified in the warrant and was reasonably directed at uncovering evidence related to the criminal activity identified in the warrant—stalking. See *Hughes*, ___ Mich at ___; slip op at 23. Nonetheless, Detective VanBonn stopped executing the search warrant when he saw evidence that he believed could be related to different criminal activity and he secured a second search warrant related to that criminal activity.

[8] Even assuming that the warrant was overbroad, Detective VanBonn reasonably relied on the search warrant in good faith, and the warrant was not so facially deficient that he could not reasonably presume it to be valid. *People v Goldston*, 470 Mich 523, 529; 682 NW2d 479 (2004).

Haupt Appendix, p.030a

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MCL 750.505 is the statutory provision that includes obstruction of justice, and provides that "any person who shall commit any indictable offense at the common law, for the punishment of which no provision is expressly made by any statute of this state, shall be guilty of a felony." Obstruction of justice is a common-law offense, "defined as 'an interference with the orderly administration of justice.' " *People v Jenkins*, 244 Mich App 1, 15; 624 NW2d 457 (2000) (citation omitted). Coercion of witnesses to constitute obstruction of justice. *People v Ormbsy*, 310 Mich 291, 300; 17 NW2d 187 (1945); *People v Tower*, 215 Mich App 318, 320; 544 NW2d 752 (1996). Specifically, an "attempt through threats and coercion to dissuade a witness from testifying" constitutes common-law obstruction of justice. *Id*. at 320. This crime is complete with the attempt through threats and coercion to dissuade a witness from testifying. *People v Coleman*, 350 Mich 268, 274; 86 NW2d 281 (1957). Whether the attempt succeeds in dissuading the witness is immaterial. *Id*. at 281. Words alone may be sufficient to constitute the crime. *Id*. at 280.

The obstruction of justice charge stemmed from the statements defendant made to AM in his truck after the altercation that resulted in separate charges of interference with electronic communications and domestic violence. Specifically, defendant told AM that she would face criminal charges if she did not withdraw her complaint to police, and that she could leave the truck if she would drop the charges. Defendant also told her to go the prosecutor's office that day to inform them that she wanted to drop the charges. By telling AM to drop the charges, and telling her not to answer any questions about why she was dropping the charges, defendant attempted to "willfully hamper, obstruct or interfere with a criminal investigation." Viewed in a light most favorable to the prosecution, the evidence was more than sufficient to establish defendant's guilt of obstruction of justice. *Wang*, 505 Mich at 251.

VIII. SENTENCING ISSUES

Finally, defendant posits several sentencing arguments. Defendant first argues that the trial court erred when scoring offense variables (OVs) 10 and 12. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*. "A trial court's findings of fact are clearly erroneous if, after reviewing the entire record, [this Court is] definitely and firmly convinced that the trial court made a mistake." *People v Carlson*, 332 Mich App 663, 666; 958 NW2d 278 (2020). "A trial court may consider all record evidence when calculating the sentencing-guidelines range." *People v Savage*, 327 Mich App 604, 617; 935 NW2d 69 (2019).

With respect to OV 10, defendant argues that the trial court improperly scored 10 points for exploitation of victim vulnerability because AM was not a vulnerable victim as she was in a consensual relationship with defendant. OV 10 is scored ten points when the "offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). "The mere existence of 1 or more of factors described in subsection (1) does not automatically equate with victim vulnerability." MCL 777.40(2). MCL 777.40(3)(b) defines "exploit" as "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(c) defines "vulnerability" as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." Therefore, to merit a score of 10 points for OV 10, a defendant must have manipulated a young

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victim for a selfish or unethical purpose and the victim's vulnerability must have been readily apparent.

Under these facts, OV 10 was easily scored 10 points. First, AM was clearly a victim, as she was the child victim portrayed in the material. *People v Althoff*, 280 Mich App 524, 536-537; 760 NW2d 764 (2008). Second, "[w]hen a person possesses child sexually abusive material, he or she personally engages in the systematic exploitation of the vulnerable victim depicted in that material. Evidence of possession therefore can support a score of 10 points for OV 10, reflecting that a defendant exploited a victim's vulnerability due to the victim's youth." *People v Needham*, 299 Mich App 251, 252; 829 NW2d 329 (2013). Here, defendant not only possessed the material, but also produced it and distributed it knowing that AM was 17 years old. Defendant exploited and manipulated AM for a selfish or unethical purpose by taking photos and videos of her engaging with him in sexual intercourse and fellatio and distributing the images to others for money. The trial court did not err by scoring 10 points for OV 10.

With respect to OV 12, defendant argues that the trial court erred by scoring 25 points because the large number of images taken by defendant within 24 hours should not have been separated and scored under both OV 12 and OV 13.

Under OV 12, MCL 777.42, the trial court had to determine whether defendant engaged in any "contemporaneous felonious criminal acts." If defendant did not engage in any contemporaneous felonious criminal acts, the trial court had to score OV 12 at zero points. MCL 777.42(1)(g). However, if defendant did engage in contemporaneous felonious criminal acts, the trial court has to evaluate the number of acts and whether the acts constituted crimes against a person or other crimes,[9] see MCL 777.42(1)(a) to (f), and then assign "the number of points attributable to the [corresponding subdivision of the statute] that has the highest number of points," MCL 777.42(1). A felonious criminal act is defined to be contemporaneous if the act occurred within 24 hours of the sentencing offense and will not result in a separate conviction. MCL 777.42(2)(a)(*i*) and (*ii*).

The trial evidence showed that defendant committed three or more acts of child sexually abusive material or activity within 24 hours of the child sexually abusive material or activity for which the trial court was not sentencing defendant. Detective VanBonn testified that he found 42 images of child sexually abusive material during the search. An extraction report exported from Cellebrite that identified the images was admitted at trial.[10] Thus, under the plain language of MCL 777.42(1)(a), the trial court had to score OV 12 at 25 points for three or more contemporaneous acts. And the trial court had to score both OV 12 and 13. See MCL 777.22(1) ("For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20"). Defendant conceded at sentencing that 25 points were properly scored for OV 13 for the sentencing offenses, and he does not specifically challenge the scoring of OV 13.[11] To the

[9] Defendant does not argue that the contemporaneous criminal acts were not acts against a person.

[10] Defendant does not argue that OV 11 applied to that conduct.

[11] Nonetheless, defendant's convictions for which he was sentenced were not and could not have been scored under OV 12 and were properly scored under OV 13 because the offenses were "part

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extent that defendant suggests that OV 13 was improperly scored, defendant has failed to show plain error in the scoring of OV 13. *Carines*, 460 Mich at 763.

Defendant also argues that even if the guidelines were properly scored, his sentence of 78 months to 20 years for producing child sexually abusive activity is unreasonable and disproportionate.

Generally, "the proper inquiry when reviewing a sentence for reasonableness is whether the trial court abused its discretion by violating the 'principle of proportionality' set forth in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), 'which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender.' " *People v Steanhouse*, 500 Mich 453, 459-460; 902 NW2d 327 (2017). A trial court abuses its discretion when the sentence imposed by the trial court is disproportionate to the seriousness of the circumstances involving the offense and the offender. *Milbourn*, 435 Mich at 636. If the trial court selects a sentence that falls within the range recommended under the advisory guidelines, that sentence is presumptively proportionate. *Id*. at 658. The reviewing court must affirm a sentence that falls within the recommended sentencing range absent an error in scoring or reliance on inaccurate information. MCL 769.34(10); *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016).

Here, defendant's sentence is at the bottom of the sentencing guidelines range of 78 to 130 months. Therefore, we must affirm defendant's sentences "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence[s]." Because we have concluded that the challenge to the scoring of the sentencing guidelines lacks merit, and defendant does not allege that inaccurate information was relied upon in determining his sentence, MCL 769.34(10) directs that the sentence be affirmed. See *People v Posey*, ___ Mich App___, ___; ___ NW2d ___ (2020) (Docket No. 345491); slip op at 8-9.

"A defendant can only overcome the presumption of proportionality by presenting unusual circumstances that would render a presumptively proportionate sentence disproportionate," such as a sentence that constitutes cruel and unusual punishment. *Posey*, ___ Mich App at ___; slip op at 7-8. Defendant appears to be suggesting that the unusual circumstances that would allow this Court to conclude that his within-guidelines sentence was disproportionate are (1) the numerous plea offers offered by the prosecution that included various sentences of less than one year and no more than five months, and his consensual sexual relationship with AM, who he asserts "did not look like a child" and whose pictures "were not sold as child pornography." However, defendant repeatedly chose not to accept a plea offer that he now deems to include what is "illustrative of a fair sentence," and he acknowledges that consent is not a defense to the charges in this case. Defendant has failed to show unusual circumstances and has failed to overcome the presumption that his within-guidelines sentence was proportionate.

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of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c).

Affirmed.

/s/ Christopher M. Murray
/s/ Michael J. Kelly
/s/ Colleen A. O'Brien

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Appendix 8: Haupt, Alex Registry of Actions through 03-10-2021

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D 001 HAUPT,ALEXANDER,JAMES DOB: 06/18/97 SEX: M RACE: W
450 SCHAEFFER CTN:181700124301 TCN:A517114494L
CLARE, MI 48617 SID:4919683E PIN:17-164-3
ATY: HOROWITZ,MICHAEL, PROSECUTOR: AMBROZAITIS,MICHELLE JOY,
P-81489 231-263-8333 APPOINTED P-62576
LOWER DISTRICT: 8010 CTY# 18 CASE# 17-0928-FY PRELIM: HELD 02/28/19
INCARCERATION DATE: 09/27/17 DISTRICT ARRAIGNMENT: 09/28/17

B 001 ALWAYS ME BAIL BONDS,,
204 N COURT STREET
MT. PLEASANT, MI 48858
IP001 MOORE,SCOTT,DOUGLAS
ATY:MOORE,SCOTT DOU
P-53609 989-386-2699

Bond History

Num	Amount	Type	Posted Date	Status
1	$100,000.00	Surety		

Charges

Num	Type	Charge(Pacc)	Asc/Trf	Charge Description	Offense Dt	Dsp	Evt
01	ORG	750.145C2		CHILD ABUS COMM ACTIVITY	12/19/16	GTY	JTW
02	ORG	752.7973F		COMP.-USE TO DO CRIME-MAX	12/19/16	GTY	JTW
03	ORG	750.145C3		CHILD ABUSE DIST/PROMOTE	12/19/16	GTY	JTW
04	ORG	752.7973D		COMPUTER-USING-CRIME	12/19/16	GTY	JTW
05	ORG	750.145C4-A		CHILD SEXUALLY ABUSIVE MA	12/19/16	GTY	JTW
06	ORG	752.7973D		COMPUTER-USING-CRIME	12/19/16	GTY	JTW
07	ORG	750.145C3		CHILD ABUSE DIST/PROMOTE	12/19/16	GTY	JTW
08	ORG	752.7973D		COMPUTER-USING-CRIME	12/19/16	GTY	JTW
09	ORG	750.505-A		JUSTICE OBSTRUCTION OF	12/19/16	GTY	JTW

Assessments

Account	Ordered	Paid	Balance
FINES	$500.00	$.00	$500.00
CO COURT COSTS	$500.00	$142.51	$357.49
CRIME VICTIM RIGHTS	$130.00	$130.00	$.00
STATE MINIMUM COSTS	$612.00	$612.00	$.00
ATTY FEES	$1,875.00	$.00	$1,875.00
DNA CIRCUIT CRT 2015	$60.00	$.00	$60.00
TOTAL:	$3,677.00	$884.51	$2,792.49

PAYMENT DUE: 11/12/20 LATE FEE DATE: 1/08/21

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments
1	12/06/17	MIENK		NOTICE SENT FOR: 12/11/17 10:40 AM CLK SJC ARRAIGNMENT

RECEIVED by MSC 9/1/2021 7:07:38 PM

		NO INFORMATION FELONY FILED	CLK	
		FINGERPRINT CARD FILED	CLK	
		ATY IS RETAINED	CLK	
3	12/07/17	ARRAIGNMENT	CRT	GXM
		WAIVED	CRT	
		WAIVER FILED.	CRT	
2	12/08/17	INFORMATION FELONY FILED &	CLK	SJC
		PROS DEMAND DISCOVERY	CLK	
4	12/11/17	PROOF OF SERVICE AND NOTICE TO	CLK	GXM
		APPEAR FOR ARRAIGNMENT SET FOR	CLK	
		12-11-17 @ 10:40 AM. CERT OF	CLK	
		MAILING.	CLK	
5	12/21/17	NOTICE SENT FOR: 01/16/18 10:40 AM PRE-TRIAL HEARING	CLK	RLR
		Defendant must be present if	CLK	
		on bond. Defense counsel must	CLK	
		provide defendant with notice	CLK	
		of hearing	CLK	
6	01/02/18	PROOF OF SERVICE AND NOTICE TO	CLK	SMS
		APPEAR.CERTIFICATE OF MAILING.	CLK	
7	01/16/18	PRE-TRIAL HEARING	CRT	GXM
		REPORTER/RECORDER NOT FOUND	CRT	
		HELD ON RECORD. P.T. SUMMARY	CRT	
		COMPLETED IN COURTROOM. PLEAS	CRT	
		OF NOT GUILTY ENTERED ON	CRT	
		BEHALF OF DEFENDANT. MOTION	CRT	
		TO CHANGE BOND RE: PHONE	CRT	
		DENIED. MATTER TO BE SET FOR	CRT	
		TRIAL. BOND CONTINUED.	CRT	
11	01/18/18	MISCELLANEOUS ACTION BY JUDGE	CRT	SJC
		P.T. SUMMARY FORM FILED	CRT	
8	01/25/18	NOTICE SENT FOR: 03/12/18 3:30 PM PRE-TRIAL HEARING	CLK	RLR
		Final Pretrial. Defendant must	CLK	
		be present. Defense counsel	CLK	
		must provide defendant with	CLK	
		notice of hearing	CLK	
9		NOTICE SENT FOR: 03/21/18 9:00 AM JURY TRIAL	CLK	RLR
		(2-3 days)	CLK	
10	01/26/18	SET NEXT DATE FOR: 02/12/18 10:40 AM MOTION HEARING	CLK	RLR
		Defendant's Motion for	CLK	
		Independent Expert	CLK	
12	01/29/18	PROOF/SERVICE & NOTICE/APPEAR	CLK	PAC
		03/12/2018 3:30PM PRE-TRIAL	CLK	
		HEARING	CLK	
		03/21/2018 9:00AM JURY TRIAL	CLK	
14		DEFENDANT'S SUPPLEMENTAL	CLK	GXM
		REQUEST FOR DISCOVERY.	CLK	
13	01/30/18	DEFENDANT'S MOTION FOR	CLK	GXM
		INDEPENDENT REVIEW, NOTICE OF	CLK	
		HEARING RE: HEARING RE:	CLK	
		MOTION SET FOR 2-12-18 @ 10:40	CLK	
		AM. PROOF OF SERVICE.	CLK	
15	02/05/18	DEFENDANT'S MOTION TO ADJOURN	CLK	GXM
		JURY TRIAL. NOTICE OF HEARING	CLK	

		RE: MOTION AND PROOF OF	CLK	
		SERVICE.	CLK	
16	02/06/18	PEOPLE'S RESPONSE TO	CLK	GXM
		DEFENDANT'S MOTION FOR	CLK	
		INDEPENDENT EXPERT REVIEW.	CLK	
		PROOF OF MAILING.	CLK	
17	02/09/18	REMOVE NEXT EVENT: 02/12/18 10:40 AM	CLK	RLR
		MOTION HEARING		
		Per Atty Weise (co-counsel	CLK	
		for defendant) motion has been	CLK	
		withdrawn	CLK	
18		MISCELLANEOUS ACTION BY JUDGE	CRT	SJC
		STIP TO ADJOURN 3-12-18 FINAL	CRT	
		P.T. & 3-21-18 JURY TRIAL &	CRT	
		POM	CRT	
19		PEOPLES SUPPLEMENTAL DISCOVERY	CLK	SJC
		REQUEST & PEOPLES RESPONSE TO	CLK	
		DEFS REQUEST FOR SUPPLEMENTAL	CLK	
		DISCOVERY	CLK	
24		STIPULATION TO ADJOURN FINAL	CLK	GXM
		PRETRIAL CONFERENCE SET FOR	CLK	
		3-12-18 @ 3:30 PM, AND THE	CLK	
		JURY TRIAL SCHEDULED FOR	CLK	
		3-21-18 @ 9 AM.	CLK	
20	02/14/18	REMOVE NEXT EVENT: 03/12/18 3:30 PM	CLK	RLR
		PRE-TRIAL HEARING		
21		REMOVE NEXT EVENT: 03/21/18 9:00 AM	CLK	RLR
		JURY TRIAL		
22		NOTICE SENT FOR: 05/17/18 9:30 AM	CLK	RLR
		PRE-TRIAL HEARING		
		Final Pretrial. Def must be	CLK	
		present. Def atty must provide	CLK	
		def w/notice of hrg. *Adj'd	CLK	
		from 3/12/18 by stip/order	CLK	
23		NOTICE SENT FOR: 05/23/18 9:00 AM	CLK	RLR
		JURY TRIAL		
		(2 days) Adjourned from	CLK	
		3/21/18 by stip/order	CLK	
25	02/20/18	MISCELLANEOUS ACTION BY JUDGE	CRT	GXM
		ORDER TO ADJOURN FINAL	CRT	
		PRETRIAL SET FOR 3-12-18 TO	CRT	
		5-17-18 @ 9:30 AM AND JURY	CRT	
		TRIAL SET FOR 2-21-18 TO	CRT	
		5-23-18 @ 9:00 AM.	CRT	
26		PROOF/SERVICE & NOTICE/APPEAR	CLK	SJC
		5-17-18 @ 9:30AM FOR PTH &	CLK	
		5-23-18 @ 9AM FOR JURY TRIAL	CLK	
		(2 DAYS)	CLK	
35	03/07/18	SUPPLEMENTAL REQUEST FOR	CLK	PAC
		DISCOVERY, PROOF OF SERVICE	CLK	
27	03/12/18	STIP/ORDER FOR ADJOURNMENT	CLK	PAC
		EMAILED TO JUDGE MIENK	CLK	
28	03/21/18	SET NEXT DATE FOR: 04/09/18 10:40 AM	CLK	RLR
		MOTION HEARING		
		Defense attorney's motion to	CLK	
		withdraw	CLK	
29	03/23/18	MOTION TO WITHDRAW	CLK	PAC

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		NOTICE OF HEARING 4/9/18 1040A	CLK	
		PROOF OF SERVICE	CLK	
30	03/30/18	REMOVE NEXT EVENT: 05/23/18 9:00 AM JURY TRIAL	CLK	RLR
31		REMOVE NEXT EVENT: 05/17/18 9:30 AM PRE-TRIAL HEARING	CLK	RLR
32		NOTICE SENT FOR: 07/24/18 9:00 AM JURY TRIAL	CLK	RLR
		Final pretrial. Defendant must	CLK	
		be present. Defense counsel	CLK	
		must provide defendant with	CLK	
		notice of hearing	CLK	
33		NOTICE SENT FOR: 08/01/18 9:00 AM JURY TRIAL	CLK	RLR
		(2 days) Adjoyrned from	CLK	
		5/23/18 by stip/order	CLK	
34	04/04/18	MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
		ORDER ADJOURNING JURY TRIAL	CRT	
		MAY 23, 2018	CRT	
36		PROOF/SERVICE & NOTICE/APPEAR	CLK	PAC
		7/24/18@9AM-PRE TRIAL HEARING	CLK	
		8/1/18@9AM-JURY TRIAL	CLK	
37	04/09/18	MOTION HEARING	CRT	GXM
		G MICHEL, #8066	CRT	
		COURT DENIES ATTORNEY GRABEL'S	CRT	
		MOTION TO WITHDRAW.	CRT	
38	04/12/18	REMOVE NEXT EVENT: 07/24/18 9:00 AM JURY TRIAL	CLK	RLR
39		REMOVE NEXT EVENT: 08/01/18 9:00 AM JURY TRIAL	CLK	RLR
40		NOTICE SENT FOR: 07/24/18 9:00 AM PRE-TRIAL HEARING	CLK	RLR
		Final Pretrial. Defendant must	CLK	
		be present. Defense counsel	CLK	
		must provide defendant with	CLK	
		notice of hrg	CLK	
41		NOTICE SENT FOR: 08/01/18 9:00 AM JURY TRIAL	CLK	RLR
		(2 days)	CLK	
42	04/16/18	PROOF/SERVICE & NOTICE/APPEAR	CLK	PAC
		PRE-TRIAL 07/24/18@9AM	CLK	
		JURY TRIAL 08/01/18@9AM	CLK	
		CERT OF MAILING	CLK	
43	06/08/18	ORIGINAL TRANSCRIPT OF	CLK	GXM
		CONDITIONAL WAIVERS OF	CLK	
		PRELIMINARY EXAMINATION.	CLK	
44	06/14/18	NOTICE SENT FOR: 06/21/18 11:15 AM STATUS CONFERENCE	CLK	RLR
45		PEOPLE'S MOTION TO WITHDRAW	CLK	PAC
		ALL PLEA OFFERS, PEOPLE'S	CLK	
		BRIEF IN SUPPORT OF MOTION TO	CLK	
		WITHDRAW ALL PLEA OFFERS,	CLK	
		NOTICE OF HEARING, PROOF OF	CLK	
		MAILING	CLK	
46	06/18/18	PROOF/SERVICE & NOTICE/APPEAR	CLK	CRG
		STATUS CONFERENCE 6/21/18	CLK	
		@11:15AM SENT CERT MAIL	CLK	

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47	06/20/18		DEFENDANT'S RESPONSE TO THE		CLK PAC
			PROSECUTION'S MOTION TO		CLK
			WITHDRAW ALL PLEA OFFERS		CLK
			PROOF OF DELIVERY		CLK
48	06/21/18		STATUS CONFERENCE		CRT PAC
			G MICHEL, #8066		CRT
			ADJOURNED		CRT
			MOTION TO WITHDRAW AS COUNSEL		CRT
			BY S GRABEL, ON BOTH CASES,		CRT
			GRANTED, PLEA OFFER OPEN UNTIL		CRT
			HEARING ON AUGUST 1ST, CANCEL		CRT
			TRIAL DATE. BOND CONTINUED		CRT
			CEO #9371		CRT
49			REMOVE NEXT EVENT: 07/24/18 9:00 AM PRE-TRIAL HEARING		CLK PAC
50			REMOVE NEXT EVENT: 08/01/18 9:00 AM JURY TRIAL		CLK PAC
51			NOTICE SENT FOR: 08/01/18 9:00 AM PRE-TRIAL HEARING		CLK PAC
			ADJOURNED FROM 7/24/2018		CLK
53			REMOVE NEXT EVENT: 08/01/18 9:00 AM PRE-TRIAL HEARING		CLK PAC
			ADJOURNED FROM 6/21/2018		CLK
54			NOTICE SENT FOR: 08/01/18 9:00 AM STATUS CONFERENCE		CLK PAC
			ADJOURNED FROM 6/21/2018		CLK
52	06/22/18	D 001	FROM: GRABEL,SCOTT,		CLK PAC
			TO: PRO-PER		CLK
55			PROOF/SERVICES & NOTICE/APPEAR		CLK PAC
			STATUS CONF: 08/1/18@9:00AM		CLK
			CERT OF MAILING		CLK
56	06/25/18		MISCELLANEOUS ACTION BY JUDGE		CRT GXM
			ORDER GRANTING ATTORNEY		CRT
			GRABEL'S MOTION TO WITHDRAW.		CRT
57	07/19/18		ORIGIONAL TRANSCRIPT RECEIVED		CLK CRG
			STATUS CONFERENCE & DEFENSE		CLK
			ATTORNEY'S MOTION TO WITHDRAW		CLK
			HELD 6/21/18		CLK
58	08/01/18		STATUS CONFERENCE		CRT SBP
			G MICHEL, #8066		CRT
			TO BE SET ON TRIAL DOCKET.		CRT
59	08/02/18		NOTICE SENT FOR: 10/23/18 10:00 AM PRE-TRIAL HEARING		CLK RLR
			Final Pretrial. Defendant must		CLK
			be present		CLK
60			NOTICE SENT FOR: 10/30/18 9:00 AM JURY TRIAL		CLK RLR
			(2-3 days)		CLK
61	08/06/18		PROOF/SEVICE & NOTICE/APPEAR		CLK SBP
			PTH 10/23/18 @ 10:00AM		CLK
			JURY TRIAL 10/30/18 @ 9:00AM		CLK
			CERT OF MAILING		CLK
62	10/16/18		PEOPLE'S ENDORSED WITNESS LIST		CLK PAC
			PEOPLE'S PROPOSED EXHIBIT LIST		CLK
			PROOF OF MAILING		CLK
63	10/17/18		AMENDED FELONY INFORMATION.		CLK GXM
			AMENDED TO CORRECT AGENCY		CLK

RECEIVED by MSC 9/1/2021 7:07:38 PM

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			REPORT NUMBER.		CLK	
64	10/19/18		INFORMATION FELONY 2ND		CLK	MLC
			AMENDED. NOLLE COUNT 7 AND		CLK	
			CHANGE ON OR ABOUT DATE		CLK	
65	10/22/18		MISCELLANEOUS ACTION BY JUDGE		CRT	MLC
			MOTION/ORDER OF NOLLE PROSEQUI		CRT	
			RE: COUNT 7		CRT	
66		00007	MISCELLANEOUS ACTION BY JUDGE		CRT	MLC
			NOLLE PROSEQUI		CRT	
67	10/23/18		PROOF OF SERVICE FILED		CLK	MLC
			PERSONAL SERVICE OF MOTION TO		CLK	
			ADJOURN TRIAL, NOTICE OF		CLK	
			HEARING, 2ND AMENDED		CLK	
			INFORMATION, NOLLE PROS,		CLK	
			WITNESS AND EXHIBIT LIST,JURY		CLK	
			INSTRUCTIONS,SENT GUIDELINE,		CLK	
			PLEA OFFER SUMMARY, 3 CCSD		CLK	
			REPORT UPON JIM HAUPT 10/19/18		CLK	
68			PRE-TRIAL HEARING		CRT	CRG
			G MICHEL, #8066		CRT	
			DEF REJECTS PLEA OFFER MATTER		CRT	
			TO PROCEED TO TRIAL. DEF		CRT	
			WAIVES RIGHT TO CAA. CT		CRT	
			ACCEPTS SELF REPRESENTATION.		CRT	
			CT DENIES DEF'S MOTION TO		CRT	
			REMAND. TRIAL TO PROCEED ON		CRT	
			10/30.		CRT	
69			MISCELLANEOUS ACTION BY JUDGE		CRT	CRG
			PRE-TRIAL SUMMARY		CRT	
70	10/24/18		SET NEXT DATE FOR: 10/30/18	9:00 AM	CLK	RLR
			JURY TRIAL			
71			SET NEXT DATE FOR: 10/30/18	9:00 AM	CLK	RLR
			JURY TRIAL			
72	10/26/18		REMOVE NEXT EVENT: 10/30/18	9:00 AM	CLK	RLR
			JURY TRIAL			
73			MISCELLANEOUS ACTION BY JUDGE		CRT	CRG
			REQUEST/ORDER FOR CAA. COURT		CRT	
			APPOINTS ATTORNEY MOORE.		CRT	
74	10/29/18		MISCELLANEOUS ACTION BY JUDGE		CRT	CRG
			JUDGMENT OF SENTENCE. COPIES		CRT	
			DISTRIBUTED.		CRT	
75	10/30/18		APPEARANCE S MOORE CAA		CLK	PAC
			PROOF OF SERVICE		CLK	
76		D 001	FROM: PRO-PER		CLK	PAC
			TO: MOORE,SCOTT DOUGLAS,		CLK	
77			NOTICE SENT FOR: 11/20/18	9:30 AM	CLK	RLR
			STATUS CONFERENCE			
78			NOTICE SENT FOR: 01/29/19	9:15 AM	CLK	RLR
			PRE-TRIAL HEARING			
			Final Pretrial. Defendant must		CLK	
			be present. Defense counsel		CLK	
			must provide defendant with		CLK	
			notice of hearing		CLK	
79			NOTICE SENT FOR: 02/20/19	9:00 AM	CLK	RLR
			JURY TRIAL			
80	11/06/18		PROOF/SERVICE & NOTICE/APPEAR		CLK	PAC
			STATUS CONF: 11/20/18@930AM		CLK	

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			PRE-TRIAL: 1/29/19@915AM	CLK	
			JURY TRIAL: 2/20/18@9AM	CLK	
			CERT OF MAILING	CLK	
81	11/20/18		STATUS CONFERENCE	CRT	SBP
			S PECHACEK, #9372 CEO	CRT	
			COURT ADJOURNS HEARING AND	CRT	
			WILL SCHEDULE ANOTHER STC	CRT	
			OUT A COUPLE OF WEEKS.	CRT	
82			NOTICE SENT FOR: 12/10/18 9:00 AM STATUS CONFERENCE	CLK	PAC
83			PROOF/SERVICE & NOTICE/APPEAR	CLK	PAC
			STATUS CONF: 12/10/18@9AM	CLK	
			CERT OF MAILING	CLK	
84	12/10/18	00003	STATUS CONFERENCE	CRT	PAC
			G MICHEL, #8066	CRT	
			REMAND TO DISTRICT COURT	CRT	
			COURT REMANDS TO DISTRICT CT	CRT	
			BOND CONTINUED	CRT	
85		00005	STATUS CONFERENCE	CRT	PAC
			G MICHEL, #8066	CRT	
			REMAND TO DISTRICT COURT	CRT	
			COURT REMANDS TO DISTRICT CT	CRT	
			BOND CONTINUED	CRT	
86			MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
			PRE-TRIAL SUMMARY FILED	CRT	
87	12/11/18		REMOVE NEXT EVENT: 01/29/19 9:15 AM PRE-TRIAL HEARING	CLK	RLR
88			REMOVE NEXT EVENT: 02/20/19 9:00 AM JURY TRIAL	CLK	RLR
89	01/10/19	00099	MISCELLANEOUS ACTION BY JUDGE	CRT	MLC
			REMAND TO DISTRICT COURT	CRT	
			ORDER TO REMAND THIS MATTER TO	CRT	
			D.C.	CRT	
90		00099	REMAND ORDER	CLK	MLC
91	01/14/19		SET NEXT DATE FOR: 02/26/19 9:00 AM STATUS CONFERENCE	CLK	SBP
92			REMOVE NEXT EVENT: 02/26/19 9:00 AM STATUS CONFERENCE	CLK	SBP
93	02/28/19		RETURN TO CIRCUIT COURT	CLK	GXM
			RETURNED FROM DISTRICT COURT	CLK	
94	03/01/19		INFORMATION FELONY 3RD	CLK	MLC
			AMENDED	CLK	
95			NOTICE SENT FOR: 03/11/19 9:00 AM ARRAIGNMENT	CLK	MLC
			CAA SCOTT MOORE	CLK	
96			PROOF/SERVICE & NOTICE/APPEAR	CLK	MLC
			CERT OF MAILING FOR ARR	CLK	
			3/11/19 @ 9:00AM	CLK	
97	03/04/19		CASE REOPENED	CLK	MLC
98	03/06/19		MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
			DEMAND/ORDER FOR TRANSCRIPT OF	CRT	
			PRELIMINARY EXAM	CRT	
99	03/11/19		ARRAIGNMENT	CRT	MLC
			P CHAFFEE, #9373 CEO	CRT	
			DEF WAIVES READING. NG PLEAS	CRT	
			ENTERED ON BEHALF OF THE DEF.	CRT	
			TO BE SET ON TRIAL DOCKET	CRT	

100	03/26/19	NOTICE SENT FOR: 04/08/19 9:00 AM PRE-TRIAL HEARING	CLK	RLR
		Defendant must be present if on bond. Defense counsel must provide defendant with notice of hearing	CLK	
101	03/29/19	PROOF/SERVICE & NOTICE/APPEAR PTH 4/8/19 @9:00AM SENT CERT MAIL	CLK	CRG
102	04/03/19	REMOVE NEXT EVENT: 04/08/19 9:00 AM PRE-TRIAL HEARING	CLK	RLR
103		NOTICE SENT FOR: 04/22/19 9:00 AM PRE-TRIAL HEARING	CLK	RLR
		Def must be present if on bond Def atty must provide def w/ notice of hrg. *Adjourned from 4/8/19 by stip/order	CLK	
104		REMOVE NEXT EVENT: 04/08/19 9:00 AM PRE-TRIAL HEARING	CLK	RLR
105	04/05/19	MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
		STIPULATED MOTION AND ORDER TO ADJOURN PRETRIAL CONFERENCE FROM 4/8/19	CRT	
106	04/08/19	PROOF/SERVICE & NOTICE/APPEAR CERT OF MAILING FOR PTH 4/22/19 @ 9:00AM	CLK	MLC
107	04/22/19	PRE-TRIAL HEARING	CRT	MLC
		P CHAFFEE, #9373 CEO	CRT	
		PRE-TRIAL SUMMARY FILED.	CRT	
		MATTER TO BE SET FOR STC IN 45 DAYS	CRT	
108		MISCELLANEOUS ACTION BY JUDGE	CRT	MLC
		PRE-TRIAL SUMMARY FILED	CRT	
109	04/24/19	NOTICE SENT FOR: 06/10/19 9:00 AM STATUS CONFERENCE	CLK	RLR
110		NOTICE SENT FOR: 06/25/19 11:45 AM PRE-TRIAL HEARING	CLK	RLR
		Final Pretrial. Defendant must be present. Defense counsel must provide defendant with notice of hearing	CLK	
111		NOTICE SENT FOR: 07/23/19 9:00 AM JURY TRIAL	CLK	RLR
		(2-3 days)	CLK	
112	04/25/19	ORIGINAL TRANSCRIPT FILED	CLK	PAC
		PRELIMINARY EXAM 2/28/19	CLK	
		JUDGE JOSH FARRELL 60752	CLK	
113	04/26/19	PROOF/SERVICE & NOTICE/APPEAR	CLK	CRG
		STC 6/10/19 @9:00AM, FINAL PTH 6/25/19 @11:45AM, JYT 7/23/19 @9:00AM SENT CERT MAIL	CLK	
114	06/05/19	EX PARTE MOTION FOR ATTORNEY TO WITHDRAW	CLK	PAC
115		MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
		ORDER DENYING EX PARTE MOTION FOR ATTORNEY TO WITHDRAW	CRT	
		DENIED	CRT	

RECEIVED by MSC 7/1/2025 7:07:48 PM

116	06/10/19		STATUS CONFERENCE	CRT	MLC
			C CHARTIER, #9386 CEO	CRT	
			COURT INFORMED PARTIES OF	CRT	
			DENIAL OF MOTION TO WITHDRAW	CRT	
			AS COUNSEL. COURT KEEPS MR	CRT	
			MOORE AS ADVISORY COUNSEL, DEF	CRT	
			WILL REPRESENT SELF. TRIAL	CRT	
			STAYS AS SCHEDULED.	CRT	
117		D 001	FROM: MOORE,SCOTT DOUGLAS,	CLK	MLC
			TO: PRO-PER	CLK	
118	06/25/19		DEFENDANT'S MOTION TO SUPPRESS	CLK	CRG
119			DEFENDANT'S MOTION TO DISMISS	CLK	CRG
120			PRE-TRIAL HEARING	CRT	CRG
			G MICHEL, #8066	CRT	
			IF OFFER IS NOT ACCEPTED BY	CRT	
			JULY 6TH THE COURT WILL NOT	CRT	
			ALLOW DEF TO TAKE ADVANTAGE	CRT	
			OF OFFER. CASE WILL GO TO	CRT	
			TRIAL JULY 23RD AS SCHEDULED.	CRT	
121			NOTICE SENT FOR: 07/02/19 9:00 AM	CLK	RLR
			MOTION HEARING		
			Defendant's Motion to Dismiss	CLK	
122			NOTICE SENT FOR: 07/02/19 9:01 AM	CLK	RLR
			MOTION HEARING		
			Defendant's Motion to Suppress	CLK	
123	06/27/19		PROOF/SERVICE & NOTICE/APPEAR	CLK	MLC
			CERT OF MAILING FOR MOH 7/2/19	CLK	
124			PEOPLE'S MOTION TO USE PRIOR	CLK	CRG
			RECORDED TESTIMONY OF	CLK	
			COMPLAINANT, NOTICE OF HEARING	CLK	
			ON 7/2/19 @9:00AM, & PROOF OF	CLK	
			SERVICE	CLK	
125	06/28/19		PEOPLE'S RESPONSE TO	CLK	MLC
			DEFENDANT'S MOTION TO DISMISS	CLK	
126			PROOF OF SERVICE OF PEOPLE'S	CLK	MLC
			RESPONSE TO DEFENDANT'S MOTION	CLK	
			TO DISMISS	CLK	
127	07/01/19		PEOPLE'S RESPONSE TO	CLK	PAC
			DEFENDANT'S MOTION TO SUPPRESS	CLK	
			PROOF OF SERVICE	CLK	
128	07/02/19		DEFENDANT'S COUNTER-RESPONSE	CLK	MLC
			TO PEOPLE'S RESPONSE TO	CLK	
			DEFENDANT'S MOTION TO SUPRESS	CLK	
129			MOTION HEARING	CRT	GXM
			G MICHEL, #8066	CRT	
			UNDER ADVISEMENT	CRT	
			- RETURNED 7/22/19	CRT	
			DEFENDANT'S MOTION TO	CRT	
			SUPPRESS. COURT TO TAKE	CRT	
			MOTION UNDER ADVISEMENT.	CRT	
			DEFENDANT HAS UNTIL FRIDAY,	CRT	
			JULY 5TH AT 4:00 TO FILE ANY	CRT	
			FURTHER MOTIONS.	CRT	
130			MOTION HEARING	CRT	GXM
			G MICHEL, #8066	CRT	
			DEFENDANT'S MOTION TO DISMISS.	CRT	
			COURT DENIES MOTION.	CRT	

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		ORDER DENYING DEFENDANT'S	CRT	
		MOTION TO DISMISS.	CRT	
131		MOTION HEARING	CRT	GXM
		G MICHEL, #8066	CRT	
		PEOPLES MOTION TO USE PRIOR	CRT	
		RECORDED TESTIMONY. COURT	CRT	
		GRANTS MOTION. DEFENDANT	CRT	
		DECLINES ALL PLEA OFFERS AT	CRT	
		THIS TIME. ORDER GRANTING	CRT	
		MOTION.	CRT	
132	07/03/19	SEND NOTICE FOR: 07/12/19 9:00 AM MOTION HEARING	CLK	RLR
		People's Motion to Compel	CLK	
133		PEOPLE'S RENEWED MOTION TO	CLK	CRG
		COMPEL DISCOVERY, BRIEF IN	CLK	
		SUPPORT, NOTICE OF HEARING ON	CLK	
		JULY 12 @9:00AM, & PROOF OF	CLK	
		SERVICE	CLK	
134		PEOPLES RESPONSE TO DEFENDANTS	CLK	SBP
		COUNTER RESPONSE TO PEOPLES	CLK	
		RESPONSE TO DEFENDANTS MOTION	CLK	
		TO SUPRESS.	CLK	
		PROOF OF SERVICE.	CLK	
135	07/05/19	DEFENDANT'S PROPOSED EXHIBIT	CLK	CRG
		LIST, DEFENDANT'S WITNESS LIST	CLK	
		& DEFENDANT'S RESPONSE TO	CLK	
		PEOPLE'S MOTION TO USE PRIOR	CLK	
		RECORDED TESTIMONY OF	CLK	
		COMPLAINANT	CLK	
136	07/08/19	SET NEXT DATE FOR: 07/12/19 9:01 AM MOTION HEARING	CLK	RLR
		People's Motion to Strike	CLK	
		Defense Witnesses and Exhibits	CLK	
137		PEOPLE'S ENDORSED AMENDED	CLK	CRG
		WITNESS LIST	CLK	
138		PROOF OF MAILING RE: PEOPLE'S	CLK	CRG
		ENDORSED AMENDED WITNESS LIST	CLK	
139		PEOPLE'S MOTION TO STRIKE	CLK	MLC
		DEFENSE WITNESSES AND EXHIBITS	CLK	
140		NOTICE OF HEARING	CLK	MLC
141		PROOF OF MAILING	CLK	MLC
142	07/12/19	MOTION HEARING	CRT	MLC
		P CHAFFEE, #9373 CEO	CRT	
		PEOPLE'S MOTION TO STRIKE	CRT	
		IS GRANTED BY THE COURT	CRT	
143		MOTION HEARING	CRT	MLC
		P CHAFFEE, #9373 CEO	CRT	
		PEOPLE'S MOTION TO COMPEL IS	CRT	
		CONDITIONALLY GRANTED UPON	CRT	
		FILING OF AMENDED PROOF OF	CRT	
		SERVICE	CRT	
144		AMENDED PROOF OF SERVICE RE:	CLK	GXM
		PEOPLE'S RENEWED MOTION TO	CLK	
		COMPEL DISCOVERY AND NOTICE OF	CLK	
		HEARING.	CLK	
145		MISCELLANEOUS ACTION BY JUDGE	CRT	GXM
		ORDER GRANTING THE PEOPLE'S	CRT	

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		MOTION TO COMPEL DISCOVERY.	CRT	
146		AMENDED PROOF OF SERVICE RE:	CLK	GXM
		PEOPLE'S RENEWED MOTION TO	CLK	
		COMPEL DISCOVERY AND NOTICE OF	CLK	
		HEARING.	CLK	
147		MISCELLANEOUS ACTION BY JUDGE	CRT	GXM
		ORDER GRANTING PEOPLE'S MOTION	CRT	
		TO STRIKE DEFENSE WITNESSES	CRT	
		AND EXHIBITS.	CRT	
148	07/16/19	PROOF OF SERVICE RE: PEOPLE'S	CLK	CRG
		RENEWED MOTION TO COMPEL	CLK	
		DISCOVERY & PEOPLE'S RESPONSE	CLK	
		TO DEF'S COUNTER RESPONSE TO	CLK	
		PEOPLE'S RESPONSE TO DEF'S	CLK	
		MOTION TO SUPPRESS AND	CLK	
		HEARING NOTICE, ORDER	CLK	
		COMPELLING DEF TO PRODUCE	CLK	
		DISCOVERY WITHIN 7 DAYS, PROOF	CLK	
		OF SERVICE & AMENDED POS	CLK	
149		PROOF OF SERVICE RE: PEOPLE'S	CLK	CRG
		MOTION TO STRIKE DEFENSE	CLK	
		WITNESSES AND EXHIBITS, NOTICE	CLK	
		OF HEARING, PROOF OF MAILING,	CLK	
		AND ORDER STRIKING DEFENSE	CLK	
		WITNESSES AND EXHIBITS	CLK	
150	07/17/19	PEOPLE'S ENDORSED 2ND	CLK	MLC
		AMENDED WITNESS LIST	CLK	
151		DEFENDANT'S MOTION TO COMPEL	CLK	CRG
		DISCOVERY, BRIEF IN SUPPORT,	CLK	
		AND PROOF OF SERVICE	CLK	
152		DEFENDANT'S RESPONSE TO	CLK	CRG
		PEOPLE'S RENEWED MOTION TO	CLK	
		COMPEL DISCOVERY & PROOF OF	CLK	
		SERVICE	CLK	
153		DEFENDANT'S RESPONSE TO	CLK	CRG
		PEOPLE'S MOTION TO STRIKE	CLK	
		DEFENSE WITNESSES AND EXHIBITS	CLK	
		BRIEF IN SUPPORT AND PROOF OF	CLK	
		SERVICE	CLK	
154	07/19/19	MISCELLANEOUS ACTION BY JUDGE	CRT	MLC
		ORDER ON DEFENDANT'S MOTION TO	CRT	
		SUPPRESS. IT IS ORDERED THAT	CRT	
		THE MOTION TO SUPRESS IS	CRT	
		DENIED.	CRT	
155		PROOF OF MAILING OF ORDER ON	CLK	MLC
		DEFENDANT'S MOTION TO SUPPRESS	CLK	
156	07/22/19	MISCELLANEOUS ACTION BY JUDGE	CRT	RLR
		RETURN FROM UNDERADVISEMENT	CRT	
157	07/23/19	JURY TRIAL HALF DAY	CRT	SBP
		G MICHEL, #8066	CRT	
		SCOTT MOORE RE-APPOINTED AS	CRT	
		DEF COUNSEL. TRIAL ADJOURNED	CRT	
		TO 7/24/19 @ 9:00AM. MOTION	CRT	
		TO SUPPRESS DENIED. MOTION TO	CRT	
		RECONSIDER DENIED. MOTIONS TO	CRT	
		COMPEL DENIED.	CRT	
158		NOTICE SENT FOR: 07/24/19 9:00 AM	CLK	SBP

RECEIVED by MSC 8/1/2025 7:07:38 PM

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			JURY TRIAL	
159			PROOF/SERVICE & NOTICE/APPEAR	CLK SBP
			JURY TRIAL 7/24/19 @ 9:00AM	CLK
			CERTIFICATE OF MAILING	CLK
160			STATUS CONFERENCE	CRT SBP
			STATUS CONFERENCE HELD IN	CRT
			CHAMBERS 7/18. COULD NOT REACH	CRT
			DEF. DEF FILED RESPONSE TO	CRT
			MOTION, COURT WILL TREAT	CRT
			RESPONSE AS A MOTION TO	CRT
			RECONSIDER 2 MOTIONS TO COMPEL	CRT
161		D 001	FROM: PRO-PER	CLK SBP
			TO: MOORE,SCOTT DOUGLAS,	CLK
162	07/24/19		JURY TRIAL WHOLE DAY	CRT SBP
			P CHAFFEE, #9373 CEO	CRT
			JURY TRIAL HELD - FULL DAY.	CRT
163	07/25/19	00001	JURY TRIAL WHOLE DAY	CRT SBP
			P CHAFFEE, #9373 CEO	CRT
			FOUND GUILTY	CRT
			JURY TRIAL. DEFS MOTION TO	CRT
			SUPPRESS IS DENIED BY THE	CRT
			COURT. DEFS MOTION FOR	CRT
			DIRECTED VERDICT DENIED BY THE	CRT
			COURT. CLOSING ARGUMENTS.	CRT
			DELIBERATION. VERDICT REACHED	CRT
			BY JURY. DEF FOUND GUILTY ON	CRT
			ALL CHARGES. BOND CANCELED.	CRT
			DEF REMANDED INTO CUSTODY OF	CRT
			CCSD PENDING SENTENCING.	CRT
164		00001	SET NEXT DATE FOR: 08/21/19 9:00 AM	CLK SBP
			SENTENCING	
165		00002	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
166		00003	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
167		00004	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
168		00005	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
169		00006	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
170		00007	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
171		00008	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
172		00009	JURY TRIAL WHOLE DAY	CRT SBP
			FOUND GUILTY	CRT
173			MISCELLANEOUS ACTION BY JUDGE	CRT SBP
			P CHAFFEE, #9373 CEO	CRT
			MOTION TO KEEP PEOPLE'S	CRT
			EXHIBITS 1(PHOTO PRINTOUT) &	CRT
			3 (IPHONE) IN THE CUSTODY OF	CRT
			CCSD. ORDER TO BE PREPARED BY	CRT
			PROSECUTOR FOR JUDGE'S	CRT
			SIGNATURE.	CRT
174	07/26/19		OFFICIAL VERDICT FORM SIGNED	CLK SBP
			BY THE FOREPERSON.	CLK

175			REMOVE NEXT EVENT: 08/21/19 9:00 AM SENTENCING	CLK	SBP
			NOT JUDGE MIENK DATE	CLK	
176			NOTICE SENT FOR: 08/26/19 8:45 AM SENTENCING	CLK	SBP
			MOVED FROM 8/21/19, NOT A	CLK	
			JUDGE MIENK COURT DATE	CLK	
177			PROOF/SERVICE & NOTICE/APPEAR	CLK	SBP
			8/26/19 @ 8:45 AM - SENTENCING	CLK	
			CERTIFICATE OF MAILING	CLK	
178			PEOPLE'S ANSWER TO DEFENDANT'S	CLK	GXM
			MOTION TO REINSTATE BOND,	CLK	
			BRIEF IN SUPPORT AND PROOF OF	CLK	
			SERVICE.	CLK	
179	07/30/19		MISCELLANEOUS ACTION BY JUDGE	CRT	CRG
			ORDER REGARDING EXHIBIT	CRT	
180	07/31/19		NOTICE SENT FOR: 08/02/19 9:00 AM MOTION HEARING	CLK	MLC
			Motion to reinstate bond.	CLK	
181			PROOF/SERVICE & NOTICE/APPEAR	CLK	MLC
			CERT OF MAILING FOR MOH	CLK	
			8/2/19 @ 9:00AM	CLK	
182			AMENDED MOTION TO REINSTATE	CLK	CRG
			BOND & BRIEF IN SUPPORT.	CLK	
183	08/02/19		MOTION HEARING	CRT	GXM
			C CHARTIER, #9386 CEO	CRT	
			COURT DENIES DEFENDANT'S	CRT	
			MOTION TO REINSTATE BOND.	CRT	
184	08/20/19		REMOVE NEXT EVENT: 08/26/19 8:45 AM SENTENCING	CLK	RLR
185			NOTICE SENT FOR: 09/30/19 8:45 AM SENTENCING	CLK	RLR
			*** Adjourned from 8/26/19	CLK	
			to allow for resolution of	CLK	
			case #17-5730-FH	CLK	
186	08/22/19		PROOF/SERVICE & NOTICE/APPEAR	CLK	CRG
			SENTENCING 9/30/19 @8:45AM	CLK	
			SENT CERT MAIL	CLK	
187	08/27/19	D 001	APPEARANCE	CLK	CRG
			ATTORNEY: P-38588 STOUT	CLK	
			AMENDED SUBSTITUTION OF	CLK	
			COUNSEL AND APPEARANCE & PROOF	CLK	
			OF SERVICE. (ORIGINAL	CLK	
			SUBSTITUTION AND APPEARANCE	CLK	
			FILED IN ERROR BY ATTORNEY	CLK	
			STOUT IN FILE 17-5730-FH)	CLK	
188		D 001	FROM: MOORE,SCOTT DOUGLAS,	CLK	CRG
			TO: STOUT,KIMBERLY W.,	CLK	
189	09/04/19		REMOVE NEXT EVENT: 09/30/19 8:45 AM SENTENCING	CLK	RLR
190			NOTICE SENT FOR: 09/19/19 10:30 AM SENTENCING	CLK	RLR
			**** Moved from 9/30/19 on	CLK	
			Court's own Motion	CLK	
191	09/06/19		PROOF/SERVICE & NOTICE/APPEAR	CLK	CRG
			SENTENCING 9/19/19 @10:30AM	CLK	
			SENT CERT MAIL	CLK	

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192	09/11/19		MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
			STIPULATED ORDER TO ALLOW	CRT	
			DR ATARA ABRAMSKY ACCESS TO	CRT	
			CC JAIL W/A LAPTOP	CRT	
193	09/12/19		NOTICE SENT FOR: 09/16/19 11:15 AM MOTION HEARING	CLK	RLR
			Defendant's Motion to Adjourn	CLK	
			Sentence	CLK	
194			PROOF/SERVICE & NOTICE/APPEAR	CLK	CRG
			MOH 9/16/19 @11:15AM SENT CERT	CLK	
			MAIL	CLK	
195	09/16/19		MOTION HEARING	CRT	MLC
			C CHARTIER, #9386 CEO	CRT	
			COURT REQUESTS THAT PROSECUTOR	CRT	
			CHECK W/VICTIM RE: NEW DATE.	CRT	
			TO BE THE 25TH OR 30TH	CRT	
			DEPENDING VICTIMS SCHEDULE.	CRT	
196	09/17/19		INFORMATION	CLK	RLR
			Per prosecutor's office,	CLK	
			the date of 9/30/19 works for	CLK	
			the victim's schedule	CLK	
197			REMOVE NEXT EVENT: 09/19/19 10:30 AM SENTENCING	CLK	RLR
198			NOTICE SENT FOR: 09/30/19 10:40 AM SENTENCING	CLK	RLR
			*** Adjourned from 9/19/19	CLK	
			on Court's own Motion	CLK	
199	09/20/19		PROOF/SERVICE & NOTICE/APPEAR	CLK	MLC
			CERT OF MAILING FOR SEN	CLK	
			9/30/19 @ 10:40AM	CLK	
200	09/30/19		MISCELLANOUS HEARING HELD	CRT	SBP
			P CHAFFEE, #9373 CEO	CRT	
			SENTENCING ADJOURNED TO	CRT	
			ANOTHER DATE. CLERK TO CHECK	CRT	
			W/PARTIES TO SCHEDULE DATE.	CRT	
			ANY COURT FILING MUST BE	CRT	
			PURSUANT TO COURT RULES.	CRT	
201	10/04/19		PEOPLE'S RESPONSE TO	CLK	MLC
			DEFENDANT'S SENTENCING	CLK	
			MEMORANDUM	CLK	
202	10/09/19		ADDIDAVIT OF CAA PAYMENT.	CLK	MLC
			ATTORNEY MOORE $1875 ON	CLK	
			10/9/19 CHK#173289	CLK	
203	10/16/19		NOTICE SENT FOR: 11/12/19 3:00 PM SENTENCING	CLK	RLR
			Adjourned from 9/30/19	CLK	
204	10/17/19		PROOF/SERVICE & NOTICE/APPEAR	CLK	PAC
			SENTENCING: 11/12/19@3PM	CLK	
			CERTIFICATE OF MAILING	CLK	
205	10/21/19		MISCELLANEOUS ACTION BY JUDGE	CRT	PAC
			EX PARTE ORDER TERMINATING	CRT	
			REPRESENTATION AS APPOINTED	CRT	
			COUNSEL (S MOORE) GRANTED	CRT	
206	11/12/19	00001	SENTENCING	CRT	SBP
			P CHAFFEE, #9373 CEO	CRT	
			DEF SENTENCED TO CT 1:6YR 6MO-	CRT	
			20YR, CT 2:6YR 6MO - 20YR, CT	CRT	

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3: 19MO - 7YR, CT4: 19MO- 7YR, CRT
CT 5: 13MO - 4YR, CT 6: 19MO - CRT
7YR, CT 7: 19MO - 7YR, CT 8: CRT
19MO - 7YR, CT 9: 13MO - 5YR. CRT
EACH COUNT WITH CREDIT FOR 123 CRT
DAYS. TO BE SEREVED CONCURRENT CRT
WITH EACHOTHER AND CASE NUMBER CRT
17-005730-FH. DEF TO HAVE NO CRT
CONTACT WITH THE VICTIM. BOND CRT
CANCELED. CRT

SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
6- 6-DDD 20-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$500.00 FINES 500.00 CO COURT COSTS
$130.00 CRIME VICTIM RIGHTS 68.00 STATE MINIMUM COSTS
$1,875.00 ATTY FEES 60.00 DNA CIRCUIT CRT 2015

207 00002 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
6- 6-DDD 20-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

208 00003 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 19-DDD 7-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

209 00004 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 19-DDD 7-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

210 00005 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 13-DDD 4-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

211 00006 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 19-DDD 7-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

212 00007 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 19-DDD 7-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

213 00008 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 19-DDD 7-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

214 00009 SENTENCING CRT SBP
SENTENCE PRISON: MINIMUM MAXIMUM CREDIT
YYY- 13-DDD 5-MMM-DDD YYY-MMM-123

BEGIN 11/12/19
$68.00 STATE MINIMUM COSTS

215 MISCELLANEOUS ACTION BY JUDGE CRT MLC

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			JUDGMENT OF SENTENCE	CRT
216			NOTICE OF APPELLATE REVIEW	CLK PAC
217			REQUEST FOR CAA FOR COURT OF	CLK PAC
			APPEALS	CLK
234			FINAL ORDER OR JUDGMENT FILED	CLK SBP
218	11/15/19		MISCELLANEOUS ACTION BY JUDGE	CRT MLC
			SENTENCING INFORMATION REPORT	CRT
219	11/19/19		SUPPLEMENTAL SENTENCING	CLK MLC
			MEMORANDUM	CLK
220	11/22/19		ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			PRETRIAL 1/16/2018	CLK
221			ORITINAL TRANSCRIPT RECEIVED.	CLK KAD
			STATUS CONFERENCE 8/01/2018	CLK
222			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			MOTION	CLK
			FINAL PRETRIAL 10/23/2018	CLK
223			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			STATUS CONFERENCE 11/20/2018	CLK
224			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			STATUS CONFERENCE 12/10/2018	CLK
225			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			ARRAIGNMENT 5/11/2019	CLK
226			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			PRETRIAL 4/22/2019	CLK
227			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			STATUS CONFERENCE 6/10/2019	CLK
228			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			DEFENDANT'S MOTION TO SUPRESS.	CLK
			DEFENDANT'S MOTION TO DISMISS.	CLK
			PEOPLE'S MOTION TO USE PRIOR	CLK
			RECORDED TESTIMONY. 7/02/2019	CLK
229			ORIGINAL TRANSCRIPT RECEIVED.	CLK KAD
			PEOPLE'S MOTION TO COMPEL.	CLK
			PEOPLE'S MOTION TO STRIKE	CLK
			DEFENSE WITNESSES AND EXHIBITS	CLK
			7/12/2019	CLK
230			ORIGIANL TRANSCRIPS RECEIVED.	CLK KAD
			STATUS CONFERENCE 17-5730-FH,	CLK
			PEOPLE'S MOTION TO REVOKE BOND	CLK
			17-5730-FH,DEFENDANT'S MOTION	CLK
			TO REINSTATE BOND 17-5731-FH	CLK
			8/02/2019	CLK
231			REPORTER/RECORDING CERTIFICATE	CLK MLC
			OF ORDERING TRANSCRIPT ON	CLK
			APPEAL. APPEAL TO COURT OF	CLK
			APPEALS.	CLK
232	11/25/19		MISCELLANEOUS ACTION BY JUDGE	CRT MLC
			CLAIM OF APPEAL ORDER	CRT
			APPOINTING COUNSEL AND CERT	CRT
			OF SERVICE	CRT
233		D 001	FROM: STOUT,KIMBERLY W.,	CLK MLC
			TO: HOROWITZ,MICHAEL,	CLK
235	01/10/20		MONEY ORDERED	CRT ***
			AUTOMATIC LATE FEE ASSESSMENT	CRT
	$735.40	20% LATE FEE		
236	01/13/20		MONEY ORDERED	CRT MLC
	$735.40-	20% LATE FEE		

237		NOTICE OF FILING OF TRANSCRIPT	CLK MLC
		AND AFFIDAVIT OF MAILING	CLK
238	03/23/20	COURT ORDERED PAID	CLK SBP
		RECEIPT# 00119662 AMT $221.55	
239	04/27/20	COURT ORDERED PAID	CLK KAD
		RECEIPT# 00119901 AMT $104.05	
240	08/03/20	COURT ORDERED PAID	CLK PAC
		RECEIPT# 00121095 AMT $241.74	
241	10/20/20	COURT ORDERED PAID	CLK KAD
		RECEIPT# 00122206 AMT $112.15	
242	11/12/20	COURT ORDERED PAID	CLK NM
		RECEIPT# 00122545 AMT $50.00	
243		COURT ORDERED PAID	CLK SBP
		RECEIPT# 00122613 AMT $155.02	
244	12/02/20	SET NEXT DATE FOR: 12/15/20 1:30 PM	CLK RLR
		MOTION HEARING	
		Defendant's Motion for	CLK
		Appellate Bond. *Attorney	CLK
		Stuart Friedman requested hrg	CLK
		date. ZOOM info sent	CLK
245	12/07/20	MOTION FOR BOND PENDING APPEAL	CLK MLC
		AND NOTICE OF HEARING	CLK
246	12/15/20	MISCELLANEOUS ACTION BY JUDGE	CRT PAC
		STIP AND ORDER TO ADJOURN	CRT
		MOTION HEARING	CRT
247		SET NEXT DATE FOR: 01/21/21 1:00 PM	CLK RLR
		MOTION HEARING	
		Motion for Bond Pending	CLK
		Appeal.*Def to be present via	CLK
		ZOOM from prison. MDOC writ	CLK
		confirmed	CLK
248	01/04/21	MISCELLANEOUS ACTION BY JUDGE	CRT CRG
		WRIT OF HABEAS CORPUS. DEF TO	CRT
		APPEAR 1/21/21 @1:00PM.	CRT
249	01/19/21	PEOPLE'S RESPONSE TO DEFENDANT	CLK KAD
		-APPELLANT MOTION FOR BOND	CLK
		PENDING APPEAL	CLK
		PEOPLE'S BRIEF IN RESPONSE TO	CLK
		DEFENDANT'S MOTION TO SUPRESS	CLK
		PROOF OF MAILING	CLK
250	01/21/21	MOTION HEARING	CRT KAD
		C CHARTIER, #9386 CEO	CRT
		MOTION DENIED. ORDER PREPARED	CRT
		BY PROSECUTOR	CRT
		HONORABLE FRED BORCHARD 11003	CRT
		HELD VIA ZOOM	CRT
251		MISCELLANEOUS ACTION BY JUDGE	CRT KAD
		ORDER FOR DEFENDANT-APPELLANT	CRT
		MOTION FOR BOND PENDING IS	CRT
		DENIED. HELD VIA ZOOM.	CRT
		HONORABLE FRED BORCHARD 11003	CRT
252	01/29/21	REPORTER/RECORDER CERTIFICATE	CLK KAD
		OF ORDERING TRANSCRIPT ON	CLK
		APPEAL	CLK
253	02/16/21	NOTICE OF FILING TRANSCRIPT &	CLK CRG
		AFFIDAVIT OF MAILING	CLK
254		ORIGINAL TRANSCRIPT RECEIVED	CLK CRG

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	MOTION FOR BOND PENDING APPEAL	CLK
	HELD 1/21/21	CLK
.....	END OF SUMMARY	

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Appendix 9: Judgment of Sentence

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Original - Court
1st copy - Corrections
2nd copy - Corrections (for return)
3rd copy - Michigan State Police CJIC
4th copy - Defendant
5th copy - Prosecutor

Approved, SCAO

STATE OF MICHIGAN 55TH JUDICIAL CIRCUIT CLARE COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 17-005731-FH-M

ORI
MI-180015J

Court Address 225 WEST MAIN
P.O. BOX 438
HARRISON, MI 48625

Court Telephone no.
989-539-7131

Police Report No. 17-164-3

THE PEOPLE OF THE STATE OF MICHIGAN	V	Defendant's name, address, and telephone no. ALEXANDER JAMES HAUPT 450 SCHAEFFER CLARE, MI 48617

CTN/TCN	SID	DOB
181700124301	4919683E	6/18/97

Prosecuting attorney's name	Bar no.	Defendant attorney's name	Bar no.
AMBROZAITIS,MICHELLE JOY,	62576	STOUT,KIMBERLY W.,	38588

THE COURT FINDS:

1. The defendant was found guilty on 7/25/19 (Date) of the crime(s) stated below.

Count	CONVICTED BY Plea*	Court	Jury	DISMISSED BY*	CRIME	CHARGE CODE(S) MCL citation/PACC code
1			X		CHILD ABUS COMM ACTIVITY	750.145C2
2			X		COMP.-USE TO DO CRIME-MAX	752.7973F
3			X		CHILD ABUSE DIST/PROMOTE	750.145C3
4			X		COMPUTER-USING-CRIME	752.7973D
5			X		CHILD SEXUALLY ABUSIVE MA	750.145C4-A
6			X		COMPUTER-USING-CRIME	752.7973D
7			X		CHILD ABUSE DIST/PROMOTE	750.145C3
8			X		COMPUTER-USING-CRIME	752.7973D
9			X		JUSTICE OBSTRUCTION OF	750.505-A

*Insert "G" for guilty plea, "NC" for nolo contendere, or "MI" for guilty but mentally ill, "D" for dismissed by court, or "NP" for dismissed by prosecutor/plaintiff.

☐ 2. The conviction is reportable to the Secretary of State under MCL 257.625(21)(b).

Defendant's driver's license number

☐ 3. HIV testing and sex offender registration are completed.

☒ 4. The defendant has been fingerprinted according to MCL 28.243.

☐ 5. A DNA sample is already on file with the Michigan State Police from a previous case. No assessment is required.

IT IS ORDERED:

☐ 6. Probation is revoked.

7. Participating in a special alternative incarceration unit is ☐ prohibited. ☐ permitted.

8. The defendant is sentenced to custody of the Michigan Department of Corrections. This sentence shall be executed immediately.

Count	SENTENCE DATE	MINIMUM Years	Mos.	Days	MAXIMUM Years	Mos.	Days	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	Days	OTHER INFORMATION
1	11/12/19	6	6		20			11/12/19		123	
2	11/12/19	6	6		20			11/12/19		123	

SEE NEXT PAGE

STATE OF MICHIGAN 55TH JUDICIAL CIRCUIT CLARE COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO DEPARTMENT OF CORRECTIONS	CASE NO. 17-005731-FH-M

Count	SENTENCE DATE	MINIMUM Years	MINIMUM Mos.	MINIMUM Days	MAXIMUM Years	MAXIMUM Mos.	MAXIMUM Days	DATE SENTENCE BEGINS	JAIL CREDIT Mos.	JAIL CREDIT Days	OTHER INFORMATION
3	11/12/19		19		7			11/12/19		123	
4	11/12/19		19		7			11/12/19		123	
5	11/12/19		13		4			11/12/19		123	
6	11/12/19		19		7			11/12/19		123	
7	11/12/19		19		7			11/12/19		123	
8	11/12/19		19		7			11/12/19		123	
9	11/12/19		13		5			11/12/19		123	

☐ 9. Sentence(s) to be served consecutively to (If this item is not checked, the sentence is concurrent.)
☒ each other. ☒ case numbers 17-005730-FH.

10. The defendant shall pay:

	$500.00 FINES	$500.00 CO COURT COSTS
$130.00 CRIME VICTIM RIGHTS	$612.00 STATE MINIMUM COSTS	$1875.00 ATTY FEES
$60.00 DNA CIRCUIT CRT 2015	$3677.00 TOTAL	$3677.00 BALANCE

The due date for payment is 11/12/19. Fine, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed.

☐ 11. The defendant is subject to lifetime monitoring under MCL 750.520n.

12. Court recommendation:
DEF SENTENCED TO CT 1:6YR 6MO- 20YR, CT 2:6YR 6MO - 20YR, CT 3: 19MO - 7YR, CT4: 19MO- 7YR, CT 5: 13MO - 4YR, CT 6: 19MO - 7YR, CT 7: 19MO - 7YR, CT 8: 19MO - 7YR, CT 9: 13MO - 5YR. EACH COUNT WITH CREDIT FOR 123 DAYS. TO BE SEREVED CONCURRENT WITH EACHOTHER AND CASE NUMBER 17-005730-FH. DEF TO HAVE NO CONTACT WITH THE VICTIM. BOND CANCELED.

11-12-19
Date

Roy G. Mienk
Judge ROY G. MIENK

47899
Bar no.

I certify that this is a correct and complete abstract from the original court records. The sheriff shall, without needless delay, deliver the defendant to the Michigan Department of Corrections at a place designated by the department.

(SEAL)

Deputy court clerk

LAST PAGE

CC 219b (3/16) JUDGMENT OF SENTENCE, COMMITMENT TO DEPARTMENT OF CORRECTIONS
MCL 765.15(2), MCL 769.1k, MCL 769.16a, MCL 775.22, MCL 780.766, MCR 6.427

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Original - Court
1st copy - MDOC court order department
2nd copy - Prisoner

Approved, SCAO

STATE OF MICHIGAN 55TH JUDICIAL CIRCUIT CLARE COUNTY	ORDER TO REMIT PRISONER FUNDS FOR FINES, COSTS, AND ASSESSMENTS	CASE NO. 17-005731-FH-M

Court Address: 225 WEST MAIN, P.O. BOX 438, HARRISON, MI 48625

Court Telephone no.: (989)539-7131

THE PEOPLE OF ☒ The State of Michigan

☐ _____

v

Prisoner's name: ALEXANDER JAMES HAUPT

Prisoner no.	SID	DOB
	4919683E	6/18/97

Institution name and address:

THE COURT FINDS:

1. The prisoner owes a balance of $3677.00, not including restitution, which is collected by the Department of Corrections in accordance with MCL 791.220h, for the obligation ordered in the judgment of sentence or other order dated 11/12/19. (A copy of the judgment of sentence or order is attached.)

IT IS ORDERED:

2. For payment toward the obligation, the Department of Corrections shall collect 50 percent of all funds received by the prisoner over $50.00 each month.
3. If the amount withheld at any one time is $100.00 or less, the Department of Corrections shall continue collecting funds from the prisoner's trust account until the sum of the amounts collected exceeds $100.00, at which time the Department of Corrections shall remit that amount to this court to ☐ the above address. ☒ the following address:

   55TH CIRCUIT COURT
   225 WEST MAIN
   P.O. BOX 438
   HARRISON, MI 48625

4. Withdrawal from the prisoner's trust account and remittance to this court shall continue until the obligation is paid in full. If the prisoner transfers to a facility at which a prisoner's trust account is not maintained, or if the prisoner is paroled, discharged, or dies, any withheld funds shall be remitted to this court.

11-12-19
Date

Judge ROY G. MIENK

47899
Bar no.

CERTIFICATE OF MAILING

I certify that on this date I served a copy of this order on the prisoner
☐ at sentencing by personal service.
☐ at the institution/facility by first-class mail addressed to its last-known address as defined by MCR 2.107(C)(3).

Date

Signature

Send a copy of this order by first-class mail or e-mail to: MDOC-CourtOrders@michigan.gov

ATTN: COURT ORDER DEPARTMENT
MICHIGAN DEPARTMENT OF CORRECTIONS
JACKSON BUSINESS OFFICE
4000 COOPER STREET
JACKSON, MI 49201

MCL 769.11

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Appendix 10: 3-Grabel Motion Withdraw 04-09-2018

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR CLARE COUNTY

COPY

THE PEOPLE OF THE STATE OF MICHIGAN,

v

Files 17-5730-FH

17-5731-FH

ALEXANDER JAMES HAUPT,

Defendant. /

ORIGINAL

DEFENSE ATTORNEY'S MOTION TO WITHDRAW

BEFORE THE HONORABLE ROY G. MIENK (P47899) CIRCUIT JUDGE

Harrison, Michigan - Monday, April 9, 2018

APPEARANCES:

Appearing for Plaintiff:
MS. MICHELLE AMBROZAITIS (P62576)
Clare County Prosecutor
225 W. Main Street
Harrison, MI 48625
(989) 539-9831

Appearing for Defendant:
MR. SCOTT GRABEL (P53310)
124 W. Allegan Street
Suite 636
Lansing, MI 48933
(866) 747-2235

2018 JUN 19 PM 1:01

RECORDED BY: Gail Michel, CEO-8066

TRANSCRIBED BY:
Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

***

Motion presented by Mr. Grabel 3

Court denied motion 6

Haupt Appendix, p.060a

Harrison, Michigan

Monday, April 9, 2018 - 11:58 a.m.

* * *

THE COURT: Calling the cases of People versus Alexander James Haupt.

MS. AMBROZAITIS: Michelle Ambrozaitis appearing on behalf of the People.

MR. GRABEL: Good morning, Your Honor. May it please, the Court attorney Scott Grabel on behalf of Mr. Haupt who is here to my right, Your Honor. It was my motion.

THE COURT: It's your motion. You may proceed.

MR. GRABEL: Just briefly, Your Honor, I think the averments were set out why our firm wants to withdraw from the case.

We were here on January 16th, I believe 2017 -- 2018 for a pretrial, and before last night I had absolutely no communication with Mr. Haupt. He did call me last night; we did have a positive conversation. There's no reason -- I think he's been in compliance with the bond completely. I don't think he has done anything that would concern the Court. It's just it has really made me feel extremely uncomfortable; I am not used to not having communication with a client.

There was some motions -- or motion -- we were

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going to file on the case, and I haven't had the opportunity to have him review it. And again, he's -- you know, when I have communicated with him, he has been compliant. I have had a lot of communication with his father, really who has kind of been almost a de facto client in this case. It's just we've had -- there's some unusual dynamics in this case that just make me feel uncomfortable. As I said, nothing nefarious, nothing illegal; I'm not suggesting that. I think they are both very passionate about the case, and I think there are legal issues of merit that probably have to be brought before the Court. It's just -- I would just say I feel uncomfortable with the lack of communication that has taken place up to this point with the client, and I think to feel successful in the case I think it's important that I have communication with a client.

I don't make a habit of withdrawing. I think in 24 years of practice I think this will be the third time I've ever petitioned any Court. So it's not something that's common. I don't take it lightly. It's just I feel -- I guess there is no other way to put it; I just feel uncomfortable continuing with the case because of some of the issues in the case. That's all I would really say.

I don't want to say anything negative about Alex, 'cause I don't think -- I think he's a good young man. I

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think it's an unusual case. He's facing a lot of charges. There is a plea agreement on the record for YTA under all the present charges, which I think says something obviously in this case that Ms. Ambrozaitis would tender agreement like that. If she thought he was a horrible individual I think certainly she would not -- an experienced prosecutor would not allow a client consideration of that offer, but at this point I don't feel that we can take the case any further.

THE COURT: All right. Ms. Ambrozaitis, any response?

MS. AMBROZAITIS: No, Your Honor.

THE COURT: All right. And Mr. Haupt, any views on the subject?

THE DEFENDANT: I do not disagree one bit with anything Mr. Grabel has said. There has been a lack of communication. That, I think, speaks to my youth. I definitely did not handle that properly. Unfortunately, this is -- you know, there's has been a lot of money and whatnot invested in the case, and so, yeah -- it's a hard pill to swallow.

THE COURT: So are you going to change your ways and be more responsive to him?

THE DEFENDANT: Oh, a hundred -- I, a hundred percent, will. Hundred percent.

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THE COURT: This is already set for trial in May, and that's less than about two months.

MR. GRABEL: Actually it's been adjourned until July -- oh, August 1st. Sorry to interrupt the Court --

THE COURT: All right.

MR. GRABEL: -- but it's been adjourned to August 1st.

THE COURT: August 1st? Okay.

MR. GRABEL: Correct.

THE COURT: And --

THE DEFENDANT: I will say, Your Honor, he's been a fantastic attorney. I -- I have no problems communicating with him, you know, on a personal level or anything like that. I just haven't.

THE COURT: So you think you've learned a lesson from this?

THE DEFENDANT: Yeah.

THE COURT: And do you still wish to have him represent you?

THE DEFENDANT: Oh, hundred percent. He's the best.

THE COURT: Based on that, the Court's going to deny the motion.

MR. GRABEL: That's fine, Your Honor.

THE COURT: All right.

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MR. GRABEL: I will continue with the case.

THE COURT: All right.

MR. GRABEL: That's fine. Thank you, Your Honor.

THE DEFENDANT: Thank you, Your Honor.

(At 12:03 p.m., hearing concluded)

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STATE OF MICHIGAN)

) ss.

COUNTY OF CLARE)

I certify that this transcript, consisting of 8 pages, is a complete, true, and correct transcript, to the best of my ability, of the motion hearing taken in this case on April 9, 2018, by Constance Thurlow-White, CEO-8791.

Dated: July 17, 2017

Rhonda L. Reppert

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 11: 4-Grabel Withdrawal 06-21-2018

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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR CLARE COUNTY

THE PEOPLE OF THE STATE OF MICHIGAN,

v

Files 17-5730-FH

17-5731-FH

ALEXANDER JAMES HAUPT,

Defendant./

ORIGINAL

STATUS CONFERENCE and DEFENSE ATTORNEY'S MOTION TO WITHDRAW

BEFORE THE HONORABLE ROY G. MIENK (P47899) CIRCUIT JUDGE

Harrison, Michigan - Monday, June 21, 2018

APPEARANCES:

Appearing for Plaintiff:
MS. CLAIRE KAISLER (P79514)
Clare County Assistant Prosecutor
225 W. Main Street
Harrison, MI 48625
(989) 539-9831

Appearing for Defendant:
MR. SCOTT GRABEL (P53310)
124 W. Allegan Street
Suite 636
Lansing, MI 48933
(866) 747-2235

RECORDED BY: Gail Michel, CEO-8066

TRANSCRIBED BY:
Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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A TRUE COPY
Dated 10/18/18
LORI MARTIN, COUNTY CLERK
By MC DEPUTY CLERK

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TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

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Motion presented by Mr. Grabel 3

Court granted motion 15

Haupt Appendix, p.069a

Harrison, Michigan

Monday, June 21, 2018 - 11:21 a.m.

* * *

THE COURT: Calling the cases of People versus Alexander James Haupt.

MS. KAISLER: Claire Kaisler appearing on behalf of the People, Your Honor.

MR. GRABEL: Good morning. Your Honor, may it please the Court, attorney Scott Grabel on behalf of Mr. Haupt who is here to my right.

THE COURT: You are Alexander James Haupt?

THE DEFENDANT: I am.

THE COURT: All right. And we have a motion on the table, People's motion to withdraw plea offers. We've had some discussions in chambers. The Court hasn't made any ruling on that motion but has given an advisory opinion. Who knows what I hear now, whether I'll change my mind or not. But Ms. Kaisler, you want to go forward on the motion first or you want to do something else?

MS. KAISLER: Your Honor, I would defer to attorney Grabel at this point. Based on our discussions in chambers, there's been some information that may affect the need for this motion to be heard, so I would defer to him at this point and then we can figure out how to proceed.

THE COURT: All right. Mr. Grabel?

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MR. GRABEL: Thank you, Your Honor. For the record, because I think it's important, at this point there's been obviously several discussions that I would rather say in front of Mr. Haupt, because this has had some complexities this case.

Back I guess last December, 2017, the prelim in this was waived with a right to remand, and certain conditions were stated on the record, and there was a plea offer under Briggs Killebrew to all the counts involved in all three files would be pled under a Briggs Killebrew agreement to HYTA status, Holmes Youthful Trainee Status.

I advised the client -- 'cause I think it's important that my interpretation of that, with the language put on the plea record, was that the client, if he so choosed [sic] when we got to Circuit Court, could file motions, discovery motions, if he felt there was missing discovery, obviously contending the search warrant in the case, and still stop the prosecutor from withdrawing the plea agreement. That was my interpretation. I advised the client, as well as his dad, and I even used the proverbial pun "you can have your cake and eat it too". So, I think it's important that I advised the client that was my legal analysis on it.

Obviously there were some changes in the Court rules, whether a client had the right to remand anymore,

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but irrespective of that, I think it's -- without going too far, I think it's this Court's position, if that language was put on the record, I get the impression the Court would probably, if the client wanted to, allow him to exercise his right to a remand. So therefore, he would sort of have the ability, if you will, to step back in time and all his rights to file search warrants, discovery motions, and everything else would remain intact. But of course the Court would also indicate you -- the parallel of that would be that the prosecution then would have the ability to withdraw, obviously, the plea offer on the table.

Now we also right now have a motion pending that the prosecution, if we move forward today, has a motion to withdraw the plea offer that I just indicated on the record, and the prosecution indicated if the motion was argued today and was successful, the client would then have no plea agreement whatsoever on this case at all.

The Court has indicated, after reviewing the prosecution's motion and my response which was filed -- the Court accepted it by fax yesterday morning -- that the Court at least was inclined to agree with the prosecutor that since the client was going to get the right to remand, that the Court felt that the client didn't detrimentally rely, that all his rights would remain intact, so therefore he would probably rule in the prosecution's favor, allowing

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the prosecution to pull the plea agreement today.

So I think at least that was my understanding of what -- you know, of what's been going on today. As it stands right now, at this second, the plea agreement of HYTA status to all the files in this case -- there's three of them -- is still intact. But again, in minutes, that may potentially change if this motion goes forth with the prosecution. And again, even though I have explained it to Mr. Haupt what HYTA status is, I think it's important to state it again so there's no misunderstanding so he can ask the Court any questions if he does misunderstand something, Holmes Youthful Trainee Status in this case would mean if Mr. Haupt pled to all the charges -- and I think there's ten in totality in all the cases -- some misdemeanors, some felonies, some involving mandatory sex registration, if the Court was inclined to go through with that agreement, Mr. Haupt would not have to register as a sex offender, as a part of Holmes Youthful Trainee Status. He would have no convictions of any kind on his record whatsoever on any of the files. Part of the agreement was three years' probation, restitution as ordered, all devices containing CSAM, you know, would have to be forfeited.

And one other caveat that -- I think it would be from the spirit of the deal that there would not be any other forthcoming charges on any of the other devices.

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That would probably be part of it. Again, the prosecutor could chime in. They've had those devices in their possession for probably well over nine months. I imagine they probably are not saying, well, we're going to come back if he takes the deal and charge him. I think all those devices have actually been examined. Other than an iPhone 6S, it's my understanding there are no other illegal materials on those memory storage devices. That's at least what I portrayed to Mr. Haupt and his father.

That sort of states my understanding of kind of where we are globally at this particular time. Obviously, the advice I gave Mr. Haupt in waiving the prelim, the Court doesn't have the same interpretation as me that he can have his cake and eat it too and file motions and still retain the agreement. Basically, if he moves forward today, there's no safety net whatsoever unless he takes this agreement.

Obviously also I want to state too, although we may have not had discussions, I did say in general that if he was convicted of the CSAM charges or the sex-related charges, I believe it scores out at the scoring guidelines to a Department of Corrections guideline calculation, understanding that guidelines now are only a recommendation. I told Mr. Haupt it was my legal opinion, although I don't speak for the Court and the Court has not

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indicated what any sentence would be in this matter, it would be my opinion that if Mr. Haupt was convicted of any of those charges, the charges of CSAM, I believe that the Court would probably -- probably -- I can't say definitely, but in my opinion as an attorney practicing 25 years, there's a serious threat of Department of Corrections that could happen here, and he would be registered as a sex offender.

You know, at this particular point when I spoke to Mr. Haupt out in the hallway -- and I did speak to him at length. We had a two-hour conversation on Monday when the deal was sort of pulled off the table. He was under that understanding. As of Tuesday I spoke to the prosecutor's office; they put the deal back on the table. I have been trying to get a hold of him the last few days to sort of update him on this new information. Unfortunately, I have not been able to speak to him until this morning. I did try to contact his dad and have him contact me the last couple days, so he feels he's -- I guess you could say -- disoriented and trying to process this material. Obviously if he would have returned my call in the last couple days I probably could have given him these updates to plug in this, although we did discuss this particular option if the Court was not going to agree with me. I don't think that it comes as a surprise. I gave him

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several alternatives, so I don't think this comes as a complete shock.

When I went out in the hallway I told him, you know, it was my strong recommendation he should take the agreement, the YTA agreement that guarantees him no -- you know, no registration, no conviction. I did indicate to him that obviously there is no sentencing agreement, but I felt that obviously it would be in his advantage that -- I think it would be more -- you know, more beneficial for him in the court, and I felt confident that again there might be some exposure to jail on this, but I had a strong inclination that the Court -- that the Court would not sentence him to prison.

At some point even a month ago, Ms. Ambrozaitis actually threw in a twelve-month Killebrew cap agreement on this. I am not saying that's applicable today, but I have a pretty good feeling, based on the equities of this case, and I think the victim -- alleged victim's posture, I feel it would be in his best interest to take the deal, and I think it would be in his best interest to avoid, in my opinion, a potential prison sentence.

The only other thing I think is important to mention, because he puts a lot of weight in the motion that we -- that we prepared and he has read on the search warrant, which the Court hasn't read, but the prosecution

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has, I think there is tremended [sic] merit -- there is tremendous merit in that motion on the search warrant, but my biggest concern was one of my cases I cited that I thought was extremely helpful was from Chicago Federal Court, which is persuasive court authority, and I indicated the issues that we raised on the search warrant, there were no binding cases on Michigan, even though I felt that we had a very powerful case from Illinois; that this Court was not under any inclination to have to follow it. And -- and basically, in short, I said the search warrant is probably a crapshoot, although I feel it had a lot of merit. Don't take the risk. Take the deal; no conviction, no sex offender registration, protect your future. And that was sort of globally what our conversation was on Monday, and then the only thing that would have to be added was the advisory opinion and the fact that the prosecution now graciously put this deal back on the record, at least as it stands right now as I stand here today, but probably will change in a couple minutes, and I see the Prosecutor nodding her head.

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 by all terms and conditions of bond. I don't want to misrepresent that. But I told him I think he's insane not

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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 disingenuous. I think he has a right to make those comments. I don't think that they should affect you, how you look at him. I don't think 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

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Court to allow me to withdraw on all the files. My only concern with that is, I think it's appropriate, but you know, if the prosecution would at least -- if the Court does let me out, I still would like Mr. Haupt to have the ability, because of again all the confusion and all the dramatics, to maybe -- the prosecution at least give him at least some time frame to think about -- I don't know if he gets the chance to consult. I've always advised him to consult with other lawyers, but maybe give him an hour or two hours or some time period so he can consult with somebody else so he's not sort of, you know, in the position that I'm going to withdraw and then he loses the deal; where he has the ability to consult with a lawyer that he feels is not biased.

If the prosecution will indulge me and let him maybe -- some period of time on that -- that would be my only request before the Court rules on allowing me to get out, so he can still keep this intact at least with the ability to consult with another lawyer.

MS. KAISLER: Your Honor, I have no objection to him taking a short period of time to attempt to consult with another attorney, but any resolution would need to be reached by the end of the day today. If he doesn't plead today, the People will proceed with their motion today as scheduled. And if the Court grants it, as it has indicated

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it is inclined to do, the plea offer placed on the record by Mr. Grabel will be withdrawn.

THE COURT: So in a roundabout way you are doing a motion to withdraw, Mr. Grabel; is that correct?

MR. GRABEL: That is correct.

THE COURT: All right.

MR. GRABEL: On all the files.

THE COURT: And --

MS. KAISLER: And for the record, Your Honor, the People have no objection to Mr. Grabel's request to withdraw.

THE COURT: You understand that if I grant the motion to withdraw and the motion to withdraw the plea hasn't been heard, the Court's going to adjourn that until we can give Mr. Haupt time -- some time to get a new attorney to deal with that motion? You understand that?

MS. KAISLER: If that's how the Court wishes to proceed, then that's how the Court wishes to proceed. Obviously the People have this motion scheduled for today. This offer has been pending since December 6th, but if the Court chooses to proceed in that way, then that's how we'll proceed.

THE COURT: Well, the question is, which motion do we proceed on first?

MR. GRABEL: I would ask the Court with --

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because of the unique circumstances and to protect the client's interest on the side of caution, to address my motion to withdraw, because I still want to give him the ability -- I have asked him multiple times to consult with other lawyers on the case. I'm not suggesting he's not -- he has to do that, but this is not a new or novel idea, but the circumstances have changed dramatically and I just want to make sure --

THE COURT: Okay. Mr. Haupt, do you have any comments regarding the motion for Mr. Grabel to withdraw?

THE DEFENDANT: Yeah. I'll just touch on it. Mr. Grabel's exact words were that -- in a loud tone, in the hallway right outside, he voiced the opinion that I would go to prison. That was it; I would go to prison, no -- you know, no back story on it. And so in my opinion somebody that has, you know --

THE COURT: So you're in agreement then that he's -- you wish to have somebody else represent your interest in this matter?

THE DEFENDANT: No. No, I'm not.

THE COURT: You're not?

THE DEFENDANT: It's -- but my -- my opinion --

THE COURT: Well, then do you have confidence in Mr. Haupt representing you?

THE DEFENDANT: Yes. Yes, I have confidence in

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him.

THE COURT: All right.

THE DEFENDANT: 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.

THE COURT: Okay.

THE DEFENDANT: But no, I do not lack confidence in him, Your Honor.

MR. GRABEL: Your Honor, I --

THE COURT: Anything further on the motion to withdraw?

MR. GRABEL: Yes. I don't feel comfortable representing him. I don't --

THE COURT: All right. You don't have to say any more.

MR. GRABEL: Thank you.

THE COURT: This is the second time you have done a motion to withdraw on this case, and it's pretty clear that the relationship is strained between the attorney and the client, so the Court's going to grant the motion to withdraw.

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MR. GRABEL: I will fill out an order, Your Honor.

THE COURT: All right. The Court can only grant the motion to withdraw on the two felony cases in front of this. You're still going to --

MR. GRABEL: Fine.

THE COURT: -- handle the District Court matter on a separate issue, because this Court does not have jurisdiction over that case, and what the Court's going to do is adjourn the motion to withdraw the plea offer. Do we have any trial dates scheduled in this case?

MS. KAISLER: Your Honor, the trial date is August 1, 2018. However, the People have received notice that the victim in this case is enlisting in the Army and will be departing for basic combat training on July 23, 2018, so she will not be available for trial.

THE COURT: All right. So the Court will cancel that as a trial date and set it on as the date to hold the hearing for the motion to withdraw the plea offer. So you have until then, Mr. Haupt, to find a new attorney.

THE DEFENDANT: August 1st, Your Honor?

THE COURT: August 1st will be the hearing date.

THE DEFENDANT: Thank you.

THE COURT: So you better get somebody --

THE DEFENDANT: I understand.

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THE COURT: -- before then.

THE DEFENDANT: Thank you.

THE COURT: All right.

MR. GRABEL: Your Honor, one question so I'm understanding it, to make sure -- and since the prosecutor is here -- does that mean that the Court is at least precluding the prosecution from withdrawing the plea offer until he has the ability to consult with another lawyer?

THE COURT: At this point, yes. So it will be open until August 1st.

MR. GRABEL: Okay. I --

THE COURT: Okay.

MR. GRABEL: Because I know the prosecution's position was they wanted to hold it open until today, but that's why I think it's important for --

THE COURT: I think it's important for Mr. Haupt to be represented. It's clearly a strained relationship. Even though he says he has confidence in you, it's pretty clear he doesn't have a lot of confidence in you and in this matter, so the Court's allowing you to withdraw, and he should be able to consult with -- retain another attorney to give him advice.

MR.GRABEL: Well, let's see if the attorney's advice is different than mine. I would be interested. I will be tracking the case to see if he can find an attorney

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on planet earth who disagrees with me on the deal.

THE COURT: You're all set, Mr. Haupt.

MR. GRABEL: Thank you.

THE DEFENDANT: Have a good day.

MS. KAISLER: Thank you.

THE COURT: Continue to abide by all the bond conditions.

THE DEFENDANT: Yes, sir.

(At 11:39 a.m., hearing concluded)

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STATE OF MICHIGAN)
) ss.
COUNTY OF CLARE)

I certify that this transcript, consisting of 19 pages, is a complete, true, and correct transcript, to the best of my ability, of the motion hearing taken in this case on June 21, 2018, by Gail Michel, CEO-8066.

Dated: July 17, 2017

Rhonda Reppert

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 12: 5-Status Conference 08-01-18

STATE OF MICHIGAN

IN THE 55TH CIRCUIT COURT FOR THE COUNTY OF CLARE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs-

Cases: 17-5730-FH
17-5731-FH

ALEXANDER JAMES HAUPT,

Defendant.

_____/

COPY

STATUS CONFERENCE

BEFORE THE HONORABLE ROY G. MIENK (P47899)

Harrison, Michigan - Wednesday, August 1, 2018

APPEARANCES:

For the People: MS. MICHELLE AMBROZAITIS (P62576)
Clare County Prosecutor
225 W. Main St.
Harrison, MI 48625
(989) 539-9831

In Pro Per: ALEXANDER JAMES HAUPT

Recorded by: Ms. Gail Michel, CEO-8066

Transcribed by: Ms. Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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TABLE OF CONTENTS

PAGE

WITNESSES:

None.

EXHIBITS:

None.

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Harrison, Michigan

Wednesday, August 1, 2018 - 9:08 a.m.

* * *

THE COURT: The Court will talk to the attorneys on People versus Alexander James Haupt in chambers.

I'm assuming that you have an attorney, or -- Mr. Haupt? No attorney? All right. We'll do this on the record then.

THE DEFENDANT: Thank you.

THE COURT: You are Alexander James Haupt?

THE DEFENDANT: I am, Your Honor.

THE COURT: All right. You've had roughly a little over a month to get a new attorney. You failed to do so?

THE DEFENDANT: I have. The issue is finding adequate representation. It -- if I may, Your Honor, my previous attorney Scott Grabel was already paid twenty five grand leading up to trial. That doesn't include trial fees. And so it's -- it's a little tight.

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. And attorneys can be

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picky. They don't have to represent anybody they don't want to.

THE DEFENDANT: I understand.

THE COURT: And so -- I had an interesting situation with an attorney that had over 20 capital trials, people charged with capital offenses, which meant life in prison. He never lost a trial. And then he decided he wasn't going to travel all around the state anymore, and he got on the court appointed list and he lost his first capital offense trial, and that's because the client wouldn't listen to him. So, no matter what you feel, you're not an attorney. You should probably consider what the attorney is saying.

THE DEFENDANT: I will, Your Honor.

THE COURT: They can evaluate the case. They know what to do. They know the Court Rules. They know the Rules of Evidence. They can evaluate the witnesses, the evidence. But a lot of times people don't take the advice of their attorneys, and that's why some attorneys don't represent certain people.

THE DEFENDANT: I understand, Your Honor.

THE COURT: So this is going to be set on the trial docket. A trial will be set probably 60 days out. You better be prepared to go. I'm not going to do any more adjournments.

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THE DEFENDANT: I understand.

THE COURT: You're all set.

THE DEFENDANT: Thank you. Have a good day.

(At 9:11 a.m., hearing concluded)

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I certify that this transcript, consisting of 6 pages, is a complete, true, and correct transcript, to the best of my ability, of the Status Conference taken in this case on Wednesday, August 1, 2018 by Gail Michel, CEO-6088.

Dated: 11/11/19

Rhonda Reppert

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 13: Motion Adjourn with Faretta Warnings -10-23-18.

STATE OF MICHIGAN

IN THE 55TH CIRCUIT COURT FOR THE COUNTY OF CLARE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs- Case No. 17-5730-FH

ALEXANDER JAMES HAUPT, 17-5731-FH

Defendant.

_____/

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MOTION (17-5730-FH)

FINAL PRETRIAL (17-5731-FH)

BEFORE THE HONORABLE ROY G. MIENK (P47899)

Harrison, Michigan - Tuesday, October 23, 2018

APPEARANCES:

For the People: MS. MICHELLE AMBROZAITIS (P62576)
Clare County Prosecutor
225 W. Main St.
Harrison, MI 48625
(989) 539-9831

In Pro Per: MR. ALEXANDER JAMES HAUPT

Recorded by: Ms. Gail Michel, CEO-8066

Transcribed by: Ms. Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

RECEIVED by MSC 9/1/2025 7:07:38 PM

TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

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Court adjourns trial in case 17-5730-FH 4

RECEIVED by MSC 9/1/2025 7:07:38 PM

Harrison, Michigan

Tuesday, October 23, 2018 - 11:00 a.m.

* * *

THE COURT: Calling the cases of the People versus Alexander James Haupt.

MS. AMBROZAITIS: Michelle Ambrozaitis appearing on behalf of the People.

THE COURT: You can have a seat at the table, Mr. Haupt.

THE DEFENDANT: Okay.

THE COURT: Today is set as the final pretrial, and then in case No. 17-5730 there's a motion to adjourn the jury trial. And both are set -- both cases, 17-005730-FH and 17-005731-FH are set for trial next Tuesday.

MS. AMBROZAITIS: Your Honor, I did provide the defendant, via personal service, a copy of the final pretrial summary in this case. I'm providing him a triplicate form now in order for him to fill that out. He has a pen.

So, Mr. Haupt, that encompasses the offer that I provided to you the other day. You can either accept it or reject it. By rejecting it, you -- you are aware that it might not be offered again. You would date it and initial it here. I would then provide it to the judge for his date and signature there for today.

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THE DEFENDANT: Okay.

MS. AMBROZAITIS: If you would like to discuss a package resolution between this and the other two files, I am open to doing that as well. Okay?

THE DEFENDANT: Appreciate it.

MS. AMBROZAITIS: Your Honor, he has elected to reject the offer. Let the record reflect that I am providing the defendant a copy --

THE DEFENDANT: Thank you.

MS. AMBROZAITIS: -- of that form.

THE COURT: All right. It's the Court's usual practice to go to trial on the case that is basically the oldest case. Both cases were filed at the same time, but when you look at the dates that they occurred on, file number 17-005731-FH is the oldest case. That will be the case that would proceed to trial on Tuesday. The other case will then be adjourned and a new trial date set on that one.

MS. AMBROZAITIS: Your Honor, we do have a motion to adjourn.

THE COURT: You have a motion to adjourn that trial date and the Court is --

MS. AMBROZAITIS: The 5730.

THE COURT: The Court is just granting it because we're going to proceed on the other case.

MS. AMBROZAITIS: Okay. Thank you.

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THE COURT: All right. So --

MS. AMBROZAITIS: And Your Honor, I would like the Court --

THE COURT: The Court doesn't have to agree; just doing it.

MS. AMBROZAITIS: Thank you. And Your Honor, because the defendant is representing himself pro per and the case that he is proceeding on for trial next week does call for a prison sentence if he is convicted, with discretionary consecutive sentencing applying, I think it's important that the Court review with him representing himself.

THE COURT: That case does have Count 1, child sexually abusive activity. It's a felony that carries a maximum penalty of 20 years in prison and/or a $100,000 fine. Count 1 is computers, using to commit a crime; maximum imprisonment of 20 years or more, or life. That's a felony. That carries a maximum penalty of 20 years in prison, and/or a $20,000 fine. A consecutive sentence may be imposed for the underlying conviction. Count 3 is child sexually abusive activity, distributing or promoting, a felony that carries a maximum penalty of 7 years in prison, and/or a $50,000 fine. Count 4 is computers, using to commit a crime; maximum imprisonment of 4 years or more, but less than 10 years. That's a felony. That carries a

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maximum penalty of seven years in prison and/or a $5,000 fine. A consecutive sentence may be imposed for the underlying conviction. Count 5 is child sexually abusive material, possession, a felony that carries a maximum penalty of 4 years in prison and/or a $10,000 fine. Count 6 is computers, using to commit a crime, maximum imprisonment of 4 years or more, but less than 10 years; a felony that carries a maximum penalty of seven years in prison and/or a $5,000 fine. A consecutive sentence may be imposed for the underlying conviction.

I see, Mr. Haupt, you don't have an attorney representing you.

THE DEFENDANT: That's correct, Your Honor.

THE COURT: You do have the ability to hire your own attorney?

THE DEFENDANT: Not at the moment, Your Honor.

THE COURT: Not at the moment? Well, you are entitled to have an attorney represent you, as the Court told you last time we were in court.

THE DEFENDANT: I was not informed last time. It was not offered. I have a transcript as well.

THE COURT: All right. Well, you are entitled to have an attorney represent you, and if you're unable to afford one, the Court will appoint one. Are you asking the Court to appoint you an attorney?

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THE DEFENDANT: Not at the moment, Your Honor.

THE COURT: All right. And you understand that you're entitled to a lawyer's assistance? You understand that; is that correct?

THE DEFENDANT: I do, yep.

THE COURT: All right. And you're waiving the right to be represented by a court appointed attorney at this time; is that correct?

THE DEFENDANT: That is correct, Your Honor.

THE COURT: And you understand the charge and the maximum possible prison sentence if --

THE DEFENDANT: I do. I do, Your Honor.

THE COURT: And do you understand the risk involved in self-representation?

THE DEFENDANT: I do, Your Honor.

THE COURT: All right. And what is your educational background? Do you have a high school degree?

THE DEFENDANT: No, Your Honor.

THE COURT: You're still in high school?

THE DEFENDANT: Nope.

THE COURT: No? You're not going to school at all?

THE DEFENDANT: No, sir.

THE COURT: What grade did you complete?

THE DEFENDANT: Eleventh.

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THE COURT: And have you ever represented yourself before in court?

THE DEFENDANT: I have not, Your Honor.

THE COURT: And why do you wish to represent yourself this time?

THE DEFENDANT: At the time, I feel that it is better representation than a public defender can provide. It's just personal opinion.

THE COURT: And you understand the risks of self-representation? You understand the elements of the offense?

THE DEFENDANT: I do, Your Honor.

THE COURT: All right. And you understand the rules of criminal procedure that we follow in this court?

THE DEFENDANT: I have the gist of it.

THE COURT: All right. You would be well advised to pick up a copy of the rules of criminal procedure.

THE DEFENDANT: I will, Your Honor.

THE COURT: All right. You understand the Michigan Rules of Evidence that we have to follow in this court?

THE DEFENDANT: Vaguely as well.

THE COURT: Those are both available online. You can download them and get copies. The Court is going to suggest that you do that. You understand that there's rules regarding jury instructions and jury selection?

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THE DEFENDANT: I do.

THE COURT: All right. And those are available online too, those jury instructions, so --

THE DEFENDANT: I understand, Your Honor.

THE COURT: The Court is going to advise you to make sure you go through that. You understand that there's certain rules for preserving issues for appeal?

THE DEFENDANT: I do.

THE COURT: Okay. And you understand that self-representation is almost always unwise?

THE DEFENDANT: I was not aware of that, but I do understand the basis behind that.

THE COURT: There's the old adage that an attorney who will represent himself has a fool for a client. That's been around for a long time. All right.

THE DEFENDANT: Very understandable.

THE COURT: Okay. You understand that you will receive no special treatment and can receive no help from the court regarding the process of a trial?

THE DEFENDANT: I do, Your Honor.

THE COURT: All right. And you understand that the prosecutor is an experienced trial lawyer who is unlikely to give you any special consideration during a trial?

THE DEFENDANT: I understand.

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THE COURT: And that you will receive no special help from the court staff regarding --

THE DEFENDANT: I understand.

THE COURT: You're expected to follow the same rules and requirements that apply to all attorneys?

THE DEFENDANT: I understand, Your Honor.

THE COURT: All right. The Court determines that the waiver of a court appointed attorney at this time is knowingly, intelligently and voluntarily made. The waiver is unequivocal; the defendant understands the disadvantages of self-representation and at this time the Court doesn't believe that self-representation will disrupt or unduly inconvenience or burden the court for the trial.

So the trial will begin on Tuesday with jury selection. Be prompt, be a few minutes early, before nine.

THE DEFENDANT: If I may, Your Honor?

THE COURT: You may.

THE DEFENDANT: It was communicated to me many times up until this court date that, first by Michelle -- or first by Ms. Ambrozaitis herself, that she was going to file a motion to stay on this case, and then it was reaffirmed by Mr. Santini about a month later. That was August 1st of this year. That she was going to file that motion to stay. Never followed through with it. That was my understanding, and that's what I based a lot of my build-up on. At the

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same time, on a whole different matter, one of my witnesses is unavailable for trial until -- my understanding is December. She is a very valid witness in this case, when you consider that the materials I'm being charged with show that they were created at her residence, and so that is something that I would like to question on at trial. It's something that my -- you know, my Sixth Amendment right protects, my right to --

THE COURT: You subpoenaed this witness?

THE DEFENDANT: Not yet. I have not, Your Honor. It is my -- it is my intention to do that.

MS. AMBROZAITIS: Your Honor, I do believe that the witness that he is talking about is the subject who is in the video. Her mother is subpoenaed to testify. I have not received any witness lists or proposed jury instructions from the in pro per defendant.

THE COURT: Who is this witness? What's her name?

THE DEFENDANT: Aleesha McCurry.

THE COURT: All right.

MS. AMBROZAITIS: She would be the subject of the videos. However, I don't need to file a motion to stay in this case, because I don't need her. We have the evidence from the cell phone that shows -- from the defendant's cell phone that shows when the videos were created, along with the GPS coordinates of where the video was taken. Her

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mother has come in and viewed those videos, has identified her daughter, will testify to her daughter's age, the fact that her daughter was 17 at the time that the child sexually abusive -- or she was 17 at the time that the child sexually abusive material was created. We also have evidence from his cell phone that shows that he distributed said videos that he made to other individuals. So this is -- this is all evidence based from his phone that doesn't require her, and it doesn't matter whether she consented or not, by law. She could not participate --

THE COURT: And why is she unavailable? Where is she at?

MS. AMBROZAITIS: She's in boot camp.

THE COURT: She's in the service?

THE DEFENDANT: If -- if I will -- Your Honor, two of those images or pieces of material that she's referring to actually show that they were created after her 18th birthday, and so part of what she's --

THE COURT: Well, that will be part of your evidence and part of your --

THE DEFENDANT: I understand.

THE COURT: Okay.

THE DEFENDANT: I'm just trying to explain it.

THE COURT: At this point we'll start with the trial. If it appears after the start of the presentation of

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your case that this witness is necessary, we can always adjourn the trial until we can get her to come back and testify.

THE DEFENDANT: All right.

THE COURT: When is she expected to complete boot camp?

MS. AMBROZAITIS: She left in July, and so 20 weeks.

THE COURT: Twenty weeks? Okay.

THE DEFENDANT: At this time, Your Honor, I would like to execute my right to remand. It's something that was touched on in the -- I believe it was the June 21st hearing. It was touched on and agreed to on pages 4 and 5.

THE COURT: Which transcript are you talking about?

THE DEFENDANT: I'm talking about the court record -- I'm not sure if Ms. Ambrozaitis has it. I do have a copy of it. I've had to file for it myself, so --

THE COURT: Are you talking about the --

THE DEFENDANT: Part of the -- part of her defense for pulling a plea agreement or a plea deal was that I maintain my right to remand, and so it did not detrimentally hurt me for her to pull that. And so at this time I'm just trying to move forward with my rights and execute that.

MS. AMBROZAITIS: The plea deal was at issue.

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THE COURT: The conditional waivers of preliminary examination were executed on December 6th of 2017.

THE DEFENDANT: Correct. It was --

THE COURT: Today is October 23rd of 2018, and if you had wanted those remands, you could have filed something in August.

THE DEFENDANT: I understand.

THE COURT: You could have filed something in September.

THE DEFENDANT: I understand, Your Honor.

THE COURT: This is five, six days before the trial date, or set one week before the trial date, and now you want to remand for a prelim?

THE DEFENDANT: I understand, Your Honor. I would have done it previously but my understanding was that she was going to file this motion to stay. And, I mean, at the end of the day, I understand the argument for the length of time it has taken me, but it's still my right, and it was still something that was reaffirmed in June of this year, on the record.

THE COURT: You keep talking about this motion to stay.

THE DEFENDANT: Would you like a copy? Oh, motion to stay was something that was verbally communicated to me by Ms. Ambrozaitis. She informed me that she was going to

RECEIVED by MSC 9/1/2025 7:07:38 PM

file --

THE COURT: When was that?

THE DEFENDANT: Maybe around May.

THE COURT: Okay. And that was --

THE DEFENDANT: May or -- it might have been June as well. And then it was reaffirmed I believe August 1st by Mr. Santini. Mr. Santini then confirmed when I asked -- I followed up with Mr. Santini, asking as to why she had not filed that motion yet. He told me that she was in the process of filing it that day.

THE COURT: Any recollection or recall regarding this motion to stay?

MS. AMBROZAITIS: I haven't had any direct conversations with the defendant. I have always communicated with his attorney of record, who is no longer an attorney of record. What Mr. Santini might have stated -- it's not his case. He filled in for me one time. He probably gave information that he considered to be true at the time, but when I understood that this case was going to go before the other ones, I decided not to file the stay because obviously if I convict him on this and he goes to prison, the purpose of going forward on the other two cases that are lesser offenses would probably be a moot point, and I wouldn't need to worry about that. But the victim is in boot camp, and so if those other cases would proceed to

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trial, I would have to file a motion to stay until she's done, and so that could eventually come, but like I said, if I convict him and send him to prison on this file next week, that's a moot point.

THE DEFENDANT: If I may, Your Honor?

THE COURT: You may.

THE DEFENDANT: Mr. Santini, I asked him, and I will agree he was not familiar with the case, and so that's why he went and spoke with Ms. Ambrozaitis for about 15 minutes before returning, and at that time he informed me that she had said that today was the day that she was filing that motion.

MS. AMBROZAITIS: I wasn't even in the state. I didn't talk to him.

THE COURT: It doesn't matter.

THE DEFENDANT: It's on the district court record that he stated that. I made sure it was on the record. He stated --

THE COURT: District Court or Circuit Court?

THE DEFENDANT: District Court. District Court record shows that he stated -- I made sure it was hashed out in District Court.

THE COURT: Oh, so you had a date in District Court on the misdemeanor case?

THE DEFENDANT: Yes.

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THE COURT: Okay.

THE DEFENDANT: And it was followed up, but this was a hundred percent stating that it was for this case in Circuit Court, but it is on the record in District Court.

THE COURT: That's fine, but, you know, that's August 1st. It's now two and-a-half months after that. No motion was ever filed. If you were relying on that, you should have filed a motion for a stay or contacted the prosecutor's office and asked her to get that filed. It has not been filed. She changed her mind, which is her prerogative to do --

THE DEFENDANT: Okay.

THE COURT: -- and so the Court is not going to stay this trial based on that.

THE DEFENDANT: I understand. I'm just specifying that --

THE COURT: Okay.

THE DEFENDANT: -- as to why I'm now at this point executing my right to remand.

THE COURT: Well --

MS. AMBROZAITIS: Your Honor, the law changed in January, that there are no --

THE DEFENDANT: It was agreed upon in June, Your Honor. I have it right here.

THE COURT: Why don't you hand that to the bailiff

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and -- do you have it highlighted?

THE DEFENDANT: Yeah. Pages 4 and 5, the beginning and end are highlighted. It's where my attorney touches on it. No disagreement to it whatsoever.

THE COURT: You may hand this back. The Court does find that in the transcript from the status conference in defense attorney's motion to withdraw that was done on June 21st, 2018.

MS. AMBROZAITIS: Your Honor, can you tell me what transcript it was that you reviewed?

THE COURT: Status conference and defendant attorney's motion to withdraw on June 21st.

MS. AMBROZAITIS: Was that here in Circuit Court?

THE COURT: Here in this court.

MS. AMBROZAITIS: Okay.

THE COURT: It was -- that was the date that the Court allowed Mr. Grabel to withdraw from the case.

MS. AMBROZAITIS: Thank you, Your Honor. Part of the deal when the defendant waived up is that he would plead guilty as charged in all files and we would Briggs-Killebrew HYTA on that. That offer remained open up until the time his attorney decided that he wanted to file motions, which were contrary to what the agreement was. But if Mr. Haupt would like to avail himself of that offer, I will remake it, that if he wants to enter a plea of guilty to every count in

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every file at this point in time, that I would honor that original agreement.

THE DEFENDANT: Your Honor, on the record for that day it will show that Ms. Ambrozaitis had filed to pull that plea agreement, and so -- I mean that shows intention up before that point, which goes against what she's saying right now, that she wanted -- that she wanted --

THE COURT: As far as all that, that's past, and that was four months ago, and you've had an opportunity to get a new attorney since then. You have had plenty of time to have asked for that remand if you had wanted one. Why haven't you asked for one in July or August or September? Why are you waiting one week before the scheduled trial date to ask for a remand?

THE DEFENDANT: Because this is my appearance in court, Your Honor. This is my first appearance since that date, in this court.

THE COURT: But, see, this is the problem for you not hiring an attorney or asking for an attorney.

THE DEFENDANT: I understand. The reason --

THE COURT: Because as an attorney, you can schedule court dates. You could -- it was on your responsibility. And this is your risk of self-representation, not knowing what you can do and when you can do it. An attorney knows that they can file and ask for a

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hearing any time on any kind of a motion, and this is your problem, and this is a problem that you're now creating, and I don't see any good reason for a remand for a prelim at this point. It will give you a good issue to appeal if you go to a trial and you lose, and you may have to redo things, but --

THE DEFENDANT: Your Honor, it's my right. That's why it was agreed upon here as a safety measure. I just --

THE COURT: But at some point she -- at some point things go too far, and you've gone too far. You've waited too long. That's the Court's decision in this matter.

The Court is not going to give you a remand for a preliminary exam in this case. So the trial date is Tuesday. If you want a court appointed attorney, ask for one and we'll give you one.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right.

MS. AMBROZAITIS: And Your Honor, Mr. Haupt, since he's bringing up the plea agreement that we moved to withdraw once his attorney started making representations that he was going to file motions rather than just schedule the matter for a plea as initially discussed, that offer is open to Mr. Haupt today if he wants to accept it. It expires today, but it's open today if he would like to take it.

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THE COURT: This offer that was made today?

MS. AMBROZAITIS: No, the one that I made initially.

THE COURT: The original offer?

MS. AMBROZAITIS: That he said he would plead straight up to every count, and I would BK/HYTA.

THE COURT: So you've got two offers on the table there. They're both available today. You have this one where you plead to Count 3 and 5 and dismiss the remainder, and it doesn't resolve the other two cases. The other one, you are BK'ing, if he pleads to all, to a HYTA.

Do you understand what the Holmes Youthful Trainee act is?

THE DEFENDANT: I do, Your Honor.

THE COURT: All right. And just for the record, it is that you can get put on probation. You can go to jail for up to a year, but you get put on probation. If you do everything you're told on probation, you're allowed to withdraw your pleas and the case is dismissed.

THE DEFENDANT: That's my understanding.

THE COURT: So you would have no criminal record.

THE DEFENDANT: Uh-huh.

THE COURT: You understand that?

THE DEFENDANT: I understand.

THE COURT: All right. The Court is here all day,

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Mr. Haupt. If you decide to change your mind, please feel free to come in and talk to the clerks about it.

THE DEFENDANT: I appreciate it, Your Honor.

THE COURT: All right. But we're set for trial on Tuesday, and we intend to go forward.

THE DEFENDANT: I understand.

THE COURT: All right?

THE DEFENDANT: Thank you, Your Honor.

THE COURT: All right. You're all set.

THE DEFENDANT: Thank you. Have a wonderful day.

THE COURT: You too.

THE DEFENDANT: Thank you.

(At 11:26 a.m., hearing concluded)

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I certify that this transcript, consisting of 23 pages, is a complete, true, and correct transcript, to the best of my ability, of the Final Pretrial and Motion taken in this case on Tuesday, October 23, 2018 by Gail Michel, CEO-6088.

Dated: 11/11/19

Rhonda Reppert

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 14: Moore Withdraw Motion 06-10-19

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STATE OF MICHIGAN

IN THE 55TH CIRCUIT COURT FOR THE COUNTY OF CLARE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs-

Case No. 17-5730-FH

ALEXANDER JAMES HAUPT, 17-5731-FH

Defendant.

_____/

COPY

STATUS CONFERENCE

BEFORE THE HONORABLE ROY G. MIENK (P47899)

Harrison, Michigan - Monday, June 10, 2019

APPEARANCES:

For the People: MS. MICHELLE AMBROZAITIS (P62576)
Clare County Prosecutor
225 W. Main St.
Harrison, MI 48625
(989) 539-9831

For the Defendant: MR. SCOTT DOUGLAS MOORE (P53609)
Aleck & Jenkins
1420 N. McEwan St.
Clare, MI 48617
(989) 386-2699

Recorded by: Ms. Christina Chartier, CEO-9386

Transcribed by: Ms. Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

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Harrison, Michigan

Monday, June 10, 2019 - 9:47 a.m.

* * *

MS. AMBROZAITIS: Michelle Ambrozaitis appearing on behalf of the People.

MR. MOORE: May it please the Court, Scott Moore for Mr. Haupt.

THE COURT: Mr. Moore, you had filed a motion -- ex parte motions to withdraw --

MR. MOORE: Yes.

THE COURT: -- as attorney in this case; is that correct?

MR. MOORE: Yes, Your Honor.

THE COURT: All right. The Court did an order denying that.

MR. MOORE: We are in receipt of that order. It had not quite made it to Mr. Haupt, although we had a brief discussion about that this morning.

THE COURT: And anything else that you wish to put on the record, I guess?

MR. MOORE: For myself?

THE COURT: Yes.

MR. MOORE: First, the reason that I asked for ex parte relief was based on what had occurred in District Court. Representations were made by Mr. Haupt that made it

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to the record that not only questioned my efforts to defend him, but also brought into question my truthfulness. In light of all that, it appeared to me that there was a complete breakdown of communication between Mr. Haupt and myself to the extent that I could not adequately or effectively defend him in this or any other court.

THE COURT: Mr. Haupt, do you have anything to say regarding this?

THE DEFENDANT: Yes, Your Honor. I -- I agree with everything Mr. Moore said. I do have evidence that he was working directly with Ms. Ambrozaitis. Some information got leaked that could have only been leaked through him to her -- or through her to him. I apologize. That's where we stand with it. There was some issues with a private investigator that did a phone dump trying to replicate Detective Van Bonn's that could not successfully do so, whose opinion was that the phone dump done by Detective Van Bonn was bogus. Mr. Moore told me that he had spoken with this detective -- or this investigator directly, whereas the investigator states that he only had spoken with Detective Van Bonn on this, because he was up here for another case. So the only two options that that got passed on through were through Detective Van Bonn or through Ms. Ambrozaitis, as she was part of it as well.

MR. MOORE: If I could respond to that, Your

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Honor.

THE COURT: You may.

MR. MOORE: My phone records indicate that my cell phone was used on February 28th to make a call to the number that is listed for Larry Dalman, the investigator in question. My phone records further reveal that there was a three-minute conversation initiated by Mr. Dalman's number to my number, and that was the only contact I had with Mr. Dalman. I won't get into the contents of it, because it could be prejudicial to the defense. However, my understanding of the content of that discussion was related to Mr. Haupt and his father, so I deny categorically that I did not speak with this investigator. Thank you.

THE DEFENDANT: If I may, Your Honor.

THE COURT: Actually, I don't want to hear any more about that situation --

MR. MOORE: Thank you, Your Honor.

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

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better job than any court appointed attorney could.

So at this point I'm not going to allow Mr. Moore to withdraw totally, but he's not going to have to represent you. He's going to be there for advisory purposes. So at this point, you are on your own, and you're going to have to represent yourself, and if you have any questions regarding the law, Court Rules or anything, Mr. Moore is the person you're going to have to go to.

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

THE DEFENDANT: I understand, Your Honor.

THE COURT: Okay. All right. Anything else anybody wishes to say regarding any of that? Mr. Moore? Ms. Ambrozaitis?

MS. AMBROZAITIS: No thank you, Your Honor.

THE COURT: All right. You're all set.

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THE DEFENDANT: Thank you, Your Honor.

(At 9:53 a.m., hearing concluded)

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I certify that this transcript, consisting of 8 pages, is a complete, true, and correct transcript, to the best of my ability, of the Status Conference taken in this case on Monday, June 10, 2019 by Christina Chartier, CEO-9386.

Dated: 11/11/19

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

RECEIVED by MSC 9/1/2025 7:07:38 PM

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Appendix 15: 14-Motion 07-02-2019

STATE OF MICHIGAN

IN THE 55TH CIRCUIT COURT FOR THE COUNTY OF CLARE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs-

Case No. 17-5730-FH
17-5731-FH

ALEXANDER JAMES HAUPT,

Defendant.

_____/

COPY

DEFENDANT'S MOTION TO SUPPRESS
DEFENDANT'S MOTION TO DISMISS
PEOPLE'S MOTION TO USE PRIOR RECORDED TESTIMONY

BEFORE THE HONORABLE ROY G. MIENK (P47899)
Harrison, Michigan - Tuesday, July 2, 2019

APPEARANCES:

For the People: MS. MICHELLE AMBROZAITIS (P62576)
Clare County Prosecutor
225 W. Main St.
Harrison, MI 48625
(989) 539-9831

In Pro Per: MR. ALEXANDER HAUPT

Recorded by: Ms. Gail Michel, CEO-8066

Transcribed by: Ms. Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

RECEIVED by MSC 9/1/2025 7:07:38 PM

TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

***

Statement by Defendant in Support of Motion to Suppress 4
Response by Ms. Ambrozaitis 15
Rebuttal by Defendant 19
Rebuttal by Ms. Ambrozaitis 20
Response by Defendant 21
Response by Ms. Ambrozaitis 22
Court takes Motion to Suppress Under Advisement 22

Statement by Defendant in Support of Motion to Dismiss 23
Response by Ms. Ambrozaitis 24
Rebuttal by Defendant 25
Rebuttal by Ms. Ambrozaitis 26
Response by Defendant 26
Court Denies Motion to Dismiss 27

Statement by Ms. Ambrozaitis in Support of People's Motion to Use Prior Recorded Testimony of the Complainant 31
Response by Defendant 32
Court Grants People's Motion to Use Prior Recorded Testimony of Complainant 32

RECEIVED by MSC 9/1/2025 7:07:38 PM

Harrison, Michigan

Tuesday, July 2, 2019 - 9:19 a.m.

* * *

THE BAILIFF: All rise. 55th Circuit Court of Clare County is now in session, with the Honorable Roy G. Mienk presiding.

THE COURT: You may be seated. Calling the cases of the People versus Alexander James Haupt.

MS. AMBROZAITIS: Michelle Ambrozaitis appearing on behalf of the People.

THE COURT: Your appearance? Mr. Haupt, your appearance?

THE DEFENDANT: Alex Haupt.

THE COURT: Okay. We're here on some motions, and you may proceed, Mr. Haupt, with your first motion you wish to do.

THE DEFENDANT: Well, we can start with the motion to suppress.

THE COURT: Okay.

THE DEFENDANT: I am assuming you've had the opportunity to at least vaguely read over it.

THE COURT: Not "vaguely". I read over it.

THE DEFENDANT: Understandable. I'll be honest, Your Honor. I'm not quite sure how this process works.

THE COURT: Well, you can basically give the high

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points of your motion or you can go over your motion fully -- it's your choice -- to put it on the record.

THE DEFENDANT: All right.

THE COURT: You've got it in writing and --

THE DEFENDANT: Yep. I'll read it directly then, Your Honor.

THE COURT: All right.

THE DEFENDANT: Myself, being Haupt, is charged in this case with, among other things, childly [sic] sexual abusive activity, MCL 750.145(c), two counts of that; distributing or promoting childly [sic] sexually abusive activity, MCL 750.145(c), three counts; possession of childly [sic] sexually abusive -- of child sexual abusive material, MCL 750.145(c), four counts for that, and three attendant counts of using a computer to commit a crime, MCL 752.797.

On September 8th, 2017, Aleesha McCurry reported to police that Haupt, being myself, her former boyfriend, had followed her. McCurry also reported to police that Haupt had texted her and called her several times September 8th, 2017. Police arrested myself, Haupt, on an outstanding warrant for one count, interfering with electronic communications, MCL 750.4 -- or 540, five counts, and two counts of domestic violence, MCL 750.812, and seized my cell phone.

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Further, police then attained a -- obtained a search warrant for my phone that essentially gave them unfettered access to every piece of data on the phone. While scouring my phone, police found sexually explicit pictures and videos of McCurry that had been taken approximately nine months earlier when McCurry was then 17 and-a-half years old. At this time, the charges ensued.

For the reasons stated in the accompanying brief attached, police did not have probable cause to search through the entirety of my phone, and the warrant was hopelessly overbroad. As a consequence, the pictures and videos in this case must be suppressed, and since the pictures and videos are the only evidence to support these charges at issue, at least at this time, those charges must be dismissed.

In the accompanying brief I state facts. The defendant, myself, submits the following facts to be established at the evidentiary hearing on this motion. On September 8th, 2017, shortly after midnight, 18-year-old Aleesha McCurry reported to police that she was being followed by her ex-boyfriend, 20-year-old Alex Haupt, Alexander Haupt, the defendant in this case. Sergeant -- myself, the defendant in this case. Sergeant Aaron Miller of the Clare County Sheriff's Department was dispatched to McCurry's location, the Speedway gas station in Clare. En

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route, he discovered that Haupt had a felony warrant -- "he" being Miller -- for his arrest. Meanwhile, Clare County police officers located and stopped Haupt. Miller made his way to the scene to stop shortly thereafter -- the scene of the stop shortly thereafter and interviewed myself.

According to Miller, Haupt said that by happenstance he had seen McCurry walking out of the Meijer parking lot in Mt. Pleasant, and after I -- after he had pulled into the parking lot. He said that she was with another man and he wanted to know who he was. Haupt generally conceded that he had followed McCurry throughout the night, ending at the Speedway.

According to Miller, Haupt gave Miller his phone and allowed him to look at his call history, but not his text messages. Importantly, Haupt admitted that it was his phone, directed deputies to the phone's location in his truck, gave Miller the pass code to unlock it, and instructed Miller specifically how to operate the phone, including where to locate the recent call history for the pertinent time frame in question.

According to Miller, Miller saw several calls made from Haupt to McCurry that went unanswered. Miller seized the phone, arrested Haupt, and placed Haupt's phone in a faraday box.

During the initial interview of Haupt, Miller

RECEIVED by MSC 9/1/2025 7:07:38 PM

requested Clare City police officer John Lake to proceed to the Speedway and to have McCurry come to their location to be interviewed. McCurry told Miller that Haupt had been following her in his truck as she was driving back from Mt. Pleasant. She said that he had pulled into the Speedway after she did. She said that she went inside the gas station to call the police and Haupt drove away. McCurry told Miller that before this incident she had been on good terms with Haupt and that she had not expected him to follow her in a manner -- in the manner -- in that manner. Sorry. Although not in the police report, this fact was gleaned from the audio of Miller's body cam. See Exhibit 1 of the transcript of the body cam audio.

She also said during the incident Haupt had called and texted her several times. Detective Donald Van Bonn then drafted an affidavit for a search warrant for Haupt's phone. Van Bonn wrote that he was seeking specific evidence related to the case being investigated by Sergeant Aaron Miller involving a stalking complaint, MCL 750.411(h). Affidavit for search warrant was 9/12 of '17.

In particular, Van Bonn wrote that Miller was seeking electronic communication that has taken place between Haupt and McCurry. Van Bonn proposed that the GPS locations, web history, search terms and internet search history, photos/videos, communications on digital devices,

RECEIVED by MSC 9/1/2025 7:07:38 PM

and cellular devices may contain relevant information such as pictures, videos, voice or text communications, affidavit for search warrant being the one on 9/12 of '17.

Van Bonn also ventured that being able to rummage through essentially all of the data -- all the data on Haupt's phone could aid in establishing evidence of ownership, affidavit for search warrant being the same. The affidavit omitted the fact that Haupt had never contested his ownership of the phone and that he let Miller browse his call history. Moreover, the phone is named Alex's iPhone, and the Apple ID connected with it is alexhaupt777@gmail.com. Perhaps most importantly, Van Bonn wrote this phone is owned by Alexander Haupt and was seized from him on Eberhart Avenue south of Colonville Road during an investigation into stalking.

Next Van Bonn sought evidence of communications under that same affidavit for the search warrant. Quotation in full is necessary to convey the full context of purported pertinence in such evidence. Your affidavit [sic] knows through training and experience that associates communicate with each other -- communicate together via phone calls, text messages, e-mails, social network posts. These communications often contain direct and indirect statements about crimes. Furthermore, affidavit [sic] knows that communications rarely explicitly mention the intent to

RECEIVED by MSC 9/1/2025 7:07:38 PM

commit a crime. Instead, they often allude to such an intent. Gonna go hustle, for instance, may be the declaration of intent to commit a theft crime, but without context, it is meaningless.

Through affidavits' -- or through affiant's -- I apologize -- training and experience, affiant knows it is possible for cellular phone users to use a variety of messaging platforms, including SMS, MMS, iChat, WhatsApp, Kik and others. Therefore, your affidavit -- your affiant seeks to search all of the communications evident -- the communications evidence on this device, to understand not only what was said, but what was intended and to whom it was -- to whom it was.

This appears to be a boilerplate language regarding communications between criminal confederates, a subject with no discernible application in this case.

What's more, McCurry had alleged that Haupt had attempted to contact her on September 8th only via phone calls and text messages.

Finally, Van Bonn reiterated that he was seeking specific evidence related to this case. Van Bonn averred that he believed cookies, bookmarks, web history, search terms, internet search history, photos/video, communications on the cellular device, may contain relevant evidence such as evidence of excessive amounts of attempted communication.

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Therefore, Van Bonn explained affiant is seeking permission to search all the metadata, file data, setting data, photographic and video data, and communications -- communication data on the cellular device. It is unclear how this broad array of data specifically related to the events of September 8th. What's more, it requires mention that all the facts asserted in the affidavit to establish probable cause related exclusively to September 8th, as the affidavit for the search warrant on 9/12 stated.

Nonetheless, the search warrant granted to police seemingly unfettered access to all the content on Haupt's phone, as the warrant appears to have adopted the verbatim -- adopted verbatim the language of the affidavit.

When police searched the phone, they discovered sexually explicit pictures and videos of McCurry that had been taken approximately nine months beforehand, when she was 17 and-a-half years of age. The charges ensued at this time.

My argument in this case is that the Fourth Amendment of the United States Constitution, article 1 of the Michigan constitution, guaranteed the right of persons to be secure against unreasonable searches and seizures. Ordinarily, a search and -- a search is reasonable if it is accompanied by a warrant that was issued upon a showing of probable cause. What's more, the text of the Fourth

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Amendment requires that the warrant particularly describe the place to be searched and the persons or things to be seized. This particularity requirement was designed to prevent desired [sic] general warrants of the colonial era, which permitted a general exploratory rummaging of a person's belongings.

Further, the probable cause supporting a warrant must be tied to the object of the search. That is, for a warrant to be valid, there must be probable cause to believe that the place or thing to be searched will turn up evidence of the specific crime being investigated.

Thus, the scope of unlawful search is defined by the object of the search -- of lawful search is to be defined by the object of the search on the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search the upstairs bedroom, probable cause to believe an undocumented -- believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase.

Further, unique considerations are implicated in cell phone searches. As the United States Supreme Court has recognized, the term "cell phone" itself -- is, itself, misleading shorthand. Many of these devices are in fact

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mini computers that also happen to have capacity to be used as a telephone. In holding that police cannot ordinarily search a person's cell phone without a warrant on a search-incident-to-arrest exception, the Court recognized that modern cell phones often hold a person's most intimate information, such as videos, prescriptions, and bank statements. In short, with all they contain and all they may reveal, they hold for many Americans the privil -- the privacies of life. The cases since Riley show that a warrant for a search -- to search a cell phone must be narrowly tailored, given the privacy interest. For example, in United States versus Winn, police received a report that on June 18th, 2014 the defendant had used his cell phone to take pictures of teenage girls at a public pool while rubbing his genitals. Police sought and obtained a search warrant for any and all files contained on the defendant's cell phone in that case, in order to charge the defendant with public indecency. Of the cell phone -- sorry. Police found images of child pornography that had been taken on June 1st, 2014. But the Court concluded that the warrant in this case was factually [sic] overbroad, exceeded the probable cause to support it, and was not -- was not as particular as the circumstances would allow. As the court orderly [sic] reasoned, the major overriding problem with the description of the object of the search, any or all

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files, is that the police did not have probable cause to believe that everything on the phone was evidence of the public indecency. Instead, the police only had probable cause to search the pictures and videos on the phone that had been taken on June 18th. Consequently, the warrant violated the Fourth Amendment.

So, too here, McCurry alleged that Haupt had stalked her only on November -- or only on September 8th and only through calls and text messages. This being the case, police had probable cause to search Haupt's call history and text messages from September 8th. But what police did not have probable cause to search was Haupt's pictures and videos from several months before September 8th. Therefore, the warrant in this case was overbroad and the videos discovered as a result must be suppressed.

The defendant presumes that the prosecution will try to invoke the good faith exception on this -- on this exclusionary rule. If a warrant turns out to have been invalid, evidence seized pursuant to a warrant -- evidence seized pursuant to that warrant will not be excluded if -- will not be -- will be -- will not be excluded -- sorry -- if the prosecution can show that the police relied on the warrant in objection [sic] to good faith. The burden is on the prosecution to establish good faith. The good faith exception will not apply, however, where the magistrate or

RECEIVED by MSC 9/1/2025 7:07:38 PM

judge issuing the warrant was misled by information in the affidavit that the affiant knew was false or would have been -- or would have known was false except for his reckless disregard of the truth.

Where the issuing magistrate wholly abandoned his judicial rule [sic], where the warrant was so lacking in indica [sic] of probable cause -- sorry -- cause as to render official belief in its existence entirely unreasonable, and where the warrant is so factually -- whatever. In failing to particularize the place to be searched and the things to be seized, the executing officers cannot reasonably presume it to be valid.

Winn provides a compelling analysis for assessing good faith when it comes to cell phone searches. In determining that the police had not acted in good faith in that case, the Court relied on the first, second and fourth factors that reboot [sic] good faith -- rebut good faith. The Court first found that the police had been reckless by requesting a warrant for all the data on the defendant's phone when only certain videos were at issue. The Court found, second, that the magistrate had not adequately reviewed the affidavit -- the affidavit and warrant, since no red flags were raised and no alarm bells sounded for the magistrate, by the fact that the police were seeking a warrant to rummage through every conceivable bit of data in

RECEIVED by MSC 9/1/2025 7:07:38 PM

the defendant's phone for a misdemeanor crime.

Finally, the Court found that the police did not have believed -- could not have believed that the warrant was valid, since it is simple common sense that dictates that the police did not need to look at every bit of data on the cell phone to find pictures of young girls in swimsuits at the public pool in question.

In the present case, the prosecution likewise cannot show good faith. Although perhaps evidentiary hearing will flush out additional -- you know -- you know, ration [sic] it. There are several undeniable -- basically, Your Honor, instead of me reading through this, getting dry mouth and slipping up on my words, the first search warrant for the first phone, overbroad, highly. That's defended by the Fourth Amendment. Beyond that, you know, that covers the motion to suppress. That's the only motion in this case -- or the only evidence in this case. Without that evidence, this case is invalid and in my opinion needs to be dismissed immediately.

We can cover specifically the motion to dismiss --

THE COURT: First, we're going to handle one motion at a time.

THE DEFENDANT: Sure. Let's do that.

THE COURT: All right. Ms. Ambrozaitis, response?

MS. AMBROZAITIS: Thank you, Your Honor. I would

RECEIVED by MSC 9/1/2025 7:07:38 PM

just point out, in our motion, that U.S. versus Riley is one of the seminal cases for digital evidence. It does stand for the proposition that a cell phone is not immune from search. It is, instead, that a warrant is generally required before such a search, even when a cell phone is seized incident-to-arrest.

So, the incident-to-arrest exception doesn't apply to cell phones, but other case-specific exceptions could still apply to justify a warrantless search of a particular phone, and you would utilize the exigent circumstances for that. So that would be in a case where you need to take the phone and put it in airplane mode, or say you're after a suspect in a murder and you believe that the evidence is there on the phone. Police are allowed to go in and look at that prior to getting a search warrant, as long as they can articulate that.

And the Fourth Amendment does not require a perfect description of the data to be searched and seized. Search warrants covering digital data can contain some ambiguities so long as law enforcement agents have done the best that they could reasonably be expected under the circumstances, and have acquired all the descriptive facts which a reasonable investigation could be expected to cover, and have ensured all of those facts were included in the warrant. And it's important to bear in mind that a search

RECEIVED by MSC 9/1/2025 7:07:38 PM

warrant does not necessarily lack the particularity simply because it is broad. And we've pointed to the case -- to the Obrecht case, which was a very large case that went down, where multiple jurisdictions were investigating the person who was running the Silk Road website on the dark web selling illegal controlled substances, and at the time that they seized the laptop and arrested him, they had an undercover agent who was in live conversations with him, was directing him to open up other windows, to look at things that they were talking about. And so when they actually arrested Obrecht in a library with the laptop open in front of him with those screens up, they still had to do a search warrant to cover the items on that laptop, and within that search warrant they also had to put evidence of ownership to show that he did own that laptop. Even though it was open in front of him, the windows that were open on the computers showed that he was the one that was conversing with the undercover police officer online, and they arrested him in front of it.

So, to show possession, you're always going to have to do a search warrant and ask for evidence of ownership, because later on the individual is going to say, well, it wasn't mine, or they might limit their access to that and say, well, other people had access. So they muddy the waters. And if we look here, the defendant did just

RECEIVED by MSC 9/1/2025 7:07:38 PM

that. During his interview with Detective Van Bonn, he kept asking him questions like: How can you prove that's my phone? How can you prove I took the pictures? It's my phone. I don't own it. My dad paid for it. And then when Detective Van Bonn addressed him and said are you saying your dad took these photos, he says, well, I'm not saying that, but I don't own the phone. And so he went through that whole litany, which is why we do search warrants for the evidence of ownership.

The defense cites to U.S. v Winn. That was a case where police asked for any and all information, standard language. They didn't make any limiting language whatsoever in their search warrant, which is why it wasn't upheld and it was found to be overbroad. But if you look at our search warrants, there are limiting languages in there. Detective Van Bonn found those photos when he was looking for evidence of ownership, and he did exactly what he's supposed to do under the law. He saw something that looked illegal. He backed out. He stopped his search. He retrieved another search warrant to go back in, to investigate that particular issue. And that's what would happen.

Now, during an investigation of the child sexually abusive material, if he had found evidence potentially of controlled substances deals, he would have to stop his search, back out and say, okay, pursuant to this other

RECEIVED by MSC 9/1/2025 7:07:38 PM

search warrant I came across this. I stopped my search. Now I'm going back in to look at this.

And so each of the search warrants that went into Mr. Haupt's phone, they were -- they had the limiting language necessary to ensure that we were only looking at it for particular things, to prove particular things, and when Detective Van Bonn found things outside the scope of the warrant, he did what he was legally required to do and obtained another search warrant. And so the defendant's argument fails and the evidence comes in.

THE COURT: Rebuttal?

THE DEFENDANT: Yeah. The prosecution states the process. Obviously when conducting that search on the phone, if the detective comes across an item that he believes to be illegal beyond the scope of that search, he is to back out, pull another search warrant. Except, in the detective's own testimony, at the prelim he states that he looked at multiple photos, multiple pieces, before going and obtaining that search warrant, that secondary one. He has violated the scope on that.

His dates on that secondary search warrant was well off. He -- he testified that he pulled that search warrant on either the 27th or the 28th, and that it was finished on the 28th, when in reality it was pulled on the 15th of September of 2017. He's well off there.

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I would also like to state, since we're on the topic of search warrants, if you turn to Page 4 of the prosecution's response, she states -- she is talking about a search warrant done on the house, and a secondary iPhone that was obtained during that search, except that iPhone is on no receipt, no nothing. There's no chain of custody on that. There's no evidence that it was ever removed from there.

Furthermore, she puts in writing here that that phone was searched, even though there was never a search warrant pulled for that phone, and if there was, I have never been provided with it. She has highly, highly violated the law.

That being said, that would be ultimately my argument for dismissal in this case specifically, Your Honor.

THE COURT: Any other rebuttal, Ms. Ambrozaitis?

MS. AMBROZAITIS: I would just point out that the defendant is somewhat naïve or ignorant in digital evidence searches, and once a cell phone is downloaded, that's when the search begins, meaning that they make a mirror image copy of the phone. They never go back to the phone. They look at the copy. They work on it in what's called a UFED reader, which allows them to look at the information brought forward and then to tag certain things. But it has not

RECEIVED by MSC 9/1/2025 7:07:38 PM

changed. So as he's going through the UFED information and he sees that, he backs out. There isn't another download of the phone with the next search warrant. It's just now permission to look at these other things inside of the download that was done. So thank you.

THE COURT: Anything else, Mr. Haupt?

THE DEFENDANT: Yeah, if I may, Your Honor. Furthermore, as to that search warrant on that second phone, Detective Van Bonn states specifically in his testimony at the prelim that that phone was not (unintelligible). He states that it was searched, but no evidence of value came up on it. So he himself as well is admitting to that search of the phone without a search warrant, and yet stating that there was no evidence found on it of value, but yet the prosecution is saying otherwise. And even beyond that, to kind of reboot -- or a little rebuttal to what the prosecution had just stated, I'm pretty aware of the search process, considering Detective Van Bonn explained it in depth at the -- at the prelim, where it will be -- it will be abundantly clear, because I will be filing a response to the prosecution's response, but in that I will outline some of the cases of perjury in which Judge Farrell himself, after asked questions by my previous attorney, Scott Moore -- who, I have to acknowledge at this time, now that I have read back through it, did a very good job at that prelim.

RECEIVED by MSC 9/1/2025 7:07:38 PM

The line of questioning, Detective Van Bonn directly contradicts when asked by Judge Farrell in the case. But like -- as I said, that will be outlined in my response to the prosecution, which obviously I will make sure you get a copy of, Your Honor.

MS. AMBROZAITIS: Well, Your Honor, I would object to any further motions. Today was the motion day. Trial is the 23rd. It is what it is. If he wants to make a response now, he needs to do it, and we're talking about the first cell phone that was seized. The second one isn't at issue. It wasn't at issue in his response, or his motion, so I ask the Court to rule.

THE DEFENDANT: It's not an issue, Your Honor, yet she cites it as part of her reasoning in her response on Page 4. So if it wasn't an issue, she has brought it into the case here. She has brought it into the response and justification of that.

THE COURT: The Court will take it under advisement at this point and read the transcripts. And, Mr. Haupt, you have until Friday at 4:00 to file any further response.

Ms. Ambrozaitis, you will have until the Friday after that to file a --

MS. AMBROZAITIS: Your Honor, I'm out of town. I'm not in the office next week.

RECEIVED by MSC 9/1/2025 7:07:38 PM

THE COURT: Well, if you wanted to file another response, then --

THE DEFENDANT: I have no problem even if she wants to provide me a copy in that time frame. As she has been e-mailing these responses to my father's e-mail, he has been printing them and providing them to me. If she wants to do that, it's completely fine with me, Your Honor.

THE COURT: So, now we can go on to the motion to dismiss.

THE DEFENDANT: Obviously you have read over the motion, Your Honor, so I'm not going to bore you with the breakdown of all the details. A lot of it has been covered in that motion to suppress and my argument there. You know, there's not a whole lot that goes over and beyond that that's covered in here. Mostly errors on the prosecution's portion, based on the -- you know, part of the reason I'm asking for the dismissal, the prosecution has jerked around with the time line. There's too much illegality in her office and in this case from her perspective. Massive Brady violations. Massive discovery violations. I have asked for many pieces of discovery that she simply will not provide, one of them being that search warrant she claims to exist but that she has never provided. Another being -- I have a couple laid out here. I'm sorry. I'm blanking, Your Honor, here.

RECEIVED by MSC 9/1/2025 7:07:38 PM

THE COURT: Specifically which search warrant are you talking about?

THE DEFENDANT: The search warrant for that secondary iPhone that she addresses in her response and she has addressed previously, and that Detective Van Bonn has testified to dumping, but there being no evidence on there. There is no search warrant ever provided for that. She has violated that thoroughly.

Another thing that has been violated, there's a 28-day rule in place. She has not provided me with a witness list, with the addresses of those witnesses on them. That is required. That's a Brady violation. If you read through this, there's plenty of Brady violations in this case, as well as more minor discovery violations. If the prosecution would simply provide what I have asked in multiple discovery requests over the course of two years going back to 2017 like they are outlined in here, we wouldn't have an issue. Because she has violated that, unfortunately it's out of my hands. In my opinion it's out of this Court's hands. She has violated the law.

THE COURT: Ms. Ambrozaitis?

MS. AMBROZAITIS: Oh, well, I think that I summed it up pretty quick and easy and succinctly. In our response to his motion to dismiss, we have provided everything to his prior counsel that they have requested. We have responded

RECEIVED by MSC 9/1/2025 7:07:38 PM

to all of their discovery requests, some of them in writing, and formally in the court we incorporated those responses by reference. Defendant doesn't understand what Brady violations are, and I'm not about to educate at this point.

If he can list out things that he wants and if they are discoverable, he can have them, if he doesn't have them already. But the defendant has not only asked for discovery via his prior attorneys; he has filed FOIA requests with law enforcement. So, the fact that he wouldn't have anything that is due to him is surprising. So -- but it's his MO. He did it in the last case that we had here that drug on for two years, and that was the same issue there. He is under this perception that everybody is out to get him and everybody wants to hide the ball. But we have provided everything. If he can list items that he wants, that he believes exist, that he did not receive, we'll look for those items and see if they should be turned over.

THE COURT: Rebuttal?

THE DEFENDANT: Yeah. I appreciate the prosecutor saying that she will provide those, although just last -- or just recently I filed a discovery motion for a good list of items that she still hasn't provided. So if what she's saying is true, what's the hold-up in providing those? And I'm glad she brought up FOIA as well, because there's things that she has acknowledged through the timeline on this case

RECEIVED by MSC 9/1/2025 7:07:38 PM

that she -- she acknowledges do not exist, but yet I have obtained them, most of them being body-worn camera footage that the prosecution states does not exist I have obtained through FOIA. She is flat out lying. The law is black and white. It's up to a matter of the Court's opinion here whether the Brady violations constitute a dismissal, but without -- even beyond that, there still will be -- and my intention, if you do not dismiss, Your Honor, I would like to request a stay in this case, because I will be requesting -- I will be filing an interlockry [sic] appeal to the State Court of Appeals.

THE COURT: Anything further, Ms. Ambrozaitis?

MS. AMBROZAITIS: Your Honor, if he received things through FOIA from law enforcement agencies that he did not receive through my office, I would like a list of those things so we can determine if law enforcement failed to provide those to our office, or if we do have them in our file. And I'm looking here, but I do believe we've been set for trial before and witness and exhibit lists were filed in October of 2018. We've met all of our deadlines.

THE COURT: Anything else?

THE DEFENDANT: As far as her witness list, she still has not attached addresses to send subpoenas to those. One of the issues in question was the fact that the witness Aleesha McCurry cannot be here for that trial.

RECEIVED by MSC 9/1/2025 7:07:38 PM

Unfortunately, she has perjured herself in -- I mean obviously if you're going to read the transcripts from the prelim, you will find it yourself. She has perjured herself in that. Her testimony cannot be used here. It must be used in person, and I can't even have -- I don't even have an address to send a subpoena to, to subpoena her for that court date, even though that's what the Court is requiring of me.

And as far as the list of items that were obtained through FOIA that she has not provided, I will gladly file -- I will gladly, I'm assuming, file it with the clerk, is the best way to get a copy to you and the prosecution. I will gladly do that this week.

THE COURT: As to the motion to dismiss, the Court is going to deny that motion. There has been a lot of delay in this case, but it was -- a lot of it is attributable to the defense in this matter as far as -- you have shown no proof that she has not provided you with items, on this item. And if you've received other things from the police department, that was always a problem when I was an attorney that the police department didn't turn over everything to the prosecutor's office.

THE DEFENDANT: I understand.

THE COURT: That has always been a problem, and I don't think that's ever going to change.

RECEIVED by MSC 9/1/2025 7:07:38 PM

THE DEFENDANT: Sure.

THE COURT: But -- so the Court is going to deny the motion to dismiss at this time.

Anything else that we want to handle today? There is People's motion to use the prior recorded testimony of the complainant. I don't think that's been set for hearing, or was it --

MS. AMBROZAITIS: We did set it for hearing today, Your Honor.

THE COURT: Today?

MS. AMBROZAITIS: And there was notice of hearing provided to the defendant on June 27th --

THE COURT: Okay.

MS. AMBROZAITIS: -- that we would hear it today. The People would stand on the motion. I mean it's pretty clear and it's pretty straightforward that we can use that testimony, and we would ask that it be granted.

THE COURT: Mr. Haupt, have you had an opportunity to review that motion?

THE DEFENDANT: No. I've never been provided with that, Your Honor. I don't know what I can do in defending it right now.

MS. AMBROZAITIS: His father responded via e-mail that he printed it and provided it to his son.

THE DEFENDANT: There was never a mailed,

RECEIVED by MSC 9/1/2025 7:07:38 PM

certified copy delivered to me. I never received a notice, a court notice from the court. I never received a certified copy of that.

MS. AMBROZAITIS: He wouldn't have received a notice from the court. Our notice of hearing was the notice, and it was attached and it was sent -- Mr. Haupt, his father, on June 27th at 2:40 p.m., said, "Michelle: Received the motions to use prior testimony. Will wait for a response to the two motions filed. Thanks. Jim Haupt." And my e-mail to him when I sent it was, "Mr. Haupt: Thank you for speaking with me via telephone earlier today. I appreciate your willingness to accept service via e-mail of filed pleadings. You advised that your son Alexander Haupt, the defendant in these matters, was not present when I called, but that you would print out a copy and share it with him when he returned home. I will forward my response to Alexander's motions that he filed this past Monday once they are completed. If he was not aware, the Court established July 2nd, 2019 at 9 a.m. as the time for the motions to be heard. There was not sufficient time granted between the filing of the motions and the date of the scheduled hearing for either party to properly serve motions or responses within the established time frame in the Court Rules on the other party. I appreciate your agreement to accept e-mail service so that we can be as timely as

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possible in serving each other with the paperwork." And that paperwork included a scanned-in copy of my motion, my proposed order, the notice of hearing, and proof of service.

THE COURT: And the Court has a copy of that, plus the e-mail that you just talked about.

THE DEFENDANT: Either way, Your Honor, I can defend that --

THE COURT: Well, at this time --

THE DEFENDANT: -- the motion.

THE COURT: -- the Court is going to -- what did you say?

THE DEFENDANT: I can -- I have a rebuttal to the motion.

THE COURT: Okay.

THE DEFENDANT: Just being -- she hasn't -- the prosecution has not done her due diligence in this case, which is required. She has not sent a subpoena out. Through military contacts that I have, I have ascertained that all -- all training and duty dates are sent out at the beginning of the year and then finalized within 30 to 60 days of that date. So she has had notice well before this and she's just now trying to drop it at the last second, to try to not have her witness here and use her testimony. But her testimony in the prelim, as you will read, is all perjured. There's countless notes in there of perjury,

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which I will gladly find -- or I will gladly file a guideline of some sort if you would like it, that clearly points out, not only between -- not only with questioning between my attorney and Ms. Ambrozaitis and the contradicting statements that witness makes, but contradicting statements between the witness and the -- and Judge Farrell himself. She has not done her due diligence. She has not made any attempt to actually get that witness here.

I'm not trying to postpone the case. I don't want it pushed back for the sake of her being able to be here. I just -- I'm not asking for any more time. I just simply want that witness to be here, because her previous testimony is perjured, and I do not believe that the prosecution has done her due diligence to subpoena her in those -- in that case.

MS. AMBROZAITIS: Your Honor, once we sent a subpoena out or gave notice -- I'm not sure how my staff did that -- to Aleesha McCurry, but she advised that she was on orders. We asked for a copy of her orders and received same. She provided those to us. Being a military wife, I am well aware of how those orders work and I'm also well aware that I cannot subpoena somebody who is on active duty orders to appear in court. She happens to be on active duty on orders during this time and is done July 29th. I advised

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the Court of this the last time. The Court asked that I file the motion to utilize her testimony, and we believe that she is unavailable. If the trial is going on the 22nd or the 23rd, whenever it is scheduled, then her testimony is here and able to be utilized.

THE COURT: Further response?

THE DEFENDANT: Yeah. If Ms. Ambrozaitis knew the process being a military wife, she would know that it's required to subpoena the commanding officer of that person, something which she has not done. It's required by law. It's a military law. It's well covered. She needs to subpoena the commanding officer to verify all that.

THE COURT: On this motion the Court is going to grant the motion to use the prior recorded testimony of the complainant.

Mr. Haupt, if you can somehow subpoena the witness and get her here, and she appears, then we wouldn't allow the use of the prior recorded testimony, only in the case that she changes her testimony on the stand. But at this point it's going to be allowed.

And earlier you stated that you wish to do an interlocutory appeal.

THE DEFENDANT: Yes, I do.

THE COURT: Based on the denial of the motion to dismiss, the Court is not going to make any stay on that.

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We're going to go through with the trial on the 23rd, unless you can get the appeals court to stay it.

THE DEFENDANT: I'll do that, Your Honor.

THE COURT: The other aspect is -- is anybody thinking of doing any other motions at this time?

MS. AMBROZAITIS: None on our part, Your Honor.

THE COURT: All right. And then the last aspect, this is set as also the final pretrial. That means it's the last day any kind of plea agreement would be accepted by the Court. Are you interested --

THE DEFENDANT: If I may, Your Honor --

THE COURT: -- in talking with the prosecutor over any plea agreement?

THE DEFENDANT: If I may, Your Honor, you stated at the last court date, and it will be in the transcripts, it was till July 5th. You gave until after the 4th.

THE COURT: All right. Okay.

THE DEFENDANT: Yeah, speaking of, you never did rule on the suppression motion, Your Honor. I would appreciate it --

THE COURT: I took that under advisement.

THE DEFENDANT: Okay.

THE COURT: And I'll make that decision.

THE DEFENDANT: Pending those -- yep, I understand.

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THE COURT: You've started mentioning the prelim, so now I need to read that before I can make that decision.

THE DEFENDANT: Fantastic. I would appreciate it if you would, Your Honor.

THE COURT: And I'll try and make that as quickly as possible.

THE DEFENDANT: Appreciate that as well.

THE COURT: For the record, Mr. Moore was the prior attorney handling the case but is now in an advisory capacity only. He is in court today.

Anything further?

MS. AMBROZAITIS: Your Honor, with the order for our -- the motion -- we attached an order, a proposed order to the motion to dismiss, and a proposed order to the motion to use recorded testimony. Would the Court care to sign those orders today so we have them?

THE COURT: The Court will review them and if they're -- if the Court thinks they are appropriate, the Court will sign them.

MS. AMBROZAITIS: Thank you.

THE DEFENDANT: If I may, Your Honor.

THE COURT: You may.

THE DEFENDANT: Am I able to file a response to that motion?

THE COURT: To which?

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THE DEFENDANT: To the one to use that -- the recorded testimony?

THE COURT: You may.

THE DEFENDANT: And just do that through the clerk's office then?

THE COURT: Yes.

THE DEFENDANT: Thank you.

THE COURT: So you may file a motion to -- a response to that.

THE DEFENDANT: Fantastic.

MS. AMBROZAITIS: So the Court is then going to withdraw its order granting --

THE COURT: No, not at this time, but if Mr. Haupt believes that he's right in filing a response, then we'll handle that -- probably look at something on the 19th, which would be a Friday afternoon, prior to the trial date. I think we can probably arrange to have any other motions on that. But that would be up to Mr. Haupt to ask for a reconsideration of that motion based on his response.

THE DEFENDANT: Fantastic. Thank you.

THE COURT: All right. Anything else?

MS. AMBROZAITIS: No, Your Honor. Thank you.

THE DEFENDANT: No, Your Honor.

THE COURT: All right. And just for the record, Mr. Haupt, you are not interested in any kind of a plea

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offer; is that correct?

THE DEFENDANT: Not at this time, Your Honor.

THE COURT: Okay. All right. So at this point the Court will not accept any plea offers. I did say I would hold that open until July 5th, so after July 5th if there's not any plea agreement worked out, after that date any kind of plea would be to all the charges.

THE DEFENDANT: I understand.

THE COURT: All right. We're in recess.

THE BAILIFF: All rise.

(At 10:04 a.m., hearing concluded)

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I certify that this transcript, consisting of 37 pages, is a complete, true, and correct transcript, to the best of my ability, of the Motions taken in this case on Tuesday, July 2, 2019 by Gail Michel, CEO-6088.

Dated: 11/21/19

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 16: 15-Motion Compel 07-12-2019

STATE OF MICHIGAN

IN THE 55TH CIRCUIT COURT FOR THE COUNTY OF CLARE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs-

Case No. 17-5730-FH

ALEXANDER JAMES HAUPT,

17-5731-FH

Defendant.

_____/

COPY

PEOPLE'S MOTION TO COMPEL

PEOPLE'S MOTION TO STRIKE DEFENSE WITNESSES AND EXHIBITS

BEFORE THE HONORABLE ROY G. MIENK (P47899)

Harrison, Michigan - Friday, July 12, 2019

APPEARANCES:

For the People: MS. EILISIA SCHWARZ (P62576)
Chief Assistant Clare County Prosecutor
225 W. Main St.
Harrison, MI 48625
(989) 539-9831

Recorded by: Ms. Peggy Chaffee, CEO-9373

Transcribed by: Ms. Rhonda L. Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

***

Statement in Support of Motion to Strike Defense Witnesses and Exhibits, by Ms. Schwarz 3

Court Grants Motion 4

Statement in Support of Motion to Compel, by Ms. Schwarz 4

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Harrison, Michigan

Friday, July 12, 2019 - 9:39 a.m.

* * *

THE COURT: Calling the case of the People versus Alexander James Haupt. Appearing on behalf of the People?

MS. SCHWARZ: Chief Assistant Prosecuting Attorney Eilisia Schwarz appearing on behalf of the People, Your Honor.

THE COURT: All right. And you scheduled a motion to compel in two cases in this matter, and a motion to strike defense witnesses and exhibits. And there's proof of service of the mailing of the motion to strike defense witnesses and exhibits in the file. So let's proceed with that one first.

MS. SCHWARZ: Thank you, Your Honor. It's the People's position that the motion should be granted for the reasons stated in the motion and brief in support. In this case, they're not relevant to the above-referenced case, and the exhibits listed on the defendant's exhibit list are not relevant as well. So we ask that the Court grant the motion.

I believe that there was a proposed order included with the motion filed by Ms. -- Prosecutor Ambrozaitis, and we would ask that you sign that granting our motion.

THE COURT: The Court has reviewed the motion.

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There has been no response by the defendant to the motion. He has not appeared here. I did notice that in the motion you cited some case law that said this wasn't -- let's see.

MS. SCHWARZ: Are you referring to averment 16, Your Honor?

THE COURT: Yes. The Court can rule on the issue without the defendant being present or making an argument. That is not considered a critical stage of the proceedings.

The defendant has a constitutional right to present a defense and to confront his accusers, but he still must comply with the procedural and evidentiary rules established to ensure fairness. The right to present a defense only extends to the relevant evidence. The witnesses that you're asking to be stricken and exhibits to be stricken had no relevance to this case; they referred to other cases to which he is charged. So the Court will grant that motion.

And as to the motions to compel?

MS. SCHWARZ: Thank you, Your Honor. In this particular case Ms. -- or excuse me -- Prosecutor Ambrozaitis filed her motion and the basis for which is detailed in the brief in support of the motion. As in the last case, both parties are bound to comply with the Michigan Court Rules in reciprocal discovery. We have not -- after attempts, numerous attempts -- been able to obtain

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certain discovery from the defendant. Therefore, we would ask that you grant the order that is attached to the motion, the proposed order in this particular case, that Mr. Haupt is required to turn over the requested information and material within seven days of the date of the entry of the order, specifically citing page -- I believe it is 3 -- of Prosecutor Ambrozaitis' motion. There are some recorded statements of witnesses in this case; we do not have them at this time.

THE COURT: In the file there's proof of service dated July 3rd of the motion to compel on the defendant. Oh, that's the motion to dismiss. Let's see.

The Court will have to review the file. If there is a notice of the hearing and proof of service of the motion to compel upon the defendant, which the Court hasn't seen at this point -- in file No. 17-5731-FH, the Court has its copy. It's a true copy. But the Court's copy of the proof of service says the motion to dismiss, response to the -- it's not the right proof of service attached to my copy. But if there is a -- if we find the proof of service on the motion to compel, the Court will sign an order granting that motion. We'll have to check the file and make sure we have a copy of the motion, renewed motion to compel discovery, and the proper proofs of service in the file.

MS. SCHWARZ: Thank you, Your Honor.

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THE COURT: All right. Anything else this morning?

MS. SCHWARZ: No thank you, Your Honor.

THE COURT: All right. We're in recess.

THE BAILIFF: All rise.

THE COURT: In the future on those proofs of service, make sure Mr. Moore gets a copy. He's only acting as advisory counsel, but he should -- I expected him here today, and if he didn't get service, then he's not going to be here, and so I don't know what happened there, but --

MS. SCHWARZ: I will -- I will check to see if that was -- if that was done, and provide it to Mr. Moore and provide a copy of that to the court. Otherwise, I will make sure that he is noticed.

THE COURT: Okay.

MS. SCHWARZ: Thank you, Your Honor.

(At 9:38 a.m., hearing concluded)

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I certify that this transcript, consisting of 7 pages, is a complete, true, and correct transcript, to the best of my ability, of the Motions taken in this case on Friday, July 12, 2019 by Peggy Chaffee, CEO-9373.

Dated: 11/11/19

R. Reppert

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 17: Jury Trial Aborted Vol I - July 23-19

STATE OF MICHIGAN

IN THE 55TH CIRCUIT COURT FOR THE COUNTY OF CLARE

THE PEOPLE OF THE STATE OF MICHIGAN,

-vs- Case No. 17-5731-FH

ALEXANDER JAMES HAUPT,

Defendant.

_____/

COPY

JURY TRIAL - VOLUME I

BEFORE THE HONORABLE ROY G. MIENK (P47899)

Harrison, Michigan - Tuesday, July 23, 2019

APPEARANCES:

For the People:	MS. MICHELLE AMBROZAITIS (P62576) Clare County Prosecutor 225 W. Main St. Harrison, MI 48625 (989) 539-9831
In Pro Per:	MR. ALEXANDER JAMES HAUPT
Appearing in an Advisory Capacity to Defendant:	MR. SCOTT DOUGLAS MOORE (P53609) Aleck & Jenkins 1420 N. McEwan St. Clare, MI 48617 (989) 386-2699
Recorded by:	Ms. Gail Michel, CEO-8066
Transcribed by:	Ms. Rhonda L. Reppert, CER-3468 Certified Electronic Reporter Gladwin, MI 48624 (989) 426-6025

RECEIVED by MSC 9/1/2025 7:07:38 PM

TABLE OF CONTENTS

WITNESSES: PAGE

None.

EXHIBITS:

None.

***

Court Denies Defendant's Motion to Suppress	3
Court Denies the Motion to Reconsider	4
Motion to Strike, Continued to be Granted	4
Statement by Mr. Moore	8
Motion in Limine by Ms. Ambrozaitis	9
Response by the Defendant	9
Mr. Moore Reappointed as Defense Counsel	10
Motion in Limine as to Photos Granted	11
Motion by Ms. Ambrozaitis Regarding Redacting Information from Preliminary Examination Transcript	11
Statement by Mr. Moore	13
Response by Ms. Ambrozaitis	15
Court Adjourns Trial to July 24, 2019	17

RECEIVED by MSC 9/1/2025 7:07:38 PM

Harrison, Michigan

Tuesday, July 23, 2019 - 9:27 a.m.

* * *

THE BAILIFF: -- the Honorable Roy G. Mienk presiding.

THE COURT: You may be seated. Calling the case of the People versus Alexander James Haupt. Mr. Haupt --

MS. AMBROZAITIS: Michelle --

THE COURT: -- please take the table.

MS. AMBROZAITIS: Michelle Ambrozaitis appearing on behalf of the People.

THE COURT: You are Alexander James Haupt?

THE DEFENDANT: I am, Your Honor.

THE COURT: All right. First thing, the Court took under advisement a motion to suppress by the defendant. That is going to be denied. The warrant was not overbroad. It was not an unreasonable search. There was probable cause for the warrant. The search was stopped. A new search warrant was requested when they found the photos. There was allegations for the original warrant of the victim texting photos, so that was included within the search. It's a reasonableness test. The warrant identifies the specific offense. It described the place to be searched. It specified the items to be seized by the relation to the case -- to the crime. So, the warrant was not overbroad, and the

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motion to suppress is denied.

There was a motion to strike by the prosecutor. The defendant did not appear. The defendant did file a response afterwards on the motion to strike. There's some case law that says the defendant doesn't have to be present to rule on the motion. The Court granted the motion to strike. Defendant's response is going to be treated by the Court as a motion to reconsider. The Court has reviewed the defendant's response and the Court is denying the motion to reconsider, and the motion to strike is going to continue to be granted in this case.

So, the witnesses that were listed by the defense that pertain to the other cases, Deputy Gerbe, Deputy Drury, Sergeant Aaron Miller, Bailey Tocco, Officer Francisco, Officer Lake, Doug Kennedy, and Deputy Weakman will not be allowed to testify in this case, since they had nothing to do with this case. And to allow them to testify would only confuse the jury, confuse the issues. Nobody did a motion to consolidate all cases for trial, so it will still be -- continue to be treated as separate cases.

Both sides have done motions to compel. It's the Court's policy that the people hand over whatever items they have of evidence to the other side. I haven't found any -- anything in any of the motions to compel that shows the other side is withholding evidence. And in fact, the

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prosecutor says that they have given over the evidence that they have to either prior attorneys in the case or to the defendant.

There was a status conference held on July 18th in which Mr. Moore was available by phone. The defendant apparently did not answer the phone, was unable to be reached. So --

THE DEFENDANT: I object, Your Honor. That's -- that's --

THE COURT: I'm putting it on the record. You don't get to object at this point.

THE DEFENDANT: Nobody called me.

THE COURT: You don't get to --

THE DEFENDANT: I have proof of it, Your Honor.

THE COURT: You have proof of it? Well, then you haven't been giving proper phone numbers to Mr. Moore, because Mr. Moore had phone numbers. He called. We listened to him on the phone while he made phone calls, and Mr. Moore will get to say what he recalls on the 18th. But --

THE DEFENDANT: The ex parte communications?

THE COURT: You can be quiet at this point. You can make a record of objections later on, but at this point the Court is making some determinations.

MS. AMBROZAITIS: Your Honor, if I may,

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defendant's father is advising him what to say. He's not an attorney.

THE COURT: All right.

MS. AMBROZAITIS: He's not an attorney. He's not a party to this case, and I'd ask the Court to instruct him --

THE COURT: We're going to get to that too.

MS. AMBROZAITIS: Thank you.

THE COURT: All right. Then as to the motions to compel, I believe on the 18th Ms. Ambrozaitis did say there was a couple items that may not have been given to the defendant and you said you were going to give them to the defendant. Have you done that?

MS. AMBROZAITIS: Your Honor, the defendant was served with --

THE COURT: It's a simple yes or no --

MS. AMBROZAITIS: Yes. Thank you.

THE COURT: -- at this point. All right.

And Mr. Haupt, your father -- James Haupt, you are not an advisory counsel, unless you are an attorney and filed an appearance. You don't get to help direct the case from the pews there. I have let it go earlier on because we haven't had a jury, but today is a jury trial. You don't get to help him do his case. He's got an advisory attorney who, if he has never asked him a question, then that's his

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problem. All right.

Also, Mr. Haupt, the Court doesn't take communications -- bailiffs, could you come here? Apparently you dropped off this letter. The Court has not read it. It does not read communications from anybody regarding a case. You can return that to the father. The father; he's the one that wrote the letter. The Court does not read ex parte communications from anybody involving any case. The Court has not read that letter. So if you continue to disrupt this case, Mr. Haupt Senior, you will be asked to leave the courtroom.

It's pretty clear from the filings of Mr. Alexander Haupt that he understands the Michigan Court Rules, the Michigan Rules of Evidence. He understands the elements of the offense of the charges against him.

Mr. Moore was placed as an advisory because of the length of this case; it's going on two years old. The delays have been mostly from the defendant. Last year we allowed Mr. Grabel to -- or the prior attorney to withdraw after his second case to withdraw, because he could not get along with the client. And we set up a court date approximately two months later and at the time of the withdrawal, Mr. Haupt, you were going to represent yourself. We went through the problems of representing yourself and the Court told you at any time if you wanted a court

RECEIVED by MSC 9/1/2025 7:07:38 PM

appointed attorney you could have one. You just had to go to the clerk's office and ask, and you waited until the next court date to come to court and ask for a court appointed attorney. Another delay that, if you knew ahead of time, you could have easily contacted the clerk's office.

Mr. Moore, you wanted to make a statement regarding what happened on July 18th?

MR. MOORE: Thank you, Your Honor. May it please the Court, Scott Moore, attorney at law. As the Court has already alluded to, there was a status conference by telephone. I was not involved directly with the scheduling of that. The prosecuting attorney had apparently emailed and telephoned my office, as well as addresses and numbers associated with Mr. Haupt. We spoke on the speaker phone. It's my understanding the Court is going to issue a preliminary order regarding any findings or action taken by the Court. As I recall, nothing of substance came from that, primarily because Mr. Haupt was not present and available. I would defer to the prosecutor to fill in the blanks, but I think what I recall most strongly was there was a suggestion that Mr. Haupt had attempted to schedule a hearing or believed that there was a hearing scheduled for Friday the 19th of July. I indicated to the Court and to the People that I would make myself available. I was available that day. Since I have been relieved as the attorney of

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record and placed in an advisory capacity, Mr. Haupt has not reached out to me for any advice or counsel in any way until this morning when he asked me directly about this July 18th phone conference. Thank you, Your Honor.

THE COURT: Ms. Ambrozaitis, do you want to put anything on the record regarding the July 18 status conference?

MS. AMBROZAITIS: No, Your Honor.

THE COURT: All right. And Ms. Ambrozaitis, is there anything you would like to put on the record this morning?

MS. AMBROZAITIS: Your Honor, we do have motions in limine that we would like to go over. First and foremost, we would like to have a motion to exclude any discussion of the victim, Aleesha McCurry, sending any images to the defendant. According to People versus Wilkens, 267 Mich App 728, 2005, consent or any participation in these types of crimes is not a defense to production of child sexually abusive material, to which the defendant is charged.

THE COURT: All right. Response to that motion in limine, Mr. Haupt?

THE DEFENDANT: Yeah. All I have to put on the record, Your Honor, is that --

THE COURT: No, no, the response to the motion.

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She just made a motion in limine to exclude any talk of consent of Ms. McCurry sending you photos.

THE DEFENDANT: I'm going to stand mute from this point on, as the Court is in violation of MCR rule 6.005. I did not -- I did not say I did not want an attorney. I told you on the record I wanted an attorney. You have not provided one, and an advisory capacity is limited to those who --

THE COURT: You have an attorney. It's Mr. Moore. If you want an attorney, he's ready and he's here today.

THE DEFENDANT: You've put --

THE COURT: Do you want an attorney?

THE DEFENDANT: -- a --

THE COURT: Do you want an attorney? Do you want an attorney?

THE DEFENDANT: Yes, I do, Your Honor.

THE COURT: Then Mr. Moore, you're reappointed to handle this case.

UNIDENTIFIED SPEAKER: Thank you, Your Honor.

THE COURT: Mr. Moore, any response to the motion in limine?

MR. MOORE: I am not prepared for this, Your Honor. I have not received a copy of the motion in limine. I mean I have received it; I'm not disputing that. That has been sent to me. As an advisor, I have not been requested

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by my client to prepare or answer questions for him in any way. All I can do at this point is say that I rely on the firm discretion of the Court and believe that the prosecutor would not misstate the state of the law.

THE COURT: The motion in limine is granted as to those pictures, any consent being argued regarding Ms. McCurry sending them.

MS. AMBROZAITIS: Thank you, Your Honor. And then with regard to the preliminary examination transcript, I would like the Court to consider redacting some of the information in there for several reasons. The Court did say that we could use the preliminary exam transcript and testimony of Aleesha McCurry. That will be read on the record today by assistant prosecutor Claire Kaisler. But specifically with regard to Page 7 -- or no -- Page -- so let's start this over.

So with regard to pages 6, 7, 8, and Page 9, lines 23, 24 and 25, we would ask that those be read. We would ask that on Page 9 --

MR. MOORE: Your Honor, I --

THE COURT: Okay.

MR. MOORE: -- in the interest of clarity, I would ask the Court to entertain an offer of proof. I'm having a hard time following this. I do have the transcript, but if there are redactions that are being proposed, I would ask

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that the prosecutor produce those.

MS. AMBROZAITIS: I can make a copy of what I have here and share it with counsel and the Court so we can review them together.

THE COURT: All right. Then that -- that needs to be done.

MS. AMBROZAITIS: I can go do that now, Your Honor.

THE COURT: Any other motions this morning, Ms. Ambrozaitis?

MS. AMBROZAITIS: No, Your Honor.

THE COURT: All right. Then we'll take a few -- recess. Mr. Moore, you can look at that and then make decisions as to whether or not you have any motions this morning to go forward with.

MR. MOORE: Thank you, Your Honor.

THE COURT: We are in recess.

MS. AMBROZAITIS: Thank you.

THE BAILIFF: All rise. Court's in recess.

(At 9:43 a.m. court recesses)

(At 9:52 a.m., court reconvenes)

THE BAILIFF: All rise. 55th Circuit Court for Clare County is back in session with the Honorable Roy G. Mienk presiding.

THE COURT: You may be seated.

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MR. MOORE: First, at my client's direction -- and I would ask the Court to withhold a ruling on the motion until I have concluded my statement.

THE COURT: All right.

MR. MOORE: And the prosecutor having an opportunity to respond, of course. My client has requested that I move the Court for an adjournment in order for counsel to prepare for the trial.

THE COURT: Anything else?

MR. MOORE: To say that I'm in an awkward -- I'm sorry, Your Honor.

THE COURT: All right. You took a pause there --

MR. MOORE: I did.

THE COURT: -- and I thought maybe you were done.

MR. MOORE: No, I'm not.

THE COURT: Okay.

MR. MOORE: In the very short time that the Court has reappointed me to this case and allowed time for the prosecutor to prepare her offer of proof, I have spoken with my client in this place. I made it clear to my client that I wish to speak to him alone. He indicated that no, he could speak to me wherever he wishes. Unfortunately, that has not included my office, for which I have sent numerous letters, emails and text messages inviting him to meet with me so that we could prepare for this case, up and to the

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date that I was relieved from the formal representation.

Again, in the short time that we were here after the Court had left the bench, my client was castigating me for lack of preparation, that I couldn't possibly get this done in 30 minutes, that all kinds of discovery and investigative efforts have occurred since I was relieved and that he could get me up to speed. Also that there were problems with the discovery order and the preparation of evidence from the prosecutor to the defense.

I indicated to Mr. Haupt, overall, that Your Honor had made its ruling, the Court had made its ruling regarding discovery, found that nothing had been withheld, and we receded from there. And this is where we get to the heart of my problem in my continued representation.

Mr. Haupt is under the impression that because there are arguable violations of state, federal and constitutional law, that somehow this trial needs to stop, that you will be held to account for it as the judge, or the prosecutor will as the prosecutor, and I repeated to him more than once that the Court's orders are valid until they're found invalid by an appellate court. These are all matters that will be preserved on the record for the Court of Appeals to review at a later time. He's not hearing me, Your Honor. He seems to think that somehow I have this magic ability to force the Court to adjourn this because we

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are unprepared based almost completely on the defendant's own actions. Consequently, I cannot represent him to any standard of professional competency at this point. But I am a lawyer, and I do understand that the Court makes its orders and I am bound to follow them until some higher court invalidates that order.

This is not my burden alone. This circus has gone on far too long. I want to help this young man. I have made myself available to him. He won't take my help. Now, my professional standing is at risk. The entire criminal justice system could be held up to opprobrium based on these shenanigans. I don't want to be a part of this, Your Honor, but I will, because I have been ordered to be until the Court relieves me of that obligation. Thank you.

THE COURT: Response, Ms. Ambrozaitis?

THE COURT: Your Honor, I understand that the Court is going to order what the Court is going to order. I don't think it's very fair to expect Mr. Moore to proceed today on trial, the Court having reappointed him. I don't believe that he has had any interaction, per his statements, with his client, but we are at a stage where the defendant has created all kinds of problems for himself. He has stalled this case repeatedly over the period of two years. So it's entirely up to the Court. If you would prefer to adjourn the matter so the defendant could meet with

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appropriate counsel and prepare, I would ask that it be a short adjournment and I ask that he be remanded into the custody of the sheriff's department in jail so he is available to meet with his attorney and prepare for this case. Thank you.

THE COURT: Anything further, Mr. Moore?

MR. MOORE: No, Your Honor.

THE COURT: The Court is not going to adjourn the trial. A lot of what Mr. Haupt claims are going to be appellate issues, as Mr. Moore says, and who knows, maybe we'll have to come back next year and have another trial. Maybe not. There's no guarantee there's going to be a conviction. There's no guarantee there's not going to be a not-guilty verdict for either side. Mr. Moore has been an attorney for a long time and very capable at handling criminal trials. He's the one that has done the preliminary exam. He's familiar with all the evidence in the case, and so the only thing this Court would do is maybe adjourn it until 9:00 a.m. tomorrow morning, if that's a request coming from Mr. Moore, to prepare for the rest of the day, but that would be the only request. This trial is going forward this week.

MR. MOORE: My client has indicated to me that that would be acceptable, Your Honor.

THE COURT: And Ms. Ambrozaitis, you made the

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request that bond be cancelled on Mr. Haupt so that Mr. Moore can prepare for the trial and meet with him because his tendency has not been to stick around or talk to Mr. Moore?

MS. AMBROZAITIS: Correct.

THE COURT: Mr. Moore, any comment on that?

MR. MOORE: We oppose that, Your Honor. I mean this goes back to the William Penn case. I mean my client is going to be held essentially incommunicato. Well, I don't know that there has been an actual violation of the bond made out, so I think that would be inappropriate at this time. Thank you.

THE COURT: All right. And you're not going to be coming in tomorrow morning and asking for another adjournment because you didn't get to meet with Mr. Haupt?

MR. MOORE: Mr. Haupt has made the representation just now that he will meet me at my office forthwith.

THE COURT: All right. Then we will resume this tomorrow morning at 9 a.m. I'm going to go address the jurors that showed up. Counsel are both invited to attend with me to notify them that we're going to do the trial and start it in the morning and that they have to reappear. All right?

MS. AMBROZAITIS: Thank you, Your Honor, for the invitation, but I do believe that if counsel meets with the

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jury panel today that that would disqualify them from further service, so I'll refrain from meeting the jury today.

THE COURT: I'm just -- you don't get to talk, but you get to listen to what I'm saying to them.

MS. AMBROZAITIS: I trust that you won't say anything inappropriate, Your Honor. Thank you.

MR. MOORE: Yes, Your Honor.

THE COURT: All right. We're in recess.

(At 10:00 a.m., hearing concluded)

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I certify that this transcript, consisting of 19 pages, is a complete, true, and correct transcript, to the best of my ability, of the Jury Trial - Volume I taken in this case on Tuesday, July 23, 2019 by Gail Michel, CEO-6088.

Dated: 1/10/2020

Rhonda Reppert

Rhonda Reppert, CER-3468
Certified Electronic Reporter
Gladwin, MI 48624
(989) 426-6025

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Appendix 18: MCR 6.005

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MCR 6.005

State rules current with changes received through July 31, 2025

Rule 6.005. Right to Assistance of Lawyer; Advice; Appointment for Indigents; Waiver; Joint Representation; Grand Jury Proceedings.

(A) Advice of Right. At the arraignment on the warrant or complaint, the court must advise the defendant

(1) of entitlement to a lawyer's assistance at all court proceedings, and

(2) that the defendant is entitled to a lawyer at public expense if the defendant wants one and is financially unable to retain one.

The court must ask the defendant whether the defendant wants a lawyer and, if so, whether the defendant is financially unable to retain one.

(B) Questioning Defendant About Indigency. If the defendant requests a lawyer and claims financial inability to retain one, the court must determine whether the defendant is indigent unless the court's local funding unit has designated an appointing authority in its compliance plan with the Michigan Indigent Defense Commission. If there is an appointing authority, the court must refer the defendant to the appointing authority for indigency screening. If there is no appointing authority, or if the defendant seeks judicial review of the appointing authority's determination concerning indigency, the court's determination of indigency must be guided by the following factors:

(1) present employment, earning capacity and living expenses;

(2) outstanding debts and liabilities, secured and unsecured;

(3) whether the defendant has qualified for and is receiving any form of public assistance;

(4) availability and convertibility, without undue financial hardship to the defendant and the defendant's dependents, of any personal or real property owned;

(5) the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and

(6) any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel.

The ability to post bond for pretrial release does not make the defendant ineligible for appointment of a lawyer. The court reviews an appointing authority's determination of indigency de novo and may consider information not presented to the appointing authority.

(C) Partial Indigency. If a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution.

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(D) Appointment or Waiver of a Lawyer. Where 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.

(E) Advice at Subsequent Proceedings. If a defendant has waived the assistance of a lawyer, the record of each subsequent proceeding (e.g., preliminary examination, arraignment, proceedings leading to possible revocation of youthful trainee status, hearings, trial, or sentencing) 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. 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.

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.

(F) Multiple Representation. When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the local indigent criminal defense system must appoint separate lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;

(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

(G) Unanticipated Conflict of Interest. If, in a case of joint representation, a conflict of interest arises at any time, including trial, the lawyer must immediately inform the court. If the court agrees that a conflict has arisen, it must afford one or more of the defendants the opportunity to retain separate lawyers. The court should on its own initiative inquire into any potential conflict that becomes apparent, and take such action as the interests of justice require.

(H) Scope of Trial Lawyer's Responsibilities.

(1) The responsibilities of the trial lawyer who represents the defendant include

(a) representing the defendant in all trial court proceedings through initial sentencing,

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(b) filing of interlocutory appeals the lawyer deems appropriate, and

(c) responding to any preconviction appeals by the prosecutor. Unless an appellate lawyer has been appointed or retained, the defendant's trial lawyer must either:

(i) file a response to any application for leave to appeal, appellant's brief, or substantive motion; or

(ii) notify the Court of Appeals in writing that the defendant has knowingly elected not to file a response.

(2) Unless an appellate lawyer has been appointed or retained, or if retained trial counsel withdraws, the trial lawyer who represents the defendant is responsible for filing postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing, and

(3) When an appellate lawyer has been appointed or retained, the trial lawyer is responsible for promptly making the defendant's file, including all discovery material obtained and exhibits in the trial lawyer's possession, reasonably available upon request of the appellate lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) Assistance of Lawyer at Grand Jury Proceedings.

(1) A witness called before a grand jury or a grand juror is entitled to have a lawyer present in the hearing room while the witness gives testimony. A witness may not refuse to appear for reasons of unavailability of the lawyer for that witness. Except as otherwise provided by law, the lawyer may not participate in the proceedings other than to advise the witness.

(2) The prosecutor assisting the grand jury is responsible for ensuring that a witness is informed of the right to a lawyer's assistance during examination by written notice accompanying the subpoena to the witness and by personal advice immediately before the examination. The notice must include language informing the witness that if the witness is financially unable to retain a lawyer, the chief judge in the circuit court in which the grand jury is convened will on request refer the witness to the local indigent criminal defense system for appointment of an attorney at public expense.

History

Rule 6.005 adopted March 30, 1989; amended August 23, 1989, eff October 1, 1989; Rule 6.005(D), (E) amended October 23, 1995, eff January 1, 1996; Rule 6.005 amended eff January 1, 2004; Rule 6.005(E), (H)(1) amended eff January 1, 2006; Rule 6.005(H) amended eff September 1, 2011; Rule 6.005(H) amended eff May 1, 2012; amended September 22, 2021, effective January 1, 2022; amended November 2, 2022, effective January 1, 2023.

Michigan Court Rules Annotated
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Appendix 19: State v. Griffin, 2025 Iowa App. LEXIS 380

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State v. Griffin

Court of Appeals of Iowa

April 23, 2025, Filed

No. 23-0893

Reporter
2025 Iowa App. LEXIS 380 *; 2025 LX 72847

STATE OF IOWA, Plaintiff-Appellee, vs. TIMOTHY ALAN GRIFFIN, Defendant-Appellant.

Notice: NO DECISION HAS BEEN MADE ON PUBLICATION OF THIS OPINION. THE OPINION IS SUBJECT TO MODIFICATION OR CORRECTION BY THE COURT AND IS NOT FINAL UNTIL THE TIME FOR REHEARING OR FURTHER REVIEW HAS PASSED. AN UNPUBLISHED OPINION MAY BE CITED IN A BRIEF; HOWEVER, UNPUBLISHED OPINIONS SHALL NOT CONSTITUTE CONTROLLING LEGAL AUTHORITY.

Prior History: [*1] Appeal from the Iowa District Court for Buena Vista County, Nancy L. Whittenburg (pre-trial hearings) and Charles K. Borth (trial), Judges. A defendant appeals his conviction for possession of methamphetamine, third or subsequent offense, as a habitual offender.

Disposition: REVERSED AND REMANDED FOR NEW TRIAL.

Counsel: Martha J. Lucey, State Appellate Defender, and Theresa R. Wilson (argued), Assistant Appellate Defender, for appellant.

Brenna Bird, Attorney General, and Anagha Dixit (argued), Assistant Attorney General, for appellee.

Judges: Heard at oral argument by Ahlers, P.J., and Badding and Buller, JJ. Badding, J., concurs; Buller, J., dissents.

Opinion by: AHLERS

Opinion

AHLERS, Presiding Judge.

Following a jury trial, the district court entered judgment and sentence against Timothy Griffin for possession of methamphetamine, third or subsequent offense, as a habitual offender. Griffin appeals.

I. Relevant Background Facts and Proceedings

During a traffic stop, police officers searched Griffin's car after a K-9 alerted to the presence of drugs. Officers found a plastic bag containing methamphetamine tucked inside a sock on the floor of the car. As a result, the State charged Griffin with possession of methamphetamine as a third offense [*2] and as a habitual offender. At his arraignment, Griffin appeared without counsel and stated he was "attending pro se."[1] Griffin failed to appear at two subsequent pretrial hearings and at a bail review hearing. The district court appointed standby counsel in between the two pre-trial hearings. Standby counsel filed a series of motions on behalf of Griffin. Standby counsel then filed a motion to withdraw, which the district court granted.

The next time Griffin appeared before the district court for a motions hearing, he again expressed his desire to represent himself. The court attempted to go through a colloquy with Griffin to ensure his waiver of counsel was knowing, voluntary, and intelligent. However, Griffin continued to interrupt the court, expressed his confusion about the judicial process, and was not responsive to the court's questions. Then he explained that some of his interruptions were due to a "recent head injury" and that he "had learning disabilities in school." In the end, the court could not complete the colloquy given Griffin's non-responsive answers. The court then entered an order denying Griffin's request to proceed pro se

[1] The district court did not go through any colloquy regarding Griffin's decision to come before the court self-represented.

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because it could not conclude that Griffin's [*3] waiver of counsel was knowing and intelligent. The court, on its own motion, also set a probable cause hearing to determine whether Griffin was competent to stand trial and stayed the proceedings. Prior to the hearing, Griffin applied for appointed counsel, and counsel was appointed for him.

Griffin appeared at the competency hearing with counsel. Defense counsel explained that Griffin did not want to proceed with a competency evaluation and that counsel had talked with Griffin and was satisfied that Griffin understood the charges against him, the significance of those charges, and the importance of crafting a defense. Counsel then questioned Griffin, asking him: "And you are asking the court for an opportunity, either with court-appointed counsel or if I am directed to serve as standby counsel, you would like to have an attorney assist you in some way to present your defense at the time of trial; is that correct?" Griffin responded, "That is correct."

The prosecutor also questioned Griffin and inquired into the head injury Griffin referred to during the prior hearing. Griffin explained that the injury occurred at work in November 2019 and impacted his memory and ability to control his [*4] actions. Griffin confirmed he required special education services while in school. When asked about any mental-health diagnoses he had, Griffin explained, "I have a bipolar. I have chronic anxiety and depression. I am PTSD. It's not PTSD. It's adjustment, adjusting to my injuries and my mental status."

After some of its own questions, the district court stated it was "confident that [Griffin] underst[ood] the proceedings" and was "able to assist effectively with [his] defense." The court dismissed its motion for a competency evaluation and reinstated the proceedings.

On the day of trial, Griffin expressed his dissatisfaction with his counsel. When asked if he was requesting to proceed without an attorney or requesting new counsel, Griffin responded that he would be happy if he could be represented by the attorney who previously served as standby counsel. The court denied Griffin's request for different counsel, noting it would delay trial and that defense counsel was "one of the preeminent attorneys in northwest Iowa." Griffin then stated, "I will do my own, then. I will represent myself, then." The court denied that request.

Following a recess, defense counsel alerted the court that [*5] Griffin wished to not be present during jury selection or any other stage of the proceeding. Griffin then clarified that he just did not want to be present for jury selection. But when told he would need to stay in the courthouse should he decide to be absent from jury selection, Griffin decided to be present for jury selection.

Part way through jury selection, defense counsel informed the court that Griffin wished to excuse himself from the remainder of jury selection and "would like to make a claim that [defense counsel] threatened him in some way." Griffin, defense counsel, and the prosecutor then explained what each believed transpired between Griffin and defense counsel. Defense counsel reassured the court that he was "happy to represent" Griffin and had "no bias" against him.

The court then informed Griffin,

> The next record we make about you requesting to have [defense counsel] removed will be the last because I'll remove him, and then you'll be representing yourself without the assistance of me or the county attorney or anybody. And I'm just concerned that you don't have the legal knowledge to do that, that there are defenses that you might not even know exist, so then you wouldn't [*6] be able to present them.
>
> But if you choose to represent yourself, you'd be doing so at your own peril. But I'm not going to continue to make that record. So the next time we make that record will be the last because I'm going to grant it and we're just going to have to plow forward.

Griffin began to complain about counsel again. The court asked Griffin if he wanted to represent himself, and Griffin responded, "I—I—I don't but I don't want this man as—representing me. I—I—I don't." The court then informed Griffin of the potential sentence if he were to be convicted and confirmed that Griffin was not a lawyer himself. It went on to explain that an attorney might know more potential defenses than Griffin knew and that the court cannot provide a defendant with advice.

Griffin then stated that if he could not have a different attorney, then he still did not want defense counsel to represent him. The court excused defense counsel from any further representation of Griffin. The proceedings continued with Griffin representing himself through the first day of trial.

On the second day of trial, Griffin once again represented himself. However, following the lunch break, Griffin did not return to [*7] the courtroom. Griffin's brother informed court staff that Griffin had gone

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to the emergency room and "would not be participating in the rest of the trial." Officers checked the nearby emergency rooms and confirmed that Griffin was not at any of them. The court determined that Griffin was voluntarily absent and proceeded with the remainder of the trial in his absence.

Following the jury's return of a guilty verdict, the district court immediately proceeded with the second stage of the proceedings to determine whether Griffin had been previously convicted of drug-related offenses and had two prior felony convictions for the habitual-offender enhancement. Griffin was not present for that proceeding either. The jury determined that Griffin had been previously convicted of possession of marijuana with intent to deliver, possession of a controlled substance, possession of 42.5 or more grams of marijuana without affixing a drug tax stamp, possession of precursors with the intent to manufacture methamphetamine, and possession of marijuana.

Following a sentencing hearing, the district court entered judgment and sentence against Griffin for possession of methamphetamine, third or subsequent offense, [*8] as a habitual offender. Griffin received a sentence of up fifteen years in prison with a three-year mandatory minimum.

Griffin, now represented by counsel, appeals. Griffin argues the "district court failed to conduct both an adequate inquiry into Griffin's decision to waive his constitutional right to counsel and his competency to do so." He urges that his "decision to proceed pro se was not knowing, voluntary, or competent" and requests a new trial. Griffin also contends that the "district court erred in proceeding with the enhancement trial after determining Griffin voluntarily absented himself from the trial on the underlying offense."

II. Discussion

We begin with Griffin's claim that he did not knowingly and voluntarily waive his right to trial counsel. As this claim is based on a constitutional guarantee, our review is de novo. *See State v. Johnson*, 756 N.W.2d 682, 686 (Iowa 2008). "The Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process." *Iowa v. Tovar*, 541 U.S. 77, 80-81, 124 S. Ct. 1379, 158 L. Ed. 2d 209 (2004). It also guarantees a defendant the right to self-representation. *Faretta v. Cal.*, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The constitutional right to counsel is effective until waived by a defendant. *Hannan v. State*, 732 N.W.2d 45, 52 (Iowa 2007). "In other words, before the right to self-representation attaches, defendants [*9] must elect to proceed without counsel by a knowing, intelligent, and voluntary waiver of their right to counsel." *State v. Jones*, No. 19-0494, 949 N.W.2d 251, 2020 WL 3264377, at *3 (Iowa Ct. App. June 17, 2020) (citing *Faretta*, 422 U.S. at 835-36).

A defendant's waiver of the right to counsel "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." *State v. Cooley*, 608 N.W.2d 9, 15 (Iowa 2000) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724, 68 S. Ct. 316, 92 L. Ed. 309 (1948)). Such is necessary to ensure that the waiver is knowing. *Id.* The defendant must also be "admonished as to the usefulness of an attorney at that particular proceeding, and made cognizant of the danger in continuing without counsel." *Id.* A waiver that does not meet these criteria cannot be considered voluntary and intelligent. *Id.*

To ensure that a defendant has such understanding, the district court must engage in an extensive colloquy. Our supreme court has endorsed the colloquy outlined in *Spencer v. Ault*, 941 F. Supp. 832, 843-44 (N.D. Iowa 1996), to ensure a defendant wishing to proceed pro se appreciates the impact of waiving the right to counsel. *State v. Martin*, 608 N.W.2d 445, 450 (Iowa 2000). That model colloquy includes the following questions:

> (a) Have you ever studied law?
>
> (b) Have you ever represented [*10] yourself or any other defendant in a criminal action?
> (c) You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
>
> (d) You realize, do you not, that if you are found guilty of the crime charged in Count I the court . . . could sentence you to as much as _ years in prison and fine you as much as $_? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)
> (e) You realize, do you not, that if you are found guilty of more than one of those crimes this court can order that the sentences be served consecutively, that is, one after another?

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(f) You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case.
(g) Are you familiar with the [Iowa] Rules of Evidence?
(h) You realize, do you not, that the [Iowa] Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
(i) Are you familiar with the [Iowa] Rules of Criminal Procedure?

(j) You realize, do you not, that those [*11] rules govern the way in which a criminal action is tried in [this] court?
(k) You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
(l) (Then say to the defendant something to this effect): I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.
(m) Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
(n) Is your decision entirely voluntary on your part?

(o) If the answers to the two preceding questions are in the affirmative, you should then say something to the following effect: "I find that the defendant [*12] has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."
(p) You should consider the appointment of standby counsel to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

Spencer, 941 F. Supp. at 843-44 (quoting 1 Bench Book for United States District Judges 1.02-2 to 1.02-5 (3d ed. 1986)). Certainly, these questions serve only as a model, and exacting repetition of them is not required. But they generally inform us of what information must be gathered and considered by the district court before it can determine whether a defendant's waiver of counsel is knowing, intelligent, and voluntary.

As the dissent points out, when conducting our review of the district court's waiver-of-counsel colloquy, the majority of a panel of this court has recognized that we may consider multiple colloquies in aggregate when determining whether the district court conducted an adequate inquiry to ensure that the defendant's waiver was knowing, intelligent, and voluntary. *See State v. Baker*, No. 11-0068, 829 N.W.2d 193, 2013 WL 751286, at *3-4 (Iowa Ct. App. Feb. 27, 2013). But we decline to take that approach in this case for two key reasons. First, the gap between the two colloquies is significantly longer here (eight weeks) than it was in *State [*13] v. Baker* (three weeks). *See* 829 N.W.2d 193, *id.* at *3. Second, there is no indication in *Baker* that the defendant had any mental-health issues. In contrast, Griffin informed the district court of his mental-health struggles when it first attempted to go through the waiver-of-counsel colloquy, and his answers to questions during that colloquy were so non-responsive that the district court had concerns about Griffin's competency. Given the mental-health issues raised here, the significance of which are compounded by the length of time between the two colloquies, we find this case distinguishable from *Baker* and decline to treat the two colloquies as if they were one. As such, we look only to the second waiver-of-counsel colloquy, from the day of trial, to determine whether Griffin's waiver was knowing, intelligent, and voluntary.

The district court did a good job of warning Griffin of the likely pitfalls of self-representation, the possible penalties he could face if convicted, and the fact that the court could not provide him guidance or assistance. But it did not inquire into Griffin's knowledge of any of our court rules, his understanding that he would be required to comply with those rules, his experience [*14] with the legal system, or his level of education. It did not explain to Griffin that he would not be able to simply get on the stand and tell his story. Nor did the court inquire whether Griffin's waiver of the right to representation was voluntary to confirm Griffin was not coerced or felt pressured into self-representation. The closest the court got to that inquiry was when it asked if Griffin wanted to represent himself as he had early on in the proceedings. Griffin responded, "I—I—I don't."

Moreover, the court had information that Griffin had

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suffered from a head injury in recent years that he claimed impacted his memory and ability to focus, which was borne out by Griffin's conduct before the district court. Griffin stated several times that he was slow and had been in special education classes. And Griffin had also told the court the day of trial that he was "having an extreme anxiety and panic attack" and that he didn't have his medication with him to take, to which the court admonished him for not bringing it. The court asked no questions relating to these facts to determine how they might impact Griffin's ability to represent himself or his ability to invoke his right to self-representation. [*15]

Lastly, we highlight the district court's careful-what-you-wish-for warning to Griffin:

> And, Mr. Griffin, I'll tell you this: *The next record we make about you requesting to have [defense counsel] removed will be the last because I'll remove him, and then you'll be representing yourself without the assistance of me or the county attorney or anybody*. And I'm just concerned that you don't have the legal knowledge to do that, that there are defenses that you might not even know exist, so then you wouldn't be able to present them.
>
> *But if you choose to represent yourself, you'd be doing so at your own peril. But I'm not going to continue to make that record. So the next time we make that record will be the last because I'm going to grant it and we're just going to have to plow forward*.

(Emphasis added.) This warning makes clear that the district court had reached a point of frustration, which is entirely understandable given Griffin's conduct and unrelenting attempts to stonewall the proceedings. And we recognize that Griffin's difficult conduct put the district court in the tough spot of being accused of committing error whichever way it went—accused of violating Griffin's right to self-representation [*16] if it required him to proceed with counsel and accused of violating Griffin's right to counsel if it let Griffin proceed with self-representation. But even the most difficult defendants are entitled to constitutional protections and process.

The district court's warning suggests it did not intend to engage Griffin in a meaningful colloquy about his waiver of his right to counsel. And that's what occurred. The district court failed to make the necessary meaningful inquiry of Griffin to determine that he knowingly and voluntarily waived his right to counsel. As a result, we conclude that Griffin did not knowingly and voluntarily waive his right to counsel. "A defendant who has not knowingly, intelligently, and voluntarily waived the right to counsel has effectively been denied representation. The denial of an attorney during the critical stages of a trial can never be construed as harmless error." *Cooley*, 608 N.W.2d at 18. As such, we reverse Griffin's conviction and remand for a new trial. Based on this resolution, it is unnecessary to address Griffin's challenge to the court proceeding to the enhancement phase of the trial in his absence.

REVERSED AND REMANDED FOR NEW TRIAL.

Badding, J., concurs; Buller, J., [*17] dissents.

Dissent by: BULLER

Dissent

BULLER, Judge (dissenting).

> I've never had an experience like this in nineteen years that I've been doing this, never. I've had some difficult folks, but nobody that couldn't be reasonable and I couldn't communicate with; that we couldn't get on the same communication wavelength.

That's how an experienced district judge described her attempts to advise Timothy Griffin on the perils of self-represenation when he sought to proceed pro se before trial. And another experienced district judge had a similar frustrating colloquy with Griffin at trial before Griffin ultimately absconded and was tried in absentia.

Difficult defendants like Griffin put district courts in a Catch-22: if the court accepts a difficult defendant's request to be relieved of counsel, the court risks reversal as outlined in the majority opinion; and if the court went the other direction and saddled a defendant with counsel despite his "Sovereign Citizen"-style[2] complaints, the court would risk reversal for violating the right to self-representation. *See Fields v. Murray*, 49

[2] Sovereign citizens "believe they are not subject to the jurisdiction of the courts and . . . frequently deny that they are the defendants in the action, instead referring to themselves as third-party intervenors . . . . Courts have been confronted repeatedly by their attempts to delay judicial proceedings and have summarily rejected their legal theories as frivolous." *United States v. Sterling*, 738 F.3d 228, 233 n.1 (11th Cir. 2013). *See generally* Leslie R. Masterson, *"Sovereign Citizens": Fringe in the Courtroom*, Am. Bankr. Inst. J., Mar. 2011, at 1, 66-67.

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F.3d 1024, 1029 (4th Cir. 1995) (on the fine line district courts walk in facing this dilemma). Although it's easy to nitpick and second-guess from the comfort of appellate review, I do [*18] not find any material deficiencies in the record made by the district court below. I therefore dissent from granting a new trial.

In reviewing self-representation colloquies, the United States Supreme Court has instructed courts to take a "pragmatic approach" and allow flexibility in "the type of warnings and procedures that should be required before a waiver of that right will be recognized." *Patterson v. Illinois*, 487 U.S. 285, 298, 108 S. Ct. 2389, 101 L. Ed. 2d 261 (1988). The purpose of the colloquy is to ensure a defendant "knows what he is doing and his choice is made with eyes open." *Adams v. United States*, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942). Or, as our supreme court put it, the colloquy must "provide fair notice of the obstacles inherent in self-representation before an accused embarks on so perilous an endeavor." *State v. Cooley*, 608 N.W.2d 9, 16 (Iowa 2000). Also as part of our review, a panel of our court previously recognized that colloquies from separate hearings may be considered in the aggregate when evaluating whether a defendant was adequately advised. *See State v. Baker*, No. 11-0068, 829 N.W.2d 193, 2013 WL 751286, at *3-4 (Iowa Ct. App. Feb. 27, 2013).

The majority seizes on three perceived deficiencies in the district court's colloquies to warrant reversal:

> • "[N]ot inquir[ing] into Griffin's knowledge of any of our court rules, his understanding that he would be required to comply with [*19] those rules, his experience with the legal system, or his level of education."
> • "[N]ot explain[ing] to Griffin that he would not be able to simply get on the stand and tell his story."
> • "No[t . . .] inquir[ing] whether Griffin's waiver of the right to representation was voluntary to confirm Griffin was not coerced or felt pressured into self-representation.

I am not persuaded any of these are a good reason to reverse.

As to the first criticism, regarding Griffin's knowledge and education on pitfalls of self-representation, I would find the district court discussed this issue adequately across the two colloquies. In the first motions colloquy, the court advised Griffin on the importance of counsel's assistance in addressing specific legal concepts like depositions, voir dire, legal defenses, mitigating factors, motions in limine, opening statements and closing arguments, the offer of evidence and objections to the same, cross-examination, and the difference between counsel and standby counsel. The court's attempt to explain these things to Griffin and conduct a thorough colloquy was done with patience and perseverance over the course of more than forty transcript pages, despite Griffin's [*20] conduct—which ranged from obstreperous to disruptive and personally insulting. When the court (through a second judge) revisited the issue at trial, the court referenced the earlier proceedings and emphasized that Griffin was not an attorney while his appointed lawyer was; that the lawyer could spot defenses and other issues such that Griffin might not "even know what [he was] missing"; and that the court could not give legal advice. Despite this, Griffin turned down the continued involvement of his attorney and elected to proceed without counsel until he absconded. In my view, the court's extended attempts to advise Griffin as to the pitfalls related to his lack of legal knowledge were sufficient to open his eyes and give him fair notice of the hazards attendant self-representation. *See Adams*, 317 U.S. at 279. That is all our law requires—"some sort of meaningful colloquy." *Cooley*, 608 N.W.2d at 15.

As to the second criticism—that the district court didn't inform Griffin he couldn't "simply get on the stand and tell his story"—I am not convinced such an advisory was required. The majority cites no legal authority requiring such an instruction, nor does Griffin in his appellate brief. And I'm not aware of any case so holding. Nor [*21] would I be inclined to adopt that rule, as it is neither reasonable nor feasible to expect a district court to disabuse a "Sovereign Citizen" defendant of every legally erroneous assumption he or she may bring to the courtroom. Taken to its logical conclusion, such a holding would require judges to explain the fringe on the flag before allowing waiver of counsel.[3] That would be absurd.

As to the third criticism levied by the majority—that the court didn't do enough to ensure Griffin was making a knowing and voluntary waiver—I find the record sufficient. As the court recognized in the colloquy at trial, Griffin had already attempted to represent himself earlier in the proceedings and understood the difference between proceeding with counsel and without. And the

---

[3] See, for example, Masterson, *"Sovereign Citizens": Fringe in the Courtroom*, Am. Bankr. Inst. J., at 67 (giving a quick primer on the fringed-flag claptrap).

forty-plus pages of colloquy with the court at the earlier hearing included numerous questions by the court geared at assessing whether Griffin was able to make a knowing and voluntary waiver. Courts do not torture answers out of defendants, and no fault lies with the district court for Griffin refusing to answer repeated colloquy questions. I am not inclined to find a record insufficient [*22] when the alleged deficiency was caused by behavior like the defendant responding to the court's inquiry of "Are you presently on any medication?" by asking the judge: "Are you?"

Last, I worry that the message sent to criminal defendants by the majority opinion is that, if you are difficult enough, interrupt the judge enough, and refuse to answer enough questions during a colloquy, there is a get-out-of-jail-free card waiting for you on appeal. I do not condone such a message, find no reversible error in this record, and believe the majority holding to be deeply fact-bound or a misapplication of controlling precedent. I therefore dissent.

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Appendix 20: MJI Attorney Waiver Checklist

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Attorney Waiver and Appointment for Indigent Defendants Checklist[1]

- ❑ At the arraignment on the warrant or complaint, advise defendant:
  - ❑of entitlement to a lawyer's assistance at all court proceedings, and
  - ❑that the defendant is entitled to a lawyer at public expense if he/she wants one and is financially unable to retain one. MCR 6.005(A).
- ❑ Ask defendant whether he/she wants a lawyer and, if so, whether he/she is financially unable to retain one. MCR 6.005(A).
- ❑ If defendant requests a lawyer and claims financial inability to retain one, refer the defendant to the local funding unit's appointing authority for indigency screening, if available. If there is no appointing authority, or if the defendant seeks judicial review of the authority's decision, determine whether the defendant is indigent guided by the following factors:
  - ❑present employment, earning capacity and living expenses;
  - ❑outstanding debts and liabilities, secured and unsecured;
  - ❑whether he/she has qualified for and is receiving any form of public assistance;
  - ❑availability and convertibility, without undue financial hardship to him/her and his/her dependents, of any personal or real property owned;

[1] For more detailed information on this topic, see the Michigan Judicial Institute's *Criminal Proceedings Benchbook, Vol. 1*.

Haupt Appendix, p.206a

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- ❑ the rebuttable presumptions of indigency listed in the MIDC's indigency standard; and

- ❑ any other circumstances that would impair the ability to pay a lawyer's fee as would ordinarily be required to retain competent counsel. MCR 6.005(B).

- ❑ **Note:** Encourage any defendant who appears without counsel to be screened for indigency and the potential appointment of counsel. MCR 6.005(D).

- ❑ **Note:** Review of an appointing authority's determination of indigency is de novo and the court may consider information not presented to the appointing authority. MCR 6.005(B).

- ❑ **Note:** The ability to post bond for pretrial release does not make defendant ineligible for appointment of a lawyer. MCR 6.005(B).

- ❑ **Note:** If defendant is able to pay part of the cost of a lawyer, contribution to the cost of providing a lawyer and establishment of a plan for collecting the contribution may be required. MCR 6.005(C).

❑ If it is determined that defendant is financially unable to retain a lawyer, promptly refer the defendant to the local indigent criminal defense system's appointing authority for appointment of a lawyer. MCR 6.005(D).

❑ Do not permit defendant to make an initial waiver of the right to be represented by a lawyer without first:

- ❑ advising him/her 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;
- ❑ offering him/her the opportunity to consult with a retained lawyer or, if he/she is indigent, the opportunity to consult with an appointed lawyer. MCR 6.005(D).

❑ Determine whether defendant has made his/her waiver of the right to counsel unequivocally. *People v Anderson*, 398 Mich 361, 367 (1976).

Haupt Appendix, p.207a

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- ❑ Determine whether defendant has made waiver of right to counsel knowingly, intelligently, and voluntarily. *Anderson*, 398 Mich at 368.

- ❑ Determine whether defendant is aware of the dangers and disadvantages of self-representation, so that the record will establish that he/she knows what he/she is doing and his/her choice is made with eyes open. *Anderson*, 398 Mich at 368.

- ❑ Determine whether defendant's self-representation will disrupt, unduly inconvenience, or burden the court and the administration of the court's business. *Anderson*, 398 Mich at 368.

- ❑ Grant or deny defendant's waiver of the right to the assistance of counsel/request for self-representation.

Haupt Appendix, p.208a

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Appendix 21: People v. Carson 2025 Mich. LEXIS 1402

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People v. Carson

Supreme Court of Michigan

April 10, 2025, Argued; July 31, 2025, Decided; July 31, 2025, Filed

No. 166923

Reporter
2025 Mich. LEXIS 1402 *; 2025 LX 353086; 2025 WL 2177501

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v MICHAEL GEORGIE CARSON, Defendant-Appellee.

Prior History: People v. Carson, 2024 Mich. App. LEXIS 1235, 2024 WL 647964 (Feb. 15, 2024)

Syllabus

This syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.

Michael G. Carson was convicted in the Emmet Circuit Court of safebreaking, MCL 750.531; larceny of property with a value of $20,000 or more, MCL 750.356(2)(a); receiving or concealing stolen property with a value of $20,000 or more, MCL 750.535(2)(a); larceny from a building, MCL 750.360; and accompanying conspiracy charges, MCL 750.157a, after a jury concluded that he had stolen money and personal property from his neighbor, Don Billings. Billings had granted defendant and his girlfriend, Brandie DeGroff, access to his house in August 2019 so they could help him sell some items online, but he later noticed that some valuable items were missing from his bedroom and that his safes had been emptied of their contents, which included approximately $60,000 in cash. After a police investigation, defendant was arrested and his cell phone was seized. The police obtained a warrant to search the phone's contents and discovered incriminating text messages between defendant and DeGroff. Defense counsel moved before trial to suppress the introduction of these messages into evidence on the basis that the seizure of defendant's phone without a warrant violated the Fourth Amendment, and the trial court, Charles W. Johnson, J., denied the motion. Defendant was sentenced to 10 to 20 years in prison for safebreaking, 9 to 20 years in prison for both larceny of property and receiving or concealing stolen property, and 3 to 15 years in prison for larceny from a building, plus a prison term for each conspiracy conviction that matched the sentence for its underlying offense. After filing his appeal as of right, defendant also moved for a new trial, alleging that counsel had been ineffective by, among other things, failing to challenge the adequacy of the search warrant. The court, Jennifer Deegan, J., denied the motion after holding a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 N.W.2d 922 (1973), and defendant's appeal proceeded. The Court of Appeals, MALDONADO, J., and HOOD, P.J. (HOOD, P.J., concurring, and REDFORD, J., dissenting), reversed defendant's convictions, holding that the search warrant was insufficiently particular because it authorized a general search of the phone's contents. __ Mich App __, 2024 Mich. App. LEXIS 1235 (February 15, 2024) (Docket No. 355925). The majority further held that the good-faith exception to the exclusionary rule did not apply and that trial counsel was constitutionally ineffective for failing to seek exclusion of the cell phone's contents on the ground that the search warrant was unconstitutionally broad. The prosecution sought leave to appeal in the Supreme Court, which granted the application. __ Mich __; 11 NW3d 269 (2024).

In an opinion by Chief Justice CAVANAGH, joined by Justices WELCH and THOMAS, and an opinion by Justice BOLDEN, the Supreme Court *held*:

The Court of Appeals correctly held that the search warrant at issue was insufficiently particular to satisfy the requirements of the Fourth Amendment. While the first sentence of the warrant contained some arguably limiting language that referred to the crimes under investigation, it did not provide a meaningful affirmative limitation on the remaining sentences, one of which allowed a search for "any and all data." Given that cell phones carry a virtually unlimited amount of private

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information, the wide-ranging search of defendant's cell phone pursuant to this warrant was constitutionally intolerable. To satisfy the particularity requirement of the Fourth Amendment, a search warrant should be as particular as the circumstances presented permit and consistent with the nature of the item to be searched. Specifying the crime under investigation is necessary, but not usually sufficient to ensure adequate particularity in the context of a cell-phone search warrant. The need for specificity about the types of data expected to be encountered and searched must be weighed against the fact that law enforcement often will not be certain what evidence exists and where it will be located; however, this does not free law enforcement from the obligation to provide the most specific description possible and to support a request to search each category of data mentioned in a warrant affidavit, nor does it permit magistrates to approve boundless searches of electronic data when the information available provides a basis for a more reasonably tailored search. When information concerning the relevant time frame of the criminal activity exists, this time limitation should be included in the search warrant to ensure adequate particularity.

In an opinion by Chief Justice CAVANAGH, joined by Justices WELCH and THOMAS; an opinion by Justice ZAHRA; and an opinion by Justice BERNSTEIN, the Supreme Court *held*:

The Court of Appeals erred by concluding that defendant was entitled to relief on the basis that his counsel provided ineffective assistance under the standard set forth in *Strickland v Washington*, 466 US 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984), and the Court of Appeals judgment was reversed in that respect.

Court of Appeals judgment affirmed in part and reversed with respect to Part II(B)(3); case remanded to the Court of Appeals for consideration of defendant's remaining issues.

Chief Justice CAVANAGH, joined by Justices WELCH and THOMAS, further stated that defendant did not show that his counsel's performance was constitutionally deficient, noting that the application of Fourth Amendment principles in the cell-phone and digital-data sphere is a rapidly evolving area of the law. She noted that *People v Hughes*, 506 Mich 512; 958 N.W.2d 98 (2020), in which the Court first discussed particularity in the context of a cell-phone search, was not decided until more than six months after counsel filed his unsuccessful motion to suppress. While hindsight, the Court's decision in *Hughes*, and five additional years of technological advances and court decisions might have rendered the lack-of-particularity argument an obvious basis for a motion to suppress, the record supports the conclusion that counsel's decision to file a motion to suppress on a different ground was not based on a misunderstanding of the law as it existed at the time and could be fairly characterized as an exercise of reasonable professional judgment under the facts and circumstances that existed when the decision was made.

Justice ZAHRA, concurring in the result only, agreed that defendant had not shown ineffective assistance of counsel. He therefore concurred in the decision to partially reverse the Court of Appeals judgment, but he would have reached that conclusion on the ground that defendant failed to show prejudice from counsel's alleged unprofessional error. He wrote separately to express disagreement with the decision to address the Fourth Amendment particularity issue given that it was unpreserved and raised only indirectly through defendant's ineffective-assistance argument, which Justice ZAHRA believed rendered the resulting analysis at best dicta and at worst an unconstitutional advisory opinion. He further noted that, given the lead opinion's conclusion that counsel need not have raised an objection regarding particularity in order to provide constitutionally adequate representation, there was no reason to reach the merits of the particularity issue, and he stated that doing so exceeded the Court's authority. He also disagreed with the lead opinion's conclusion regarding particularity, stating that the warrant satisfied the Fourth Amendment's particularity requirement under the weight of established caselaw because it limited the scope of the cell-phone search to evidence of specific offenses, and he further stated that the proper inquiry would have been whether law enforcement reasonably directed their efforts toward uncovering evidence of the crimes specified in the warrant.

Justice BERNSTEIN, concurring in the result, agreed with the lead opinion's decision to reverse the judgment of the Court of Appeals on the basis that defendant's ineffective-assistance-of-trial-counsel claim fails. Justice BERNSTEIN wrote separately because he disagreed with the decision to reach the question whether the search warrant was sufficiently particular given that the issue was unpreserved and that the case was resolved on the threshold issue of ineffective assistance of trial counsel. He disagreed that the particularity issue was germane to the lead opinion's holding regarding ineffective assistance given its conclusion that defense counsel was not unreasonable for failing to raise the issue.

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Noting that the lead opinion's input on the particularity issue could not have influenced the outcome of the case, he characterized that analysis as categorically dictum. He stated that, while he did not necessarily disagree with the lead opinion's analysis of the particularity issue, he would have refrained from addressing that issue until the Court was presented with a case in which its resolution would have the force of law.

Justice BOLDEN, concurring in part and dissenting in part, agreed with the analysis and conclusion of the lead opinion regarding the Fourth Amendment particularity requirement, but she disagreed with its conclusion that defense counsel's decision to not challenge the evidence obtained from an insufficiently particular search warrant was reasonable. She stated that the Court of Appeals majority applied the proper analysis and reached the appropriate conclusion, which is that defense counsel's failure to seek suppression of the cell phone's contents was based on a misunderstanding of the law rather than trial strategy. She also agreed with the Court of Appeals majority that defendant showed a reasonable probability that the result of the proceeding would have been different had trial counsel moved to suppress the text messages. Further, she would have affirmed the Court of Appeals' holding that the good-faith exception to the exclusionary rule did not apply because the warrant at issue was so facially deficient that no reasonable officer could have relied on it in objective good faith. She would also have concluded that the severance doctrine was inapplicable because, given that the entire search warrant failed to satisfy the particularity requirement of the Fourth Amendment, there were no constitutional categories or valid portions of the search warrant that could have been severed. Accordingly, while she agreed with the analysis and conclusion in Part III of the lead opinion, she dissented from Part IV(C) and would have affirmed the Court of Appeals' decision in full.

Justice HOOD did not participate because the Court considered this case before he assumed office and because he was on the Court of Appeals panel.

Judges: [*1] Chief Justice: Megan K. Cavanagh. Justices: Brian K. Zahra, Richard H. Bernstein, Elizabeth M. Welch, Kyra H. Bolden, Kimberly A. Thomas, Noah P. Hood. ZAHRA, J. (concurring in the result only). BERNSTEIN, J. (concurring in the result). BOLDEN, J. (concurring in part and dissenting in part). HOOD, J., did not participate because the Court considered this case before he assumed office and because he was on the Court of Appeals panel.

Opinion by: Megan K. Cavanagh

Opinion

BEFORE THE ENTIRE BENCH (except HOOD, J.)

CAVANAGH, C.J.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and *particularly describing the place to be searched, and the persons or things to be seized*." US Const, Am IV (emphasis added). At issue in this case is whether a search warrant obtained by police officers to search defendant's cell phone violated the particularity requirement of the Fourth Amendment. We hold that it did. However, defendant raises this claim by way of a Sixth Amendment claim of ineffective assistance of counsel, and we conclude that defendant has not established that he received constitutionally ineffective assistance of counsel under the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Therefore, while we agree with the Court of Appeals [*2] on the underlying merits, we disagree that defendant is entitled to reversal of his convictions on this basis. Accordingly, we reverse the judgment of the Court of Appeals in that regard, and we remand this case to the Court of Appeals to consider defendant's remaining issues.

I. FACTS

Defendant, Michael Carson, was convicted by a jury of safebreaking, MCL 750.531; larceny of property with a value of $20,000 or more, MCL 750.356(2)(a); receiving or concealing stolen property with a value of $20,000 or more, MCL 750.535(2)(a); larceny from a building, MCL 750.360; and accompanying conspiracy charges, MCL 750.157a.[1] These charges were filed after defendant

[1] In his appeal of right, defendant argued that his convictions of both larceny and receiving or concealing stolen property violated his double-jeopardy rights. *People v Carson*, __ Mich App __,__; __ NW3d__, 2024 Mich. App. LEXIS 1235 (February 15, 2024) (Docket No. 355925). The Court of Appeals majority agreed, holding, over a dissent from Judge REDFORD, that the constitutional protections against double jeopardy would bar defendant from being reconvicted of both these counts, as well as both corresponding conspiracy charges, if defendant were to be retried. *Id.* at __,__; 2024 Mich. App. LEXIS 1235. The

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and his girlfriend and accomplice, Brandie DeGroff,[2] were accused of stealing from their neighbor, Don Billings.

In August 2019, Billings underwent back surgery and moved out of his home because of mobility issues. He solicited defendant's and DeGroff's help in selling household items online so that he could downsize his possessions. In exchange, Billings agreed that defendant could keep 20% of the proceeds. Billings told defendant what items he wanted to sell, gave defendant a house key,[3] and granted him access to the home.

Billings testified that he was a collector of many items. He also had two [*3] large safes that he kept in a "shop room" where he stored documents and valuables such as collectible coins and silver certificates. Inside one of the large safes, Billings had a smaller fireproof safe where he stored approximately $60,000 in yellow-banded stacks of hundred-dollar bills. A couple of months after the arrangement with defendant and DeGroff began, Billings noticed that collectible coins and rolls of wrapped quarters were missing from his bedroom. Although defendant and DeGroff denied taking the missing items, Billings asked them to return his house key, and the broker arrangement ended. Billings believed that defendant and DeGroff had returned all his property.

In late November 2019, Billings attempted to open his safes but could not get the combinations to work. With the help of a locksmith, the safes were unjammed.[4] Billings discovered that "every bit" of his cash was gone, along with silver certificates, coins, and silver bars. Upon this discovery, Billings notified the Michigan State Police, and an investigation ensued. Billings testified that only defendant and DeGroff had access to the safes and that he had not given them permission to open them or sell their contents. [*4]

Accordingly, the criminal investigation turned to defendant and DeGroff. Defendant was arrested on February 26, 2020, at which point his cell phone was also seized. The police obtained a warrant to search the phone's contents and discovered text messages exchanged between defendant and DeGroff. Those texts stated:[5]

> *Defendant*: Don and Judy were investors in the stock market, complete records for hundreds of thousands of dollars.
>
> *DeGroff*: Wow that's crazy. Have you found any records of what's in the space yet?
>
> *Defendant*: In the, what, yet?
>
> *DeGroff*: Lol, . . . safe[.]
>
> *Defendant*: No. I'm guessing it's all on the computer.
> * * *
>
> *Defendant*: We need to go through those pennies. If there's a 1943 copper penny in there, it's worth millions, these people said. Also, the 1943s pennies can go for . . . $20,000 each.
>
> *DeGroff*: Holly Molly! [sic] That's a lot . . . of money.
>
> *Defendant*: I'm thinking that these guys cashed out stocks, and whatnot, and converted to cash and gold and silver in the safes.
> * * *
>
> *Defendant*: These are the keys that you're thinking are safe keys, I think that these are lockbox keys from a bank.

---

prosecution did not appeal the panel's double-jeopardy ruling, so we express no opinion on that part of the Court of Appeals' opinion, as it is not properly before the Court. We note that, should the Court of Appeals on remand reject defendant's additional challenges to his convictions, the proper remedy for the unchallenged double-jeopardy violation is to vacate defendant's convictions of receiving or concealing stolen property and conspiracy to commit that crime. See, e.g., *People v Wafer*, 509 Mich 31, 50-51; 983 NW2d 315 (2022).

[2] DeGroff pleaded guilty to conspiracy to commit larceny of property with a value of $20,000 or more, MCL 750.356(2)(a), in exchange for the dismissal of several other charges. She was sentenced to three years' probation.

[3] Billings testified that there was one other spare house key but that it was hidden.

[4] At trial, the locksmith explained that the safe could be opened with either a combination or a key. If the keylock was engaged, the combination alone could not open the safe. The locksmith surmised that someone had locked the safe with a key, which was why Billings could not open the safe with the combination. Billings testified that he always used the combination but that keys to the safe "could be" somewhere in the house.

[5] These texts were read into the record by a detective. Defendant does not dispute the accuracy of the detective's recitation of the text messages, and so we rely on his representation of the messages for present purposes.

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DeGroff: Might be.
* * *

Defendant: I'm totally confused. Does he not know there's a million dollars [*5] in those safes?

DeGroff: I really don't think he does. I think he opened it up, . . . threw that money in there and closed it.
* * *

Defendant: It amazes me that he's worried about a few rolls of coins and never went into the safes.

Defendant: Should we be worried now?
* * *

Defendant: He must've tried to get into the safe and couldn't and then thought there was a ton of money in that chest.
* * *

Defendant: Yeah, right. It's all you've done is use me and cheat on me.

DeGroff: Right. Um, use you for what? 'Cause I haven't made any money or help you steal sixty thousand dollars? And cheat? When? Tell me when I had the opportunity to f****** cheat? You are the one who didn't work most of the summer and hasn't held a single job.
* * *

Defendant: I just need to go.... I'm always full of anger and everyone at home is in line of fire and it's not fair to all of you. It's just best I, not, be there until I get some sort of help to calm me and help me sleep. It doesn't help that I'm overly stressed over our finances.... I wish now that I had a way to go rob those entire safes. Tomorrow I'm taking all that other money to the bank and just deposit it .... F*** chasing shit around. I'm trying to sell shit [*6] and bring money in but it's not working. I'm a mixed ball of everything and I'm going f****** crazy.

In addition to these incriminating text messages, other circumstantial evidence connected defendant to the theft. Much of the trial testimony was related to defendant's and DeGroff's increased spending habits in August and September 2019. For example, their roommate, Alan Olsen, testified that in August 2019 defendant and DeGroff began going out almost every night, usually not returning until the early morning. Many of those nights, they were at the casino. In August 2019, records showed that defendant played through approximately $57,000[6] in the gaming machines at the Odawa Casino and had a total loss of approximately $4,000. One night in August, Olsen accompanied defendant to the casino and defendant gave him $800 in cash to gamble with. Olsen saw defendant in possession of three or four "stacks" of hundred-dollar bills with a "yellow paper wrap" around them. In addition, defendant bought a $3,600 truck and a $1,490 diamond ring in August, both with cash. These spending habits were juxtaposed with testimony that defendant and DeGroff had only $283 in their joint bank account at the [*7] end of July 2019.[7] Moreover, defendant's former employer testified that defendant quit his job in early August, telling the employer that "he ran across some money and some valuables . . . in a locker that he bought online," and so he "had a lot of money" and "didn't need to work for awhile ...." And, when law enforcement executed a search warrant at defendant and DeGroff's house in February 2020, the police found several items belonging to Billings, including a wooden wall clock, a knife, cast iron pans, two cameras, leisure bags, screws and bolts, costume jewelry, snow sleds, a spray gun, fishing poles, and snowshoes.

Defendant's defense was that the prosecution failed to prove beyond a reasonable doubt that anyone broke into the safes and stole from Billings, contending that Billings had lied or was confused because of his age and the effect of pain medications. Defendant also presented evidence to show his income stream at the time of the alleged thefts. This was largely through the testimony of his brother, who testified that defendant worked for his construction company. Although he had

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[6] This amount was tracked through defendant's "players club card," a device that the casino uses to monitor wins and losses or "coin-in and coin-out" of each player. According to Odawa Casino's slot director, this did not mean that defendant had spent $57,000 at the casino; rather, it represented the amount of money that defendant had played through the machine in August 2019. The slot director explained that the number was not necessarily representative of the total amount of money gambled because a person can also put money into a machine without using their players club card. Put simply, the $57,000 figure did not necessarily correspond with the $60,000 stolen from Billings, but it did reflect increased casino spending in August.

[7] For DeGroff's part, evidence was presented that she made $245 per week and that she played through more than $12,000 in the casino in August with a loss of more than $2,000. In addition, in the "late summer," she made a $1,600 cash donation to a fundraiser.

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no documentation to prove it, defendant's brother testified that he paid defendant approximately [*8] $25,000 in 2019 and he transferred the money into defendant's checking account.

As previously indicated, the jury convicted defendant of safebreaking, larceny of property with a value of $20,000 or more, receiving or concealing stolen property with a value of $20,000 or more, larceny in a building, and corresponding conspiracy charges. He was sentenced to 10 to 20 years in prison for safebreaking, 9 to 20 years in prison for both larceny of property and receiving or concealing stolen property, and 3 to 15 years in prison for larceny from a building, plus a prison term for each conspiracy conviction that matched the sentence for its underlying offense.

Following an unsuccessful motion in the trial court for a new trial, defendant appealed by right. In an opinion authored by Judge MALDONADO and joined by Judge HOOD, the Court of Appeals majority held, in relevant part,[8] "that the warrant authorizing the search of defendant's cell phone violated the particularity requirement because it authorized a general search of the entirety of the phone's contents." *People v Carson*, __ Mich App __; __ NW3d __, 2024 Mich. App. LEXIS 1235 (February 15, 2024) (Docket No. 355925). The majority further held that the good-faith exception to the exclusionary rule did not apply and that trial counsel was constitutionally [*9] ineffective for failing to seek exclusion of the cell phone's contents. *Id.* at __; 2024 Mich. App. LEXIS 1235. Judge REDFORD authored a dissenting opinion and Judge HOOD authored a concurring opinion.[9] The prosecution sought leave to appeal in this Court. We granted the prosecution's application and directed the parties to address

> whether the Court of Appeals erred by: (1) holding that the warrant to search the defendant's cell phone violated the Fourth Amendment's particularity requirement, see *People v Hughes*, 506 Mich 512, 538[; 958 NW2d 98] (2020); (2) failing to sever any valid portions of the search warrant from any invalid portions, see *People v Keller*, 479 Mich 467, 479[; 739 NW2d 505] (2007); (3) holding that the good-faith exception to the exclusionary rule did not apply, see *People v Goldston*, 470 Mich 523, 531[; 682 NW2d 479] (2004), discussing *United States v Leon*, 468 US 897, 923[; 104 S Ct 3405, 82 L Ed 2d 677] (1984); and (4) finding that trial counsel deprived the defendant of his right to the effective assistance of counsel by failing to move to suppress the evidence obtained from his cell phone on these grounds, see *Strickland*[, 466 US at 687-688]. [*People v Carson*, __ Mich __,__; 11 NW3d 269, 269 (2024).]

II. STANDARD OF REVIEW

In a postconviction motion for a new trial, defendant argued that his attorney provided constitutionally ineffective assistance of counsel by not moving to suppress text messages obtained pursuant to a constitutionally deficient search warrant. In order to discern whether counsel performed [*10] deficiently, we find it appropriate and necessary to consider the underlying substantive Fourth Amendment issue.[10] Our

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[8] As noted, the Court of Appeals also held that defendant's convictions of both larceny and receiving or concealing stolen property, and both corresponding conspiracy convictions, violated the prohibition against multiple punishments for the same offense. *Carson*, __ Mich App at __,__ n 5, __; 2024 Mich. App. LEXIS 1235. Because that issue and the issue currently before this Court were sufficient to resolve the appeal, the panel did not address defendant's other arguments. *Id.* at __; 2024 Mich. App. LEXIS 1235.

[9] In his separate concurrence, Judge (now Justice) HOOD joined the majority opinion in full but wrote separately to highlight his view that the warrant affidavit failed to adequately set forth a nexus between the item to be seized and the suspected criminal conduct. *Carson*, __ Mich App at __ (HOOD, J., concurring); 2024 Mich. App. LEXIS 1235, citing *Hughes*, 506 Mich at 527 n 6. This issue is not currently before the Court.

[10] "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Thus, the lack of substantive merit in an argument necessarily defeats a claim that trial counsel performed deficiently by failing to object on a particular basis. But if an underlying substantive issue has merit, an appellate court must assess whether trial counsel's failure to object was nonetheless objectively reasonable given the legal landscape and facts of the case "viewed as of the time of counsel's conduct." *Strickland*, 466 US at 690. Thus, the substantive merit of an argument is necessarily intertwined with and germane to the determination of whether trial counsel's performance was objectively reasonable. We therefore disagree with Justice ZAHRA and Justice BERNSTEIN that our Fourth Amendment holding constitutes obiter dicta or an advisory opinion because the Fourth Amendment issue is germane to our ultimate holding that defendant's counsel did not perform ineffectively. *Detroit v Mich Pub Utilities Comm*, 288 Mich 267, 299-300; 286 N.W. 368 (1939), quoting *Chase*

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review of Fourth Amendment principles is de novo. *People v Hammerlund*, 504 Mich 442, 451; 939 NW2d 129 (2019). "Whether a defendant received ineffective assistance of trial counsel is a mixed question of fact and constitutional law." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). We review the trial court's findings of fact for clear error, but questions of constitutional law are reviewed de novo. *Hammerlund*, 504 Mich at 451.

III. THE FOURTH AMENDMENT PARTICULARITY REQUIREMENT

The Fourth Amendment protects individuals from unreasonable searches and seizures. US Const, Am IV. In general, for a search to be considered reasonable, the police must obtain a search warrant. *Hughes*, 506 Mich at 525. In *Riley v California*, 573 US 373, 403; 134 S Ct 2473; 189 L Ed 2d 430 (2014), the United States Supreme Court held that the warrant requirement applied to the search of a cell phone seized incident to arrest. *Riley* acknowledged the magnitude of the privacy interests at stake, noting that a cell phone can carry "the sum of an individual's private life" and that "[a] cell phone search would typically expose the government to far more than the most exhaustive search of a house[.]" *Id.* at 394, 396 (emphasis omitted). That is, "[m]odern cell phones are not just another technological convenience," *id.* at 403; rather, most "who own a cell phone keep on their [*11] person a digital record of nearly every aspect of their lives—from the mundane to the intimate," *id.* at 395.

The issue we confront today is the proper relationship between these realities and the Fourth Amendment's particularity requirement, which mandates that a warrant "*particularly* describ[e] the place to be searched, and the persons or things to be seized." US Const, Am IV (emphasis added).[11] "The manifest purpose of this particularity requirement was to prevent general searches." *Maryland v Garrison*, 480 US 79, 84; 107 S Ct 1013; 94 L Ed 2d 72 (1987). "By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit." *Id.* "Whether a search warrant satisfies the particularity requirement depends on the circumstances and the types of items involved." *People v Brcic*, 342 Mich App 271, 278; 994 NW2d 812 (2022), citing *Steele v United States*, 267 US 498, 503; 45 S Ct 414; 69 L Ed 757 (1925); see also *United States v Galpin*, 720 F3d 436, 446 (CA 2, 2013) ("[A] failure to describe the items to be seized with as much particularity as the circumstances reasonably allow offends the Fourth Amendment ....") (quotation marks and citation omitted).

This Court considered the particularity requirement's effects on the scope of a warrant-authorized search of [*12] a cell phone in *Hughes*, 506 Mich at 512.[12] In *Hughes*, the police obtained a warrant to search the defendant's cell phone for evidence of a specific crime, drug trafficking. *Id.* at 519. Later, and without obtaining a second search warrant, the police searched the same data for evidence of another unrelated crime, armed robbery. *Id.* at 521. This Court held that the second search violated the Fourth Amendment because "a

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v American Cartage Co, Inc, 176 Wis 235, 238; 186 NW 598 (1922) (" 'When a court of last resort intentionally takes up, discusses, and decides a question *germane* to, though not necessarily decisive of, the controversy, such decision is not a *dictum* but is a judicial act of the court which it will thereafter recognize as a binding decision.' "); see also *People v Kevorkian*, 447 Mich 436, 487 n 65; 527 NW2d 714 (1994) (opinion by M. F. CAVANAGH, C.J., and BRICKLEY and GRIFFIN, JJ.) (same).

[11] Our state Constitution, Const 1963, art 1, § 11, also guards against unreasonable searches and seizures. In fact, as amended by voter initiative in the 2020 general election, Const 1963, art 1, § 11 specifically provides that "[n]o warrant to . . . access electronic data or electronic communications shall issue without describing them ...." However, defendant's claims below rested solely on Fourth Amendment principles. Therefore, we have no occasion to consider whether the language of Const 1963, art 1, § 11 provides broader protection than the Fourth Amendment in this context. Compare *People v Lucynski*, 509 Mich 618, 634 n 6; 983 NW2d 827 (2022) (noting that Const 1963, art 1, § 11 is interpreted coextensively with the Fourth Amendment unless there is a compelling reason for a different interpretation), with *People v Bullock*, 440 Mich 15, 30-31; 485 NW2d 866 (1992) (concluding that a textual difference between the Eighth Amendment and Const 1963, art 1, § 16 supported a broader interpretation of our state constitutional provision).

[12] In *Hughes*, 506 Mich at 540, we noted that "the warrant authorized officers to review the entire 600-page report containing the apparent totality of [the] defendant's cell-phone data ...." It is unlikely that such a wide-ranging search would pass muster under the parameters we announce today. However, the dispositive issue in *Hughes* was whether the police acted within the scope of the warrant, whereas here the issue concerns the scope of the warrant itself. *Hughes*, 506 Mich at 551 n 26.

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search of digital data from a cell phone must be reasonably directed at uncovering evidence of the criminal activity alleged in the warrant," and "any search that is not so directed . . . is beyond the scope of the warrant." *Id.* at 538 (quotation marks and citation omitted).

This holding was informed by the "extensive privacy interests in cellular data," *id.*, that the Supreme Court recognized in *Riley*, 573 US at 403, as well as by the particularity requirement. This Court acknowledged that a suspect might not store or organize incriminating information in an obvious manner; nonetheless, it "decline[d] to adopt a rule that it is always reasonable for an officer to review the entirety of the digital data seized pursuant to a warrant on the basis of the mere possibility that evidence may conceivably be found anywhere on the device ...." *Hughes*, 506 Mich at 541. Such a rule would [*13] "nullify the particularity requirement" and "rehabilitate an impermissible general warrant that would in effect give police officers unbridled discretion to rummage at will among a person's private effects." *Id.* at 542 (quotation marks, citations, and emphasis omitted). It would also be especially problematic in light of the "sheer amount of information contained in cellular data and the highly personal character of much of that information." *Id.*, citing *Riley*, 573 US at 394-396.

A. THE SEARCH WARRANT AT ISSUE

With these principles in mind, we turn to the language of the search warrant at issue in this case. The warrant provided, in relevant part:

> **1. The person, place or thing to be searched is described as . .** .
>
> Cellular device belonging to Michael Georgie Carson ....
>
> **2. The PROPERTY . . . to be searched for and seized, if found, is specifically described as**:
>
> Any and all records or documents*[13] pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search [*14] for any such items, searching agents may seize and search the following: cellular devices; Any physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; Any passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; This shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer.

B. THE COURT OF APPEALS' [*15] DECISION

The Court of Appeals majority held that the search warrant in this case was an unconstitutional general warrant "that gave the police license to search *everything* on defendant's cell phone in the hopes of finding anything, but nothing in particular, that could help with the investigation." *Carson*, __ Mich App at __; 2024 Mich. App. LEXIS 1235. The warrant did not place any limitations on the permissible scope of the search. "The only hint of specificity" was the warrant's opening reference to " 'the investigation of Larceny in a Building and Safe Breaking....' " *Id.* at __; 2024 Mich. App. LEXIS 1235. However, the majority reasoned that this "small guardrail was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents." *Id.* at __; 2024 Mich. App. LEXIS 1235.

The panel majority acknowledged that there existed sufficient probable cause to believe that defendant and DeGroff broke into and stole from Billings's safe and to believe that the two communicated by cell phone. *Id.* at __; 2024 Mich. App. LEXIS 1235. Therefore, the majority reasoned that it would have been appropriate for the police to search the phone for correspondence between

[13] This asterisk has no counterpart to which it refers. To avoid confusion, we will omit this asterisk when quoting this part of the warrant.

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defendant and DeGroff, for example, SMS (Short Message Service) messages or messages sent through other applications. However, the warrant [*16] allowed the police to search everything and even mentioned photographs and videos, which the majority found "particularly troubling." *Id.* at _; 2024 Mich. App. LEXIS 1235. In addition, the panel majority expressed unease about the police having free rein to peruse applications that might include sensitive health-related records and information. *Id.* at _; 2024 Mich. App. LEXIS 1235. With these concerns in mind, the majority concluded that the search warrant authorized the type of " 'wide-ranging exploratory search[] the framers intended to prohibit.' " *Id.* at _; 2024 Mich. App. LEXIS 1235, quoting *Hughes*, 506 Mich at 539. In fact, the panel majority reasoned, many people might view an unfettered search of their digital data "as more deeply violative of their privacy than the sort of general search of a home that the framers originally intended to avoid." *Carson*, _ Mich App at _; 2024 Mich. App. LEXIS 1235. Accordingly, the majority held that a cell-phone search warrant "must be carefully limited in scope." *Id.* at _; 2024 Mich. App. LEXIS 1235. And while the warrant need not tell the police "precisely what they are looking for or where to find it, . . . there must be guardrails in place." *Id.* at _; 2024 Mich. App. LEXIS 1235.[14]

Judge REDFORD dissented. He concluded that, in light of the introductory sentence of the warrant, which provided for the search of "any and all records or documents pertaining to the investigation of Larceny [*17] in a Building and Safe Breaking," the warrant at issue was not a general warrant. *Id.* at _ (REDFORD, J., dissenting); 2024 Mich. App. LEXIS 1235. Judge REDFORD reasoned that this opening clause "provided context for all that followed" and "necessarily plac[ed] limitations and parameters on the nature and scope of the information and data that could be sought or retrieved by law enforcement ...." *Id.* at _; 2024 Mich. App. LEXIS 1235. The search warrant, therefore, "supplied context connecting the particularized description of the venue to be searched, i.e., the cell phone, and the data and information to be seized with the larcenous, safe-breaking criminal conduct that was suspected." *Id.* at _; 2024 Mich. App. LEXIS 1235. Judge REDFORD disagreed with the majority that this opening language was an insufficient "guardrail." *Id.* at _; 2024 Mich. App. LEXIS 1235. Instead, he stated that "the sentence plainly set forth the boundaries of the entire warrant." *Id.* at _; 2024 Mich. App. LEXIS 1235. In Judge REDFORD's opinion, the search warrant was consistent with this Court's instruction in *Hughes* because it limited the extent of the search to data and information related to larceny and safebreaking and did not allow a search for any and all criminal activity. *Id.* at _; 2024 Mich. App. LEXIS 1235.

C. DISCUSSION

Cell phones in the modern world hold "the privacies of life." *Riley*, 573 US at 403 (quotation marks and [*18] citation omitted). Therefore, like the protections that extend to the home, "Fourth Amendment principles apply with equal force to the digital contents of a cell phone." *Hughes*, 506 Mich at 527. Accordingly, in the context of a cell-phone search, we must jealously guard the requirements of the Fourth Amendment, including the particularity requirement. See, e.g., *Galpin*, 720 F3d at 447 (finding it appropriate to view the particularity requirement in the context of digital searches with a "heightened sensitivity"); *United States v Russian*, 848 F3d 1239, 1245 (CA 10, 2017) (recognizing the importance of the particularity requirement for searches of digital information because such searches are "especially vulnerable to a worrisome exploratory rummaging by the government") (quotation marks and citation omitted); *Commonwealth v Dorelas*, 473 Mass 496, 502; 43 NE3d 306 (2016) ("[G]iven the properties that render an iPhone distinct from the closed containers regularly seen in the physical world, a search of its many files must be done with special care and satisfy a more narrow and demanding standard."). And, like the Court of Appeals majority, we also conclude that the warrant at issue was insufficiently particular and that, therefore, the unrestrained search of defendant's cell phone violated the Fourth Amendment.

We first consider the opening clause of the search warrant and whether it acted as [*19] an insufficient "small guardrail," *Carson*, _ Mich App at _, 2024 Mich. App. LEXIS 1235 (opinion of the Court); slip op at 12, or a firmly set boundary, see *id.* at _ (REDFORD, J., dissenting); slip op at 10. Our focus is on "practical accuracy, as opposed to technical precision," when reviewing the language of a search warrant. *United*

[14] The majority recognized that there was no binding authority "discussing the analysis of whether the language of a warrant authorizing a search of cell phone data comports with the particularity requirement." *Id.* at _; 2024 Mich. App. LEXIS 1235. However, the panel cited and briefly discussed several persuasive authorities, including *State v Smith*, 344 Conn 229; 278 A3d 481 (2022); *State v Bock*, 310 Or App 329; 485 P3d 931 (2021); *People v Coke*, 461 P3d 508; 2020 CO 28 (Colo, 2020); *Richardson v State*, 481 Md 423; 282 A3d 98 (2022); and *State v Wilson*, 315 Ga 613; 884 SE2d 298 (2023).

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States v Tompkins, 118 F4th 280, 287-288 (CA 2, 2024); see also *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992) ("Search warrants . . . are to be read in a common-sense and realistic manner.") (quotation marks and citation omitted). That said, even viewed through the lens of common sense, the search warrant at issue is a hard-to-decipher amalgamation of seemingly unrelated boilerplate language in one long paragraph.[15] The first sentence instructs that the property to be searched for and seized is "[a]ny and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking." The second sentence purports to describe what the term "records or documents" entails. The third sentence provides that searching agents can seize physical items (cellular devices, physical keys, encryption devices), digital items (passwords, test keys, encryption codes, computer codes), and physical features (thumbprint and facial recognition) as necessary to access the cell phone. The fourth sentence [*20] broadly provides that an executing officer can search "[a]ny and all data" including text messages, pictures, videos, "address book," and "all records or documents."

Broken down this way, it is difficult to conclude that the first sentence, which arguably has some limiting language, provides any meaningful affirmative limitation on the remaining sentences—most importantly, the fourth sentence, which allows a search for "any and all data." We cannot conclude that a practical reading of the search warrant at issue would sufficiently inform an executing officer how to reasonably conduct a limited and constitutionally particular search. The lack of instruction on the scope, breadth, or focus of the search shifts the particularity requirement from the warrant, where it belongs, to the executing officer's discretion. *Marron v United States*, 275 US 192, 196; 48 S Ct 74; 72 L Ed 231; Treas. Dec. 42528 (1927) (holding that the particularity [*21] requirement ensures that "nothing is left to the discretion of the officer executing the warrant"); but see *Galpin*, 720 F3d at 446 (noting that the "no discretion" standard is not generally applied literally, as courts often tolerate "some ambiguity"). Or, as we put it in *Hughes*, the warrant does not inform the executing officers how to "reasonably direct[] [their search] at uncovering evidence related to the criminal activity identified in the warrant ...." *Hughes*, 506 Mich at 540.

The prosecution argues that a warrant that specifies the items to be seized by their relation to designated crimes provides sufficient guidance to the executing officers, see *Tompkins*, 118 F4th at 287. But even assuming that the entirety of the search warrant was limited by the opening language to authorize the search and seizure of "[a]ny and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking," we disagree that the limitation is sufficient to satisfy the particularity requirement. Specifying the crime under investigation is necessary, but not usually sufficient to ensure adequate particularity in the context of a cell-phone search warrant. "[A] caveat that the search is limited to evidence of a particular crime . . . gives [*22] little or no clarity to an officer as to where to look, for what to look, or how to look for it." *State v Wilson*, 315 Ga 613, 619; 884 SE2d 298 (2023) (Peterson, J., concurring). The authorization to search every nook and cranny of the cell-phone data for "any and all records or documents" and "any and all data" related to safebreaking and larceny provides no meaningful constraint in this case. Although such a wide-ranging search might uncover incriminating evidence, such exploratory rummaging is not "reasonably directed at obtaining evidence" of safebreaking or larceny. *Hughes*, 506 Mich at 516.[16]

If this warrant was insufficiently particular, the question that naturally arises is what *would* satisfy the particularity requirement. Like the Court of Appeals majority in this case, we cannot and do not create a per

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[15] See *United States v Otero*, 563 F3d 1127, 1133 (CA 10, 2009):

> Differences such as subject headings and paragraph formation might seem insignificant, but if we are to follow our command of reading each part of the warrant in context, these structural indicators are useful tools. Affording the government a practical rather than a technical reading does not require us to indulge every possible interpretation.

See also *United States v Winn*, 79 F Supp 3d 904, 919 (SD Ill, 2015) ("Templates are, of course, fine to use as a starting point. But they must be tailored to the facts of each case.").

[16] Finally, we note that the warrant broadly allowed a search for records and documents generally "pertaining to the investigation of Larceny in a Building and Safe Breaking," not to any specific evidence that law enforcement believed it might uncover on the basis of probable cause. The lack of adequate particularity as to what officers were searching for further supports the Court of Appeals majority's conclusion that officers were searching defendant's cell phone "in the hopes of finding anything, but nothing in particular ...." *Carson*, __ Mich App at __ (opinion of the Court); 2024 Mich. App. LEXIS 1235.

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se rule of specificity that applies to all cell-phone searches. We recognize that, in many cases, an exact description of what law enforcement should be searching for and where they should search for it is not necessarily feasible. See *Hughes*, 506 Mich at 540-541 (noting that "criminal suspect[s] will not always store or organize incriminating information on [their] digital devices in the most obvious way or in a manner that facilitates the location of that information"). [*23] However, a search warrant should be as particular as the circumstances presented permit and consistent with the nature of the item to be searched. See *United States v Leary*, 846 F2d 592, 600 (CA 10, 1988) ("[T]he fourth amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow ....").[17]

While there is little Michigan caselaw outlining the specifics of the particularity requirement, other states' high courts have considered the issue, and their decisions provide guidance. Many cases, for example, emphasize the importance of temporal limitations on the data to be searched. See *Commonwealth v Snow*, 486 Mass 582, 593; 160 NE3d 277 (2021) ("The magnitude of the privacy invasion of a cell phone search utterly lacking in temporal limits cannot be overstated.").[18] This emphasis is unsurprising in the context of cell phones and digital data. *Riley*, 573 US at 394 (noting the privacy consequences of cell-phone searches considering that "the data on a phone can date back to the purchase of the phone, or even earlier"). And such temporal information will generally be easy to include in the search warrant. That is, even if the drafter of a search warrant cannot specifically describe the evidence sought, generally an investigating officer will [*24] be able to identify a relevant time frame for the criminal activity. Put simply, when information concerning the relevant time frame of the criminal activity exists, this time limitation should be included in the search warrant to ensure adequate particularity.

Another common particularity limit focuses on the categories of data to be searched. Some courts have concluded that warrants that, expressly or effectively, allow the police to search *all* data on a cell phone violate the particularity requirement. See, e.g., *State v Henderson*, 289 Neb 271, 290; 854 NW2d 616 (2014) (holding that a warrant authorizing a search for "[a]ny and all information" and listing various categories of data did not comply with the particularity requirement); *Terreros v State*, 312 A3d 651, 667 (Del, 2024) (holding that a warrant that "in effect" allowed the police to search "any and all data" amounted to a general warrant).[19] The need for specificity about the types of

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[17] Justice ZAHRA cites a host of caselaw from the federal circuits, which he finds persuasive. We find it unnecessary to catalog specific disagreement with each of these nonbinding cases. That said, we note that at least one case predates *Riley* and the proliferation of smartphone technology, so the value of its holdings may be overstated. See, e.g., *United States v Stabile*, 633 F3d 219 (CA 3, 2011). And many of the post-*Riley* decisions express similar concerns about the quantity of data contained in cell phones and state that warrants to search them must be carefully limited in scope. See, e.g., *United States v Palms*, 21 F4th 689, 698 (CA 10, 2021) ("Because computers can contain enormous amounts of information and relevant evidence can be stored in any location, the Fourth Amendment requires warrants for computer searches to 'affirmatively limit the search to evidence of specific . . . crimes or specific types of material.' ") (citation omitted; ellipsis in original).

[18] See *State v Short*, 310 Neb 81, 139; 964 NW2d 272 (2021) ("The most important constraint in preventing unconstitutional exploratory rummaging is that the warrant limit the search to evidence of a specific crime, ordinarily within a specific time period, rather than allowing a fishing expedition for all criminal activity."); *Richardson*, 481 Md at 458-459 ("Perhaps the most common limitation that issuing judges should consider including in a warrant to satisfy the particularity requirement is a temporal restriction."); see also *Terreros v State*, 312 A3d 651, 668 (Del, 2024); *State v Smith*, 344 Conn 229, 252; 278 A3d 481 (2022); *People v Coke*, 461 P3d 508, 516; 2020 CO 28 (Colo, 2020) (all concluding that warrants lacking time restrictions violated the particularity requirement); *State v Mansor*, 363 Or 185, 188; 421 P3d 323 (2018) (reaching a similar conclusion under the state constitution).

[19] Oftentimes, questions about the types of data to be searched are bound up in the question of the "nexus . . . between the item to be seized and criminal behavior." *Warden, Md Penitentiary v Hayden*, 387 US 294, 307; 87 S Ct 1642; 18 L Ed 2d 782 (1967). Thus, courts have invalidated warrants that allow officers to search and seize information beyond what is otherwise justified by a showing of probable case in the affidavit. See, e.g., *State v Castagnola*, 145 Ohio St 3d 1, 20; 2015-Ohio-1565; 46 NE3d 638 (2015) ("[T]he broad language of this search warrant clearly included items that were not subject to seizure. The search warrant permitted [law enforcement] to examine every record or document on [the defendant's] computer in order to find any evidence of the alleged crimes."); *Burns v United States*, 235 A3d 758, 774 (DC, 2020) ("The facts set forth in the warrants' supporting affidavits established probable cause to believe the phones contained [GPS and text-message evidence of a murder]. But beyond those discrete items, the affidavits stated no facts that

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data expected to be encountered and searched must be weighed against the fact that law enforcement often will not be certain what evidence exists and where it will be located. This does not, however, free them from the obligation to provide the most specific description possible and to support a request to search each category of data mentioned [*25] in a warrant affidavit. Nor does it permit magistrates to approve boundless searches of electronic data when the information available provides a basis for a more reasonably tailored search. See *Burns v United States*, 235 A3d 758, 777 (DC, 2020), quoting *United States v Bass*, 785 F3d 1043, 1050 (CA 6, 2015) (" 'The proper metric of sufficient specificity is whether it was reasonable to provide a more specific description of the items at that juncture of the investigation.' "); *State v Goynes*, 303 Neb 129, 142; 927 NW2d 346 (2019) ("A search warrant may be sufficiently particular even though it describes the items to be seized in broad or generic terms if the description is as particular as the supporting evidence will allow, but the broader the scope of a warrant, the stronger the evidentiary showing must be to establish probable cause.").[20]

In sum, our decision today builds on our decision in *Hughes*. The same concerns that led us to place limits on the conduct of a search in *Hughes* underlie the standards we impose on warrants. Requiring additional specificity in the text of a warrant ensures that executing officers "reasonably direct" their search "at uncovering evidence related to the criminal activity identified in the warrant...." *Hughes*, 506 Mich at 540.[21] Indeed, without clear guidance in the warrant about the nature and location of the evidence sought, officers [*26] cannot know where to "reasonably direct" their efforts. Ultimately, the degree of particularity required to adequately direct a search depends on the crime being investigated and the items sought. *Brcic*, 342 Mich App at 278.[22]

We conclude that the search warrant in this case was insufficiently particular. It allowed officers to comb through every conceivable type of information on the cell phone limited only, at best, to evidence "pertaining to the investigation of Larceny in a Building and Safe Breaking." In our modern age, when cell phones carry a virtually unlimited amount of private information, such wide-ranging exploratory rummaging is constitutionally intolerable and clearly violates the Fourth Amendment.[23]

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

As explained, the Fourth Amendment issue comes through defendant's claim that his attorney should have raised the issue in a motion to suppress. "[T]o obtain a new trial because of ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a

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even arguably provided a reason to believe that any other information or data on the phones had any nexus to the investigation of [the victim's] death.").

[20] Applying such considerations to the facts of this case, the warrant here might have contained adequate particularity if it had directed law enforcement to search for text messages or communications (categorical limitation) between defendant and DeGroff during August and September 2019 (temporal limitation).

[21] Justice ZAHRA contends that we should focus on the search method and whether the search was conducted reasonably. While it is important that officers reasonably direct their search efforts within the bounds set by the warrant, they must be armed with a sufficiently particularized warrant in order to do so. These two requirements cannot be separated as our colleague suggests. Cf. *Snow*, 486 Mass at 590 (stating that the particularity requirement serves two purposes: "(1) to protect individuals from general searches and (2) to provide the Commonwealth the opportunity to demonstrate, to a reviewing court, that the scope of the officers' authority to search was properly limited") (quotation marks and citations omitted).

[22] We reject the prosecution's attempt to analogize the search here to searches in cases like *Steele*, 267 US at 505, in which the United States Supreme Court in a Prohibition-era case held that the search of a "whole building" for a case of whiskey was constitutional. More recently, the Supreme Court has explicitly acknowledged that physical searches and digital searches are not readily comparable. See *Riley*, 573 US at 393 (quipping that the argument that a search of data on a phone and a search of a physical item were materially indistinguishable "is like saying a ride on horseback is materially indistinguishable from a flight to the moon"). "Indeed, a cell phone search would typically expose to the government far *more* than the most exhaustive search of a house[.]" *Id.* at 396.

[23] Notably, our decision today is based on the warrant's lack of particularity regarding the authorization to *search* defendant's cell-phone data for incriminating evidence; we do not address the *seizure* of a broader swath of data, given the nature of the property at issue and the technology used to identify the data that may be permissibly searched. See *Hughes*, 506 Mich at 529-530 (highlighting the important distinctions between a search of cell-phone data and the seizure of that data).

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reasonable probability that [the] outcome could have been different." *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023) (quotation marks and citation [*27] omitted).

As to the performance prong of a claim alleging ineffective assistance of counsel, courts "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 US at 690. In other words, "[a] reviewing court must not evaluate counsel's decisions with the benefit of hindsight." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). While "defense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument," *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996), if "there was existing precedent that would have strongly supported a motion to suppress, trial counsel's failure to raise [a] Fourth Amendment challenge cannot be excused for not foreseeing a change in the law," *People v Hughes (On Remand)*, 339 Mich App 99, 109; 981 NW2d 182 (2021).

As to the prejudice prong of a claim alleging ineffective assistance of counsel, "[a] reasonable probability is a probability sufficient to undermine confidence in the outcome." *Yeager*, 511 Mich at 488 (quotation marks and citations omitted). "[W]here there is relatively little evidence to support a guilty verdict to begin with . . ., the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." *People v Trakhtenberg*, 493 Mich 38, 56; 826 NW2d 136 (2012) (quotation marks and citation omitted).

A. ADDITIONAL FACTUAL BACKGROUND

Defendant's attorney filed [*28] a pretrial motion to suppress in June 2020. The motion argued that defendant's Fourth Amendment rights were violated not when defendant's cell phone was searched, but rather when it was *seized* without a warrant at the time defendant was arrested. The trial court held a hearing on the motion on July 7, 2020. Thereafter, the trial court denied the motion in a written order and opinion, concluding that it was a valid seizure incident to arrest.[24]

In his postconviction motion for a new trial, defendant argued that it was constitutionally ineffective for his attorney not to have sought suppression of the contents of the cell phone on the basis of the search warrant. The trial court held a *Ginther*[25] hearing, at which defendant's trial counsel was the only witness. Counsel explained that he thought the affidavit in support of the search warrant was "fine," which was why he filed the motion to suppress based on the cell phone's seizure. When reviewing the search warrant, counsel thought it provided "a basis to look for that cell phone," and "after that, the content of the cell phone is basically pro forma." After further questioning from the trial court, counsel noted that "[l]ooking back" he believed it was an [*29] error not to file a motion to suppress the contents of the cell phone, but he expressed hesitation about whether such a motion would have been successful.

Following the hearing, the trial court issued an opinion and order denying defendant's motion for a new trial. As to performance, the trial court concluded that counsel should have filed a motion to suppress the contents of the cell phone "if only to preserve the appeal." The trial court concluded that the text messages were "integral to the Prosecutor's case" and that there was a reasonable probability of a different outcome if they had been suppressed. However, the trial court concluded that the good-faith exception to the exclusionary rule would have applied; therefore, the court believed that, even if counsel had filed a motion to suppress and the court had invalidated the warrant, the text messages would not have been suppressed. Accordingly, the trial court concluded that such a motion would not have produced a different outcome, and defendant thus did not receive constitutionally ineffective assistance of counsel.

B. THE COURT OF APPEALS' DECISION

The panel majority agreed with the trial court that trial counsel's failure to [*30] seek exclusion of the cell phone's contents constituted objectively unreasonable performance and found that there was a reasonable probability of a different outcome of defendant's trial had the evidence obtained from the cell phone been excluded from trial. *Carson*, __ Mich App at __; 2024 Mich. App. LEXIS 1235.

Under the first prong, the majority concluded that trial counsel did not have a strategic reason for failing to seek exclusion of the cell phone's contents as violative of the particularity requirement. The majority noted that trial counsel's testimony suggested a mistaken belief that if the police had a lawful basis to *seize* a phone,

[24] This issue is not before the Court.

[25] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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they also had the legal right to search the entirety of its contents. Therefore, the failure to seek exclusion was based on a misunderstanding of the law, not valid trial strategy. *Id.* at __; 2024 Mich. App. LEXIS 1235.

Turning to the prejudice prong, the majority concluded that it was "not difficult . . . to conclude that there is a reasonable probability that the trial would have had a different outcome had the contents of the cell phone not been admitted." *Id.* at __; 2024 Mich. App. LEXIS 1235. It acknowledged the "persuasive circumstantial evidence," summarizing:

> The properly admitted evidence established that defendant did not have a significant source of income [*31] when he began selling property for Billings and that he and DeGroff only had $283.13 in their joint bank account at the end of July 2019. However, in September 2019, not long before Billings discovered that the contents of the safes were missing, defendant deposited nearly $10,000 into the bank account he shared with DeGroff, and in August 2019 defendant put $57,000 into the gaming machines at the Odawa Casino. Also, defendant quit his job and told his boss that he no longer needed the work because he had found valuables in a locker he purchased online. Moreover, Billings testified that only defendant and DeGroff could have accessed the safes during the period when they were emptied. This evidence was sufficient to prove beyond a reasonable doubt that defendant and DeGroff conspired to steal the contents of Billings's safe. [*Id.* at __; 2024 Mich. App. LEXIS 1235.]

However, "[w]hile the properly admitted evidence was persuasive," the improperly admitted text messages were "essentially definitive," and their value could not "be overstated." *Id.* at __; 2024 Mich. App. LEXIS 1235. While a guilty verdict would have been "unsurprising" without the text messages, with the text messages a not-guilty verdict would have been "shocking." [*32] *Id.* at __; 2024 Mich. App. LEXIS 1235. Therefore, the majority concluded that there was a reasonable probability that the outcome of the proceedings would have been different if not for defense counsel's failure to file a motion to suppress.

Judge REDFORD did not discuss trial counsel's performance but concluded that defendant was unable to show prejudice in light of the overwhelming untainted evidence. *Id.* at __ (REDFORD, J., dissenting); 2024 Mich. App. LEXIS 1235. He reasoned that "[w]hile the text messages undoubtedly strengthened the prosecution's case, they simply made an overwhelming case of guilt an insurmountable case of guilt," and he concluded that there was not a reasonable probability "that the jury would have acquitted defendant absent the text messages." *Id.* at __; 2024 Mich. App. LEXIS 1235.

C. DISCUSSION

We are not satisfied that defendant has shouldered his burden to demonstrate ineffective assistance of counsel in this case. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

As indicated by our previous analysis, a motion to suppress based on the lack of particularity in the search warrant at issue would not have been substantively meritless. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). However, as we must, we consider counsel's performance in light of the facts and circumstances that existed at the time of counsel's conduct. *Strickland*, 466 US at 690. Unlike the Court of Appeals [*33] majority, we believe that defendant has not shown that counsel's performance was constitutionally deficient. *Id.* While we are not prepared to call the Fourth Amendment particularity argument in this case "novel," *Reed*, 449 Mich at 695, we also recognize that the application of Fourth Amendment principles in the cell-phone and digital-data sphere is an area of the law that continues to rapidly evolve. *Riley*, 573 US at 403, which was decided several years before this case arose, recognizes the important privacy implications at stake when a cell phone is searched, but its holding is that the police must obtain a search warrant before searching a cell phone seized incident to arrest. It does not speak to particularity. And *Hughes*, 506 Mich at 512—the case we build on today and in which this Court first discussed particularity in the context of a cell-phone search—was not decided until more than six months after counsel filed his unsuccessful motion to suppress. Additionally, many of our sister state courts—whose opinions we rely on today—did not take up the question of particularity in this context until after 2020. See, e.g., *Short*, 310 Neb 81; 964 N.W.2d 272 (2021); *Richardson*, 481 Md 423; 282 A.3d 98 (2022); *Wilson*, 315 Ga 613; 884 S.E.2d 298 (2023).

While hindsight, our *Hughes* decision, and five additional years of technological advances and court decisions may now render the lack-of-particularity [*34] argument an obvious basis for a motion to suppress, the record supports that counsel's decision to file a motion to suppress on a different basis was not based on a

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misunderstanding of the law as it existed at the time and may be fairly characterized as an exercise of reasonable professional judgment under the facts and circumstances that existed when the decision was made. *Strickland*, 466 US at 689. Therefore, defendant's claim of ineffective assistance of counsel fails.[26]

V. CONCLUSION

We agree with the Court of Appeals that the search warrant in this case violated the particularity requirement of the Fourth Amendment. However, this substantive claim must be considered through the lens of counsel's performance, and we conclude that defendant has not demonstrated that it was objectively unreasonable for defendant's attorney not to have filed a motion to suppress on this basis.[27] We, therefore, reverse Part II(B)(3) of the judgment of the Court of Appeals because defendant is not entitled to reversal of his convictions on this specific claim of ineffective assistance of counsel. However, because the Court of Appeals did not address additional arguments that defendant made in his appeal of right, we remand [*35] this case to the Court of Appeals for consideration of those issues.

We do not retain jurisdiction.

Megan K. Cavanagh

Elizabeth M. Welch

Kimberly A. Thomas

Concur by: Brian K. Zahra; Richard H. Bernstein; Kyra H. Bolden (In Part)

Concur

ZAHRA, J. (*concurring in the result only*).

We are asked to decide whether the Court of Appeals properly granted relief to defendant based on a claim of ineffective assistance of counsel. Defendant contends that his trial counsel performed deficiently by failing to object to the admission of evidence obtained through a warrant authorizing the police to search defendant's cell phone. In defendant's view, the search warrant did not satisfy the Fourth Amendment's particularity requirement. I conclude that defendant fails to show ineffective assistance of counsel because he has not shown prejudice from the alleged unprofessional error by trial counsel. Therefore, I concur in the decision to partially reverse the Court of Appeals' judgment and remand this matter to the Court of Appeals for consideration of defendant's remaining arguments.

I write separately to express my disagreement with the lead opinion on two points. First, the Court overreaches by addressing the Fourth Amendment particularity issue. That issue [*36] was raised only indirectly

[26] Because defendant must demonstrate both objectively unreasonable performance and prejudice, and we conclude that counsel's performance was objectively reasonable under the circumstances, we need not consider prejudice. Were we to examine prejudice, however, we would find it to be an exceedingly close case. The untainted evidence in this case was persuasive. Defendant and DeGroff had less than $300 in their bank account at the end of July but, after being provided near-exclusive access to Billings's home, their spending habits significantly increased. This was despite testimony that defendant quit his job at the end of July and DeGroff made only $245 per week. Defendant's roommate saw defendant in possession of stacks of hundred-dollar bills that matched the description of the money stolen from Billings's safe. There was also the damaging testimony that defendant had quit his job, a decision he allegedly explained by saying that he "ran across some money and some valuables . . . in a locker that he bought online." That said, there was also evidence that could have provided an alternative explanation for the increased spending. For example, testimony indicated that defendant had won a $12,500 jackpot from the casino in August and that he had sold two vehicles in September. Defendant's brother also testified that defendant worked for his construction company and was paid in cash. A close reading of the testimony of the casino's slot director, as discussed in note 6 of this opinion, suggests that the money that defendant spent at the casino did not directly "correspond" to the sums stolen. Ultimately, however, any possible reasonable doubt raised by these alternative income streams was dashed with the introduction of the text messages that were "essentially definitive" as to defendant's guilt. *Carson*, __ Mich App __; 2024 Mich. App. LEXIS 1235. Although we decline to make a determination on prejudice, this is a close question on which reasonable minds could differ, as demonstrated by the differing opinions of the trial court, the majority and dissenting opinions in the Court of Appeals, and the opposing conclusions reached by Justice ZAHRA, Justice BERNSTEIN, and Justice BOLDEN.

[27] Although the parties were directed to address the good-faith exception to the exclusionary rule and the severance doctrine, because we conclude that counsel's performance was not objectively unreasonable in this respect and that defendant is not entitled to reversal of his convictions on the basis of this claim of ineffective assistance of counsel, we find it unnecessary to address these issues.

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through defendant's ineffective-assistance argument. Generally, the Court should not address legal questions that do not bear on the resolution of the appeal before it. And this Court has long stated that it will not reach constitutional issues that are unnecessary to our decision. At best, the particularity analysis of the lead opinion constitutes improvident dicta. At worst, it is an unconstitutional advisory opinion, which follows an unfortunate and misguided trend of this Court.[1]

Second, having reached the particularity issue, the lead opinion erroneously concludes that the warrant was insufficiently particular. The weight of authority shows that the warrant satisfied the Fourth Amendment's particularity requirement, as the warrant cabined the scope of the cell-phone search to evidence of specific offenses. Given this limitation, the warrant was facially valid, and the proper inquiry would be whether law enforcement "reasonably directed" their efforts toward uncovering evidence of the crimes specified in the warrant. Although I concur in the decision to partially reverse the judgment of the Court of Appeals and remand to that Court for further proceedings, I cannot join [*37] the lead opinion because it both overreaches and engages in flawed legal analysis.

I. BACKGROUND

Defendant was convicted of multiple crimes after he, along with his girlfriend, Brandie DeGroff, stole a significant amount of property and cash from their neighbor, Don Billings. After the initial police investigation pointed to defendant and DeGroff as the prime suspects, law enforcement arrested defendant. At the same time, they seized defendant's cell phone. The police later obtained a warrant to search the phone. The warrant authorized the police to search the cell phone for the following:

Any and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; [a]ny physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are [*38] necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; [a]ny passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; [t]his shall include thumb print and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer. [Asterisk omitted.]

According to testimony at defendant's trial, the phone was sent to a computer crime unit in Traverse City, where a forensic analysis was conducted. The forensic analysis isolated and flagged items for the investigating officers to review. [*39] One of the flagged items was a series of incriminating text messages between defendant and DeGroff in which the two discussed going through the contents of Billings's home safe and stealing $60,000 from him. Unrelated to the search of defendant's phone, the investigation also uncovered significant circumstantial evidence that pointed to defendant and DeGroff as the culprits.

The prosecution charged defendant with safebreaking,[2] larceny of property with a value of $20,000 or more,[3] receiving or concealing stolen property with a value of $20,000 or more,[4] larceny from a building,[5] and conspiracy to commit each of those offenses.[6] Before trial, defendant moved to suppress the evidence obtained from his cell phone on the ground that the police improperly seized the phone when executing the warrant for defendant's arrest. The trial court denied the motion. Defendant did not move to suppress the evidence obtained from his cell phone on the ground that the search warrant was invalid.

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[1] See *People v Warner*, 514 Mich 41, 72-78; NW3d (2024) (ZAHRA, J., dissenting in part).

[2] MCL 750.531.

[3] MCL 750.356(2)(a).

[4] MCL 750.535(2)(a).

[5] MCL 750.360.

[6] MCL 750.157a.

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At the end of defendant's trial, the jury convicted him as charged. Defendant moved for a new trial on several grounds, including a claim that his trial counsel had provided constitutionally deficient performance by [*40] failing to move for suppression of the evidence obtained from the cell phone because of a lack of particularity in the search warrant. The trial court, with a different trial judge presiding, conducted a hearing on defendant's motion for a new trial but later entered an opinion and order denying his motion. Defendant appealed by right.

In a published opinion, a divided Court of Appeals panel agreed with defendant that he had received ineffective assistance of trial counsel.[7] The Court of Appeals majority held that the search warrant for defendant's phone was facially invalid because it failed the Fourth Amendment's particularity requirement.[8] The Court of Appeals majority also held that the good-faith exception to the exclusionary rule did not apply to the evidence from defendant's cell phone.[9] Finally, the Court of Appeals majority concluded that there was a reasonable probability that the outcome of the trial would have been different but for trial defense counsel's deficient performance.[10] Accordingly, the Court of Appeals overturned defendant's convictions and remanded the case to the trial court.[11]

This Court granted the prosecution's application for leave to appeal[12] and [*41] heard oral argument on April 10, 2025.

II. STANDARD OF REVIEW

When considering a claim of ineffective assistance of counsel, this Court reviews the trial court's findings of fact for clear error and reviews questions of constitutional law de novo.[13]

III. ANALYSIS

I conclude that defendant's ineffective-assistance claim fails because he cannot show prejudice from the alleged error by his counsel. The lead opinion does not address prejudice and instead holds that defendant cannot prevail on his ineffective-assistance claim because his trial counsel's failure to challenge the particularity of the search warrant did not amount to objectively unreasonable representation.[14] Because this conclusion disposes of the appeal, I am perplexed by the decision to address the merits of the particularity argument that defendant's trial counsel was supposedly not ineffective for failing to make. If, as the lead opinion concludes, it is dispositive that counsel was not required to make a particularity argument, it is self-evident that the merits of that argument are irrelevant. To compound this error, the lead opinion answers the constitutional question incorrectly. The weight of persuasive authority leads to [*42] the conclusion that the search warrant in this case was sufficiently particularized because it constrained law enforcement to search for evidence of specific crimes.

A. DEFENDANT CANNOT SHOW ENTITLEMENT TO RELIEF BASED ON INEFFECTIVE ASSISTANCE OF COUNSEL

The Constitutions of both the United States and Michigan guarantee a right to the effective assistance of counsel.[15] Under what is commonly known as the *Strickland*[16] standard, in order to obtain a new trial based on the ineffective assistance of counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have

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[7] *People v Carson*, ___ Mich App ___ ; ___ NW3d ___ (February 15, 2024) (Docket No. 355925); 2024 Mich. App. LEXIS 1235. The Court of Appeals also held that it violated double-jeopardy protections for a person to "be convicted of both larceny and receiving or concealing stolen property as a result of the same criminal act." *Id.* at __; 2024 Mich. App. LEXIS 1235. Judge REDFORD dissented regarding both ineffective assistance of counsel and double jeopardy; he would have affirmed entirely. *Id.* at (REDFORD, J., dissenting); 2024 Mich. App. LEXIS 1235. I agree with the lead opinion's decision not to address the double-jeopardy issue because the prosecution did not raise it in this Court.

[8] *Id.* at __; 2024 Mich. App. LEXIS 1235 (opinion of the Court).

[9] *Id.* at __; 2024 Mich. App. LEXIS 1235.

[10] *Id.* at __; 2024 Mich. App. LEXIS 1235.

[11] *Id.* at __; 2024 Mich. App. LEXIS 1235.

[12] *People v Carson*, __ Mich __; 11 NW3d 269 (2024).

[13] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[14] See *People v Yeager*, 511 Mich 478, 488; 999 NW2d 490 (2023).

[15] *Yeager*, 511 Mich at 488, citing *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See also US Const, Am VI; Const 1963, art 1, § 20.

[16] *Strickland*, 466 US 668.

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been different."[17] This means that defendant in this case is entitled to relief only if he can show both that his counsel's performance was constitutionally deficient and that counsel's error prejudiced him.[18]

I would resolve this case under the second *Strickland* prong. Even assuming that counsel performed deficiently and the evidence from defendant's cell phone should not have been admitted at trial, defendant cannot show a reasonable probability that the outcome of the [*43] trial would have been different. Putting aside the text messages, the dissenting Court of Appeals judge summed up the remaining evidence well:

> [D]efendant and DeGroff had direct access to the safes; the balance in the couple's joint bank account dramatically increased after the larceny absent explanation for the funds; defendant quit his job following the theft indicating that he "ran across some money"; defendant and DeGroff began making costly purchases after the larceny; the couple started regularly going out to dinner and the casino following the theft, spending enormous sums of money; items belonging to victim Billings other than the money were found in defendant's home; and the amounts spent by defendant and DeGroff corresponded to the sums stolen from Billings.[19]

With this evidence presented at trial, there was no "reasonable probability"[20] that defendant would have been acquitted absent the evidence of the text messages. That is, in all likelihood, defendant would have been convicted anyway on the strength of the unchallenged evidence. I agree with dissenting Judge REDFORD's conclusion: "While the text messages undoubtedly strengthened the prosecution's case, they simply [*44] made an overwhelming case of guilt an insurmountable case of guilt."[21] Because defendant cannot show prejudice under *Strickland*, his ineffective-assistance theory of relief fails.[22]

B. IT IS INAPPROPRIATE FOR THE LEAD OPINION TO ADDRESS PARTICULARITY

The lead opinion resolves this appeal on the ground that defense counsel did not perform unreasonably by not raising the particularity issue. But before reaching that outcome-determinative question, the lead opinion jumps ahead of itself to conduct a standalone Fourth Amendment particularity analysis of the search warrant for defendant's cell phone. That analysis might be appropriate if particularity were before us as a discrete issue. But it is not. The Fourth Amendment particularity issue was not preserved in the trial court. It comes before this Court solely through defendant's postconviction argument that he received ineffective assistance from his trial counsel. Accordingly, we can consider it only through the framework of ineffective assistance.[23]

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[17] *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). The *Strickland* standard applies to ineffective-assistance claims brought under the state Constitution as well as the federal Constitution. See *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

[18] *Trakhtenberg*, 493 Mich at 51.

[19] *Carson*, __ Mich App at __(REDFORD, J., dissenting); 2024 Mich. App. LEXIS 1235.

[20] *Trakhtenberg*, 493 Mich at 51.

[21] *Carson*, __ Mich App at __(REDFORD, J., dissenting); 2024 Mich. App. LEXIS 1235. The lead opinion observes that, in ruling on defendant's motion for a new trial, the trial court concluded that the text messages were " 'integral to the Prosecutor's case' " and that there was "a reasonable probability" of a different outcome had the evidence from the phone been suppressed. Although this is true, it is insignificant. To begin, the standard of review is de novo, so there is no deference to the trial court's legal conclusions. *LeBlanc*, 465 Mich at 579. Further, the context of the statements should be understood. The judge who made those statements was not the judge who presided over the trial and observed firsthand the evidence and witnesses presented at trial; it was the judge who presided over the proceedings on defendant's motion for a new trial. Thus, the statements did not come from a judge who had any unique insight into the events at trial or the evidence there presented. What is more, the trial court provided no reasoning or explanation for its statements that the text messages were integral to the case and that the reasonable-probability standard had been satisfied. Instead, the trial court appears to have made these statements in passing so that it could consider the application of the good-faith exception to the exclusionary rule and resolve defendant's motion on that basis. See *United States v Leon*, 468 US 897, 924; 104 S Ct 3405; 82 L Ed 2d 677 (1984).

[22] Although I believe that the prejudice prong of *Strickland* would be the clearest and best means by which to dispose of this case and thus would go no further, I do not disagree with the lead opinion's conclusion that defendant also fails to satisfy the deficient-performance prong because counsel did not provide objectively unreasonable performance by not challenging the search warrant on the basis of particularity.

[23] The Court of Appeals majority similarly erred by addressing

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It can be appropriate to use an ineffective-assistance claim to consider underlying issues of substantive law—for instance, if a defendant's ineffective-assistance claim has been denied on the ground that [*45] the issue that counsel allegedly should have raised lacked merit.[24] But that is different from what the lead opinion does here. The lead opinion resolves the appeal by holding that defendant's counsel had no obligation to raise a particularity challenge to the search warrant for defendant's phone because it was not an obvious argument to be made under the then-existing facts and circumstances. That should end the analysis in this appeal. There is no sound jurisprudential reason to address particularity because it has no effect on the outcome of the appeal and no relevance for the Court's decision.[25]

If counsel need not have raised an objection in order to provide constitutionally adequate representation, then it makes no difference whatsoever to the ineffective-assistance analysis whether the objection would have been meritorious. The necessity of raising a challenge is a logically required question that precedes the question of whether the challenge might have succeeded. If the answer, as here, is that it was not necessary to raise the challenge, then there is no logical or principled reason to go further than that. Given the lead opinion's ultimate conclusion that the particularity issue [*46] did not need to be raised, there is no excuse for conducting a backward analysis and reaching the merits of the particularity issue.

As a general matter, "this Court does not . . . declare principles or rules of law that have no practical legal effect on the case before it."[26] But with constitutional issues, this rule carries even greater weight. We have repeatedly emphasized that "[t]his Court will not unnecessarily decide constitutional issues"[27] and that "constitutional issues should not be addressed where the case may be decided on nonconstitutional grounds."[28] Yet that is precisely what the lead opinion does by opining that the search warrant in this case was invalid under the Fourth Amendment. I cannot agree with the decision to flout our long-established rule against addressing a constitutional question that has no bearing on our resolution of the matter before us. Because the lead opinion's conclusions about the search warrant's particularity have no conceivable relevance to the case's outcome, that part of the lead opinion appears to be an unconstitutional advisory opinion.[29] As we have said, "[p]erhaps the most critical element of the judicial power has been its requirement of a genuine case or controversy [*47] between the parties, one in which there is a real, *not a hypothetical*, dispute . . . ."[30] Because the validity of the search warrant is challenged only through defendant's theory of ineffective assistance, and defendant cannot prevail on that theory because the lead opinion holds that counsel had no professional obligation to raise the argument in question, the merits of the argument that counsel supposedly should have made remain in the realm of

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the Fourth Amendment issue as a standalone matter outside the context of defendant's ineffective-assistance theory.

[24] See generally *People v Hughes*, 506 Mich 512; 958 NW2d 98 (2020).

[25] See *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010).

[26] *Id.* (quotation marks and citation omitted).

[27] *J & J Constr Co v Bricklayers and Allied Craftsmen*, Local 1, 468 Mich 722, 734; 664 NW2d 728 (2003).

[28] *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). See *J & J Constr*, 468 Mich at 734 ("[I]t is an undisputed principle of judicial review that questions of constitutionality should not be decided if the case may be disposed of on other grounds."); *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993) ("[T]here exists a general presumption by this Court that we will not reach constitutional issues that are not necessary to resolve a case."); *MacLean v State Bd of Control for Vocational Ed*, 294 Mich 45, 50; 292 NW 662 (1940) (declining to address constitutional issues "under the familiar rule that questions of constitutionality are not decided where a case may be disposed of without such a determination").

[29] See *Warner*, 514 Mich at 72-74 (ZAHRA, J., dissenting in part) (explaining that this Court's constitutional power does not extend to controversies not presented by the facts of the case). As I explained in my partial dissent in *Warner*, this use of "advisory opinion" reflects that term's common usage in the context of justiciability. See *id.* at 75 n 22. I do not refer to the opinions of this Court that the other branches of government may request "on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date." Const 1963, art 3, § 8.

[30] *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 292; 715 NW2d 846 (2006) (emphasis added; quotation marks and citation omitted); see also *id.* ("With regard to the necessity of a justiciable controversy, it derives from the constitutional requirement that the judiciary is to exercise the 'judicial power' and only the 'judicial power.' ").

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the hypothetical. The Court has no authority to bypass procedural requirements simply because a plurality of justices wish to opine on a legal issue irrelevant to the appeal's outcome. Finally, the lead opinion's particularity analysis, at most, constitutes nonbinding dicta because it is "unnecessary to determine the case at hand and, thus, lack[s] the force of an adjudication."[31] In sum, the lead opinion exceeds this Court's authority by reaching and purporting to decide the particularity issue.[32]

C. THE SEARCH WARRANT WAS SUFFICIENTLY PARTICULAR

Reaching the issue only to respond to the lead opinion, I disagree with its conclusion that the search warrant in this case failed the Fourth Amendment's particularity requirement.[33] The Fourth Amendment requires that search [*48] warrants "particularly describ[e] the place to be searched, and the persons or things to be seized."[34] In addition to the items to be searched and seized, the particularity requirement requires that a search warrant must also state with particularity "the alleged criminal activity justifying the warrant."[35] The United States Supreme Court has explained the purpose of the particularity requirement as follows:

> The manifest purpose of this particularity requirement was to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers intended to prohibit.[36]

Courts applying the Fourth Amendment have consistently recognized that search warrants must be construed in a practical manner without excessive strictness or technicality. This Court has said that "[s]earch warrants . . . are to be read in a common-sense and realistic manner."[37] According to the United States Court of Appeals for the Second Circuit, a warrant satisfies the Fourth Amendment's particularity requirement if [*49] it provides a description "with practical accuracy rather than absolute precision"; this approach "extends to warrants authorizing the search of electronic devices."[38] The United States Court of Appeals for the Eighth Circuit has similarly explained that the particularity requirement is one of "practical accuracy rather than a hypertechnical one."[39] In *Andresen v Maryland*, the Supreme Court of the United States made clear that warrant language must be read in context.[40] Accordingly, the Supreme Court held, a general reference to "crime" at the end of the warrant in

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[31] *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011) (quotation marks and citation omitted).

[32] Although the lead opinion deems its particularity discussion " 'germane to . . . the controversy' " at hand, *ante* at 9 n 10, quoting *Detroit v Mich Pub Utilities Comm*, 288 Mich 267, 300; 286 NW 368 (1939) (additional quotation marks, citation, and emphasis omitted), this is not the case. The controversy at hand is whether defendant received ineffective assistance of counsel. Because the Court now holds that it was reasonable for counsel not to raise a particularity challenge, the potential merits of that particularity challenge have no relation to the question of ineffective assistance. When the lead opinion concludes that counsel had no obligation to raise an argument—even though it agrees with the merits of the argument—then the substantive merits simply are not germane to or intertwined with the basis for resolving the case. The rationale and conclusion would remain the same regardless of what the lead opinion concludes about the merits of the substantive argument. *Strickland* does not require or imply that a determination of a substantive argument's merits is necessary or appropriate if it was not objectively unreasonable performance not to raise the argument. See *Strickland*, 466 at 688-691. In short, the lead opinion does the analysis backward by resolving one issue and then, only after, proceeding to reach and decide a logically antecedent question in a way that removes any effect from its prior analysis.

[33] Because defendant argues solely under the United States Constitution, the Court has no occasion to consider the Michigan Constitution's analogous search-and-seizure provisions.

[34] US Const, Am IV.

[35] *Hughes*, 506 Mich at 538.

[36] *Maryland v Garrison*, 480 US 79, 84; 107 S Ct 1013; 94 L Ed 2d 72 (1987).

[37] *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992) (quotation marks and citation omitted).

[38] *United States v Tompkins*, 118 F4th 280, 287-288 (CA 2, 2024).

[39] *United States v Ivey*, 91 F4th 915, 918 (CA 8, 2024) (quotation marks and citation omitted) (holding that a warrant to search the defendant's entire phone for evidence of firearms crimes was sufficiently particular).

[40] *Andresen v Maryland*, 427 US 463, 480-481; 96 S Ct 2737; 49 L Ed 2d 627 (1976).

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Andresen needed to be understood as meaning the crime specified earlier in the warrant, and not as granting a general warrant to search for evidence of any crime.[41]

In *Riley v California*, the Supreme Court held for the first time that searches of cell phones require warrants.[42] But the Supreme Court provided no guidance on how these warrants should be worded or what their scope should look like.[43] Thus, we must examine other authorities to help discern the Fourth Amendment's requirements in this context. Although there are no Michigan cases directly on point, our decision in *People v Hughes*, issued six years after *Riley*, provides crucial guidance about [*50] how search warrants for digital data should be focused so as to satisfy the particularity requirement.

In *Hughes*, we considered a case involving a search warrant, substantially like the one at issue here, that permitted the search of the defendant's digital data specifically for evidence of drug trafficking.[44] After seizing the *Hughes* defendant's cell phone, a police officer used forensic software to search the phone for and found evidence of armed robbery—a crime for which the warrant did not authorize a search.[45] This Court held that the evidence of armed robbery was not within the scope of the search warrant and therefore was obtained in violation of the Fourth Amendment.[46] Because of this holding, the Court declined to consider whether the search warrant itself was overly broad.[47] That said, the Court offered guidance for how cell-phone searches should be limited:

> [A]s with any other search conducted pursuant to a warrant, a search of digital data from a cell phone must be "reasonably directed at uncovering" evidence of *the criminal activity alleged in the warrant* and . . . any search that is not so directed but is directed instead toward finding evidence of *other* and *unrelated* criminal activity is beyond [*51] the scope of the warrant.[48]

That is, under *Hughes*, the limitation for searching a cell phone is that the search must be reasonably directed toward uncovering evidence of the crime specified in the warrant.[49] This speaks to how law enforcement should execute a search warrant. But it also provides insight as to the proper focus of a warrant. If the standard is to be "reasonably directed at uncovering" evidence of the specified criminal activity,[50] then the focus of the warrant should be on that activity as well. The focus on a particular crime prevents the police from engaging in indiscriminate rummaging as would be allowed under an impermissible general warrant. As recognized in *Hughes*, forensic software allows law enforcement to isolate and view only the data that is relevant to the warrant.[51] This technology allows law enforcement to constrain their searches and exclude nonresponsive data; the question becomes whether the investigating officers have used the available resources in a manner reasonably directed toward uncovering evidence of the offense or offenses specified in the search warrant.[52]

Summing up its opinion, the *Hughes* Court reiterated that a warranted search of digital [*52] data is limited by the criminal activity alleged in the warrant:

> The ultimate holding of this opinion is simple and straightforward—a warrant to search a suspect's digital cell-phone data for evidence of one crime does not enable a search of that same data for evidence of another crime without obtaining a second warrant. Nothing herein should be construed to restrict an officer's ability to conduct a reasonably thorough search of digital cell-phone data to uncover evidence of the criminal activity alleged in a warrant, and an officer is not required to discontinue a search when he or she

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[41] *Id.*

[42] *Riley v California*, 573 US 373, 403; 134 S Ct 2473; 189 L Ed 2d 430 (2014).

[43] See *id.*

[44] See *Hughes*, 506 Mich at 519-520.

[45] *Id.* at 521.

[46] *Id.* at 550-551.

[47] *Id.* at 551 n 26.

[48] *Id.* at 538 (first emphasis added), quoting *United States v Loera*, 923 F3d 907, 917, 922 (CA 10, 2019).

[49] See *Hughes*, 506 Mich at 538.

[50] *Id.* (quotation marks and citation omitted).

[51] See *id.* at 520-521, 550 (discussing the use of a forensic software program called Cellebrite). The record suggests that similar software was used in this case when defendant's phone was analyzed by the Michigan State Police Computer Crimes Unit in Traverse City.

[52] See *id.* at 550.

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discovers evidence of other criminal activity while reasonably searching for evidence of the criminal activity alleged in the warrant. However, respect for the Fourth Amendment's requirement of particularity and the extensive privacy interests implicated by cell-phone data as delineated by the United States Supreme Court's decision in *Riley v California* requires that officers reasonably limit the scope of their searches to evidence related to the criminal activity alleged in the warrant and not employ that authorization as a basis for seizing and searching digital data in the manner of a *general warrant* in search of [*53] evidence of any and all criminal activity.[53]

To refresh, the search warrant in this case allowed the investigating officers to search defendant's cell phone for the following:

Any and all records or documents pertaining to the investigation of Larceny in a Building and Safe Breaking. As used above, the term records or documents includes records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer. In order to search for any such items, searching agents may seize and search the following: cellular devices; [a]ny physical keys, encryption devices and similar physical items that are necessary to gain access to the cellular device to be searched or are necessary to gain access to the programs, data, applications and information contained on the cellular device(s) to be searched; [a]ny passwords, password files, test keys, encryption codes or other computer codes necessary to access the cellular devices, applications and software to be searched or to convert any data, file or information on the cellular device into a readable form; [t]his shall include thumb print [*54] and facial recognition and or digital PIN passwords, electronically stored communications or messages, including any of the items to be found in electronic mail ("e-mail"). Any and all data including text messages, text/picture messages, pictures and videos, address book, any data on the SIM card if applicable, and all records or documents which were created, modified, or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a cellular phone or a computer. [Asterisk omitted.]

The first sentence is the most important. It contains the cabining language that constrains the scope of the authorized search. The police were required to "reasonably direct[]" their search of the phone toward uncovering evidence of "Larceny in a Building and Safe Breaking."[54] This was a "global modifier,"[55] which limited the scope of everything that followed to "the investigation of Larceny in a Building and Safe Breaking." Although the police could access "[a]ny and all records or documents" relating to these crimes, they could not seek evidence of any other crimes in their search. True enough, the remaining language is expansive. The warrant describes [*55] "records or documents" as used in the first sentence to include "records or documents which were created, modified or stored in electronic or magnetic form and any data, image, or information that is capable of being read or interpreted by a computer." Practically, this scope would include all of the data stored on the phone. The warrant continues, stating that "[i]n order to search for any such items"—i.e., the records or documents pertaining to the investigation of the specified crimes—"searching agents may seize and search" many other items. But crucially, everything that follows is cabined by the qualification that it may be done "in order to search for" evidence of the already specified crimes for which probable cause exists.

That is, the all-encompassing breadth of items on the phone that could be searched under the warrant must be read in the context of the limiting language in the first sentence.[56] Investigators were authorized to search *only* for evidence of the two specifically identified crimes for which probable cause existed to search. The warrant therefore provided the parameters for the police to "reasonably direct[]" their focus.[57] In no sense, then, was this a general warrant [*56] to rummage through all the files on defendant's phone for evidence of anything that might incriminate him regarding some yet unknown criminal activity. The lead opinion, like the Court of Appeals majority, applies an improperly narrow, technical, and context-free reading of the warrant language, an approach that contradicts established caselaw.[58]

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[53] *Id.* at 552-553.

[54] *Hughes*, 506 Mich at 538.

[55] *United States v Castro*, 881 F3d 961, 965 (CA 6, 2018).

[56] *Andresen*, 427 US at 480-481; *Castro*, 881 F3d at 965.

[57] *Hughes*, 506 Mich at 538.

[58] See *Russo*, 439 Mich at 603 (requiring a commonsense and

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It makes little sense to expect investigators to predict with any precision what form evidence will take or where the relevant data might be found on a cell phone. "[A] criminal suspect will not always store or organize incriminating information on his or her digital devices in the most obvious way or in a manner that facilitates the location of that information."[59] The relative ease with which incriminating information might be hidden in a digital device should not raise a shield against an investigation where probable cause has been established.[60] In *United States v Bass*, the United States Court of Appeals for the Sixth Circuit recognized both the problem and the solution as follows:

Here, the warrant authorized the search for any records of communication, indicia of use, ownership, or possession, including electronic calendars, address [*57] books, e-mails, and chat logs. At the time of the seizure, however, the officers could not have known where this information was located in the phone or in what format. Thus, the broad scope of the warrant was reasonable under the circumstances at that time.[61]

The Supreme Court of the United States has long recognized that the scope of a search is "defined by the object of the search and the places in which there is probable cause to believe that it may be found."[62] For physical objects, this means that the police may not search in places where the sought-after evidence would not reasonably be found. "Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."[63] Similarly, the search of physical premises generally extends to the "entire area in which the object of the search may be found "[64]

But because the digital world lacks the physical constraints that might otherwise guide the search of a tangible place, it is much harder to use the sought-after evidence's form or location [*58] as touchstones to limit a search of a digital device.[65] A given file could contain just about anything, and the evidence described in a warrant could exist just about anywhere in digital data.[66] Thus, it makes ample sense not to limit the scope of a digital search to specified areas or files in a cell phone or computer.[67] Instead of location, the logical limiting factor is the relationship of the file's contents to the specific crime.[68] In other words, as we suggested in

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reasonable reading of search warrants); *Andresen*, 427 US at 480-481 (instructing that warrant language must be read in context); *Castro*, 881 F3d at 965 ("[Warrants] need not meet the rigors of Roget, Merriam, Webster, Strunk, and White. A commonsense contextual reading usually suffices, and usually gets the point the magistrate and officer sought to express."). The Court of Appeals majority disregarded the essential cabining language as a meaningless "small guardrail" that "was negated by the ensuing instruction to search for such items by searching and seizing the entirety of the phone's contents." *Carson*, Mich App at __; 2024 Mich. App. LEXIS 1235. This reasoning was circular. The Court of Appeals concluded that the cabining language could not provide meaningful constraint because of the breadth of the subsequent language. *Id.* But the subsequent language could only be understood to be as broad as the Court of Appeals majority deemed it if the cabining language was first read as providing no meaningful constraint.

[59] *Hughes*, 506 Mich at 540-541. See also *United States v Mann*, 592 F3d 779, 782 (CA 7, 2010) ("Unlike a physical object that can be immediately identified as responsive to the warrant or not, computer files may be manipulated to hide their true contents.").

[60] See *Andresen*, 427 US at 481 n 10 ("The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession."); *United States v Stabile*, 633 F3d 219, 237 (CA 3, 2011) (noting that "criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity").

[61] *United States v Bass*, 785 F3d 1043, 1050 (CA 6, 2015).

[62] *Garrison*, 480 US at 84 (quotation marks and citation omitted).

[63] *United States v Ross*, 456 US 798, 824; 102 S Ct 2157; 72 L Ed 2d 572 (1982).

[64] *Id.* at 820.

[65] See Kerr, *Executing Warrants for Digital Evidence: The Case for Use Restrictions on Nonresponsive Data*, 48 Tex Tech L Rev 1, 14-15 (2015).

[66] See *United States v Bishop*, 910 F3d 335, 336-337 (CA 7, 2018).

[67] See *id.*

[68] Other limitations, such as temporal limitations, can also be helpful. But that is not to say that they are generally required for cell-phone searches. See, e.g., *Castro*, 881 F3d at 965;

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Hughes, the focus of a reviewing court should be on the search method and how it is reasonably directed toward uncovering evidence of the offense for which probable cause exists.[69] The United States Court of Appeals for the Tenth Circuit has explained its adoption of this type of particularity focus on the search method and not items identified in the search warrant in the context of digital searches:

We recognize the general rule that "investigators executing a [sufficiently particular] warrant can look anywhere where evidence described in the warrant might conceivably be located." Even so, we have cautioned that this traditional [*59] analysis of a warrant's physical scope is "less effective in the electronic-search context." This is so "[g]iven the enormous amount of data that computers can store and the infinite places within a computer that electronic evidence might conceivably be located." As such, our circuit's reasonableness analysis for electronic searches has trended away from focusing on the "what" permitted under a search warrant; instead, "we have focused on 'how' the agents carried out the search, that is, the reasonableness of the *search method* the government employed."[[70]]

As we recognized in *Hughes*, a primary way that investigating officers can reasonably direct their searches of digital devices to evidence of specific crimes is by using forensic software to isolate relevant evidence.[71] That way, law enforcement can avoid evidence unrelated to the offense or offenses for which there is probable cause to search. The employment of forensic software—and evidence of how officers have used that software—is crucial for determining whether the search method remains within the constraints of reasonableness for Fourth Amendment purposes.[72] Indeed, that was the basis for this Court's holding in *Hughes*; the investigating officers [*60] there had used forensic software to search for evidence of a crime not contained within the search warrant.[73]

Inexplicably, the lead opinion does not recognize the existence or use of such forensic software for cell-phone searches. Instead, the lead opinion buys into the unrealistic hysteria of the Court of Appeals majority that officers were presumably rummaging through every file on defendant's cell phone looking for " 'anything, but nothing in particular ' "[74] This assertion disregards the reality of how such searches are typically conducted[75] and, apparently, how the search in this case was conducted. The lead opinion concludes that there was no meaningful constraint on the investigators' discretion because it simply refuses to acknowledge the constraints that existed.

It is also remarkable that the lead opinion's particularity analysis—like that of the Court of Appeals majority—does not rely on on-point caselaw from the federal courts of appeals, despite the fact that it is the federal Constitution under consideration.[76] This avoidance is perhaps unsurprising, however, as it appears that every federal court of appeals to have definitively answered the question [*61] has signaled that a warrant's specification of the offense to be searched for in a digital device satisfies the Fourth Amendment's particularity requirement.[77] If the lead opinion were to engage with

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Bishop, 910 F3d at 336-337.

[69] See *Hughes*, 506 Mich at 538. I do not argue, as the lead opinion suggests, that the particularity requirement and the direction of search efforts should be separated or that a warrant need not be sufficiently particularized. See *ante* at 23 n 21. Instead, I offer a different approach to what particularity means in this context.

[70] *United States v Salas*, 106 F4th 1050, 1060 (CA 10, 2024), quoting *Loera*, 923 F3d at 916-917 (alterations in *Salas*).

[71] See *Hughes*, 506 Mich at 520-521 (explaining the use of Cellebrite forensic software to exclude nonresponsive data from a search for evidence for a specific crime). See also Kerr, *Executing Warrants*, 48 Tex Tech L Rev at 7-8 (explaining "typical" practices for an electronic search, which include creating a mirror image of the device's contents and using forensic software to isolate evidence that is responsive to the warrant).

[72] See *Hughes*, 506 Mich at 552-554; *Salas*, 106 F4th at 1060.

[73] *Hughes*, 506 Mich at 552-554.

[74] *Ante* at 19 n 16, quoting *Carson*, Mich App at _; 2024 Mich. App. LEXIS 1235.

[75] See *Executing Warrants*, 48 Tex Tech L Rev at 7-8 (2015).

[76] Of course, as explained, the Court has no occasion to consider the Fourth Amendment issue at all.

[77] See *Tompkins*, 118 F4th at 289 (deeming a search warrant for a defendant's entire phone sufficiently particular because it "specifies that forensic examination of the cellular phone and any associated electronic storage is authorized for the purpose of identifying digital information evidencing a specific offense") (Second Circuit); *Stabile*, 633 F3d at 237, 239 (noting that "because criminals can—and often do—hide, mislabel, or manipulate files to conceal criminal activity, a

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these cases, it would have to explain its disagreement with them.[78]

I am also puzzled by the lead opinion's admonition that law enforcement must "provide the most specific description possible" in search-warrant affidavits.[79] To what degree must officers exhaust the bounds of possibility before an affidavit is sufficiently specific? It would almost always be possible to provide a more specific description, however unreasonable or immaterial that specificity might be. Thus, a court could invalidate practically any search warrant on the basis that more specificity could have been provided. The lead opinion gives little guidance for how or where to draw lines about particularity, except for tautological admonitions that more specificity is better. I fear that the lead opinion's approach to particularity will accomplish little more than impairing investigators' ability to conduct narrowly targeted and particularized forensic searches of cell phones, all while rewarding criminals who are clever [*62] enough to conceal evidence of illicit activities in areas of their phones where the police would not guess to look.[80]

In sum, although the lead opinion improperly addresses the issue, the warrant in this case satisfied the Fourth Amendment's particularity requirement because it described and limited the place to be searched (defendant's phone) and the items to be searched for and seized as evidence (records or documents relating to larceny in a building and safebreaking), and it specified the crimes regarding which the search was being conducted. Accordingly, the warrant "reasonably directed" the officers' efforts toward evidence of the crimes for which there was probable cause to search.[81] If the matter were properly before us, I would cleave to the instructive value of our own caselaw along with the heavy weight of federal authority and uphold the facial validity of the search warrant.

IV. CONCLUSION

I agree with the lead opinion that defendant is not entitled to relief based on his ineffective-assistance challenge. I therefore concur in the disposition of the case. But the lead opinion does not stop there. Instead, it addresses a hypothetical question of constitutional dimension that has no plausible [*63] bearing on the

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broad, expansive search of the hard drive may be required" and upholding a search where "the scope of the consent and state search warrant [was] limited to evidence of financial crimes") (Third Circuit); *United States v Cobb*, 970 F3d 319, 328 (CA 4, 2020) (holding that a search warrant was valid because it "confined the executing officers' discretion by allowing them to search the computer and seize evidence of a specific illegal activity—[the victim's] murder on September 7, 2014") (Fourth Circuit); *Castro*, 881 F3d at 965 ("A warrant that empowers police to search for something satisfies the particularity requirement if its text constrains the search to evidence of a specific crime.") (Sixth Circuit); *Bishop*, 910 F3d at 337 (holding that a warrant to search a cell phone was lawful because it is enough "if the warrant cabins the things being looked for by stating what crime is under investigation") (Seventh Circuit); *Ivey*, 91 F4th at 918 (holding that a warrant to search anywhere in a defendant's cell phone for evidence related to firearms possession satisfied the particularity requirement because "the [particularity] requirement is one of 'practical accuracy rather than a hypertechnical one' ") (Eighth Circuit) (citation omitted); *United States v Palms*, 21 F4th 689, 698-699 (CA 10, 2021) (holding that a warrant to search a defendant's entire phone for evidence of human trafficking was sufficiently particular) (Tenth Circuit). See also *United States v Jackson*, 118 F4th 447, 450, 453-454 (CA 1, 2024) (upholding a search based on a warrant to seize and search " 'mobile devices' " for " 'any and all computer-related documentation, records, documents, material, proceeds, and passwords or other data security devices related to the possession and transfer of child pornography' " by applying the good-faith exception without "definitively determin[ing]" whether the particularity requirement was satisfied) (First Circuit); *United States v Morton*, 46 F4th 331, 335 (CA 5, 2022) (en banc) (resolving a case en banc using the good-faith exception where the vacated panel decision had found that a lack of probable cause to search a certain category of files on the defendant's phone rendered part of a search warrant invalid) (Fifth Circuit); *United States v Smith*, 467 US App DC 105, 111-114; 108 F.4th 872 (2024) (using the good-faith exception to uphold a broad search of cell phones and digital data based on an expansive warrant while declining to address the merits of the defendant's particularity challenge) (DC Circuit).

[78] The lead opinion questions the value of these federal cases without raising any significant disagreement with them. The opinion notes that *Stabile* was decided before *Riley*. This is true, but *Stabile*'s principles well apply to searches of cell phones along with other digital devices. It is also curious that the lead opinion handwaves away federal cases as "nonbinding," *ante* at 20 n 17, while simultaneously relying primarily on nonbinding cases from the courts of other states. There should be little surprise that all these cases are nonbinding. That is the nature of addressing an issue that has not been subject to a binding decision from this Court or the Supreme Court of the United States.

[79] *Ante* at 22.

[80] See *Hughes*, 506 Mich at 540-541; *Stabile*, 633 F3d at 237; *Mann*, 592 F3d at 782.

[81] *Hughes*, 506 Mich at 538.

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resolution of this case. And not only does the lead opinion exceed its authority in answering that question, it answers the question incorrectly. Because I disagree with these decisions, I decline to join the lead opinion.

Brian K. Zahra

BERNSTEIN, J. (*concurring in the result*).

I agree with this Court's decision to reverse the judgment of the Court of Appeals and remand to that same court for further proceedings because defendant's ineffective-assistance-of-trial-counsel claim fails under the standard set by *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). I write separately because, like Justice ZAHRA, I disagree with the lead opinion's decision to reach the question of whether the search warrant at issue in this case was sufficiently particular to satisfy the requirements of the Fourth Amendment. Because this case is resolved on the threshold issue of ineffective assistance of trial counsel, I believe that this Court should refrain from opining on the particularity issue, which was unpreserved.

As a longstanding principle, this Court has refused to " 'declare principles or rules of law that have no practical legal effect in the case before' it." *People v Richmond*, 486 Mich 29, 34; 782 NW2d 187 (2010), quoting *Federated Publ'ns, Inc. v City of Lansing*, 467 Mich. 98, 112; 649 N.W.2d 383 (2002), abrogated in part on other grounds by *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 719 N.W.2d 19 (2006). By addressing the Fourth Amendment particularity [*64] issue despite concluding that trial counsel's performance was reasonable, I fear that the analysis in Part III of the lead opinion constitutes mere dicta. See *People v Peltola*, 489 Mich 174, 190 n 32; 803 NW2d 140 (2011), quoting *Wold Architects & Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) ("Obiter dicta are not binding precedent. Instead, they are statements that are unnecessary to determine the case at hand and, thus, 'lack the force of an adjudication.' ").

The lead opinion states that its analysis does not constitute dicta "because the Fourth Amendment issue is germane to our ultimate holding that defendant's counsel did not perform ineffectively." *Ante* at 9 n 10, citing *Detroit v Mich Pub Utilities Comm*, 288 Mich 267, 299-300; 286 NW 368 (1939). "Germane" is defined as "being at once relevant and appropriate[.]" *Merriam-Webster's Collegiate Dictionary* (11th ed). However, the lead opinion concludes that defendant's counsel was not unreasonable for failing to raise the particularity issue in light of the legal landscape at the time the instant case arose. Therefore, this Court's input on the particularity issue is not relevant and appropriate but superfluous to its resolution of this case. Not only does it fail to practically influence the outcome of the case, but there is also no manner in which discussion of the particularity issue *could* influence the outcome of the case. It is categorically [*65] dictum.

While I do not necessarily disagree with the lead opinion's analysis of the particularity issue, I would refrain from addressing this question until this Court is presented with a case in which our resolution of this issue will have the force of law. Accordingly, I concur in the result of the lead opinion.

Richard H. Bernstein

Dissent by: Kyra H. Bolden (In Part)

Dissent

BOLDEN, J. (*concurring in part and dissenting in part*).

I agree with the conclusion reached in the lead opinion that the search warrant in this case violated the particularity requirement of the Fourth Amendment. However, I respectfully disagree with Part IV(C) of the lead opinion. That section concludes that defendant does not prevail on his claim of ineffective assistance of counsel because he has not established that defense counsel's performance—the failure to move to suppress the cell-phone records, including the incriminating text messages, obtained through the deficient search warrant—fell below an objective standard of reasonableness. In other words, the lead opinion concludes that defense counsel's decision to not challenge the evidence obtained from an insufficiently particular search warrant was reasonable. I disagree.

In my view, the Court [*66] of Appeals majority applied the proper analysis and reached the appropriate conclusion, and its decision is well-reasoned and supported by the whole record. As the Court of Appeals recognized, the *Ginther*[1] hearing testimony strongly supports the panel's conclusion that defense counsel's "failure to seek exclusion of the phone's contents was based on a misunderstanding of the law rather than trial

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

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strategy," *People v Carson*, __ Mich App __, __; __ NW3d __ (February 15, 2024) (Docket No. 355925); 2024 Mich. App. LEXIS 1235, or, as the lead opinion puts it, "an exercise of reasonable professional judgment under the facts and circumstances that existed when the decision was made," *ante* at 30.[2]

I also believe that the Court of Appeals properly analyzed the prejudice prong of defendant's ineffective-assistance-of-counsel claim. See *Carson*, Mich App at __; 2024 Mich. App. LEXIS 1235 ("While the properly admitted evidence was persuasive, the tainted evidence was essentially definitive. Indeed, defendant and [defendant's romantic partner] each made several statements that could fairly be characterized as confessions."). To demonstrate prejudice, a defendant must establish that there exists "a reasonable probability that the outcome would have been different" but for counsel's error. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). A reasonable probability "is a probability sufficient to [*67] undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018) (quotation marks and citation omitted). I agree with the Court of Appeals majority that defendant has shown a reasonable probability that the result of the proceeding would have been different had trial counsel moved to suppress the text messages. See *Carson*, ___ Mich App at __; 2024 Mich. App. LEXIS 1235 (concluding that "a not guilty verdict would have been shocking" when the text messages are considered in conjunction with the properly admitted evidence).

Therefore, I would affirm the Court of Appeals' decision as to defendant's claim of ineffective assistance of counsel. I would also affirm the Court of Appeals' holding that the good-faith exception to the exclusionary rule does not apply "because this was a facially invalid general warrant upon which no reasonable officer could have relied in objective good faith." *Id.* at __; 2024 Mich. App. LEXIS 1235. See also *United States v Leon*, 468 US 897, 923; 104 S Ct 3405; 82 L Ed 2d 677 (1984) ("[D]epending on the circumstances of the particular case, a warrant may be so facially deficient—*i.e.*, in failing to particularize the place to be searched or the things to be seized—that the executing officers cannot reasonably presume it to be valid.").

Additionally, I would conclude that the severance doctrine is inapplicable in this case. Although the prosecution [*68] did not raise this argument below, Judge REDFORD concluded that, "[t]o the extent that the search warrant satisfied the Fourth Amendment only with respect to retrieval of the text messages, the constitutionally infirm portion of the warrant could be severed, allowing admission of the text messages." *Carson*, ___ Mich App at __ (REDFORD, J., dissenting); 2024 Mich. App. LEXIS 1235.

In *People v Keller*, 479 Mich 467; 739 NW2d 505 (2007), when evaluating the constitutionality of a search warrant issued to search a defendant's home for evidence of marijuana manufacturing and distribution, this Court noted that even if there had not been probable cause to suspect illegal *distribution*, the part of the warrant addressing illegal *manufacturing* would have been valid under the severance doctrine, which provides that " 'the infirmity of part of a warrant requires the suppression of evidence seized pursuant to that part of the warrant, but does not require the suppression of anything described in the valid portion of the warrant . . . .' " *Id.* at 478, quoting *United States v Sells*, 463 F3d

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[2] The lead opinion recognizes that "a motion to suppress based on the lack of particularity in the search warrant at issue would not have been substantively meritless," *ante* at 29, yet nonetheless concludes that defense counsel's failure to challenge the inadequate search warrant "was not based on a misunderstanding of the law as it existed at the time and may be fairly characterized as an exercise of reasonable professional judgment under the facts and circumstances that existed when the decision was made," *ante* at 30. However, the constitutional requirement that search warrants be sufficiently particular is longstanding, and it is well settled that a search may not stand on a general warrant. See *People v Musk*, 221 Mich 578, 580-581; 192 NW 485 (1922) ("The constitutional requirement is a description which particularly points to a definitely ascertainable place and so as to exclude all others. The writ should not leave the place to be searched to the discretion of the officer; and the modern authorities are unanimous in holding that a search warrant directing an officer to search places generally is clearly illegal.") (quotation marks and citation omitted); see also *People v Hughes*, 506 Mich 512, 542; 958 NW2d 98 (2020), quoting *People v Herrera*, 357 P3d 1227, 1228; 2015 CO 60 (Colo, 2015) (citing *Herrera* with approval and summarizing its holding as follows: "[A]llowing a search of an entire device for evidence of a crime based upon the possibility that evidence of the crime could be found anywhere on the phone and that the incriminating data could be hidden or manipulated would 'render the warrant a general warrant in violation of the Fourth Amendment's particularity requirement[.]' "). Moreover, this Court has recognized that a counsel's error or omission that is "inconsistent or based on a misunderstanding of the law" may be sufficient to establish that their performance "fell below the objective standard of reasonableness required by *Strickland* [*v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)]." *People v Yeager*, 511 Mich 478, 491, 494; 999 NW2d 490 (2023).

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1148, 1150 (CA 10, 2006) (additional quotation marks and citation omitted). Determining whether the severance doctrine applies is a "multiple-step analysis" and requires the following:

> First the court must divide the warrant into categories. Then, the court must evaluate the constitutionality of each category. [*69] If only some categories are constitutional, the court must determine if the valid categories are distinguishable from the invalid ones and whether the valid categories "make up the great part of the warrant." [*Keller*, 479 Mich at 478-479, quoting *Sells*, 463 F3d at 1151.]

The *Sells* court also explained that "[i]f no part of the warrant particularly describes items to be seized for which there is probable cause, then severance *does not* apply . . . ." *Sells*, 463 F3d at 1151 (emphasis added). In this case, I would conclude that the severance doctrine does not apply because the entire search warrant failed to satisfy the particularity requirement of the Fourth Amendment. In other words, there are no constitutional categories or valid portions of the search warrant that may be severed. See *id.*; *Keller*, 479 Mich at 489 (M. F. CAVANAGH, J., dissenting), quoting *United States v George*, 975 F2d 72, 79-80 (CA 2, 1992) (" 'The [severance] doctrine is not available where no part of the warrant is sufficiently particularized, where no portion of the warrant may be meaningfully severed, or where the sufficiently particularized portions make up only an insignificant or tangential part of the warrant.' ").

Accordingly, while I agree with the analysis in Part III of the lead opinion, I respectfully dissent from Part IV(C), and I would affirm the Court of Appeals' decision in full.

Kyra H. Bolden

HOOD, [*70] J., did not participate because the Court considered this case before he assumed office and because he was on the Court of Appeals panel.

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Appendix 22: People v. Grant, 2025 Mich. App. LEXIS 146

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People v. Grant

Court of Appeals of Michigan

January 9, 2025, Decided

No. 368658

Reporter
2025 Mich. App. LEXIS 146 *; 2025 LX 254713; 2025 WL 65430

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ANDREW DAVID GRANT, Defendant-Appellant.

Notice: THIS IS AN UNPUBLISHED OPINION. IN ACCORDANCE WITH MICHIGAN COURT OF APPEALS RULES, UNPUBLISHED OPINIONS ARE NOT PRECEDENTIALLY BINDING UNDER THE RULES OF STARE DECISIS.

Prior History: [*1] Livingston Circuit Court. LC No. 2022-027466-FH.

Counsel: For PEOPLE OF MI, Plaintiff - Appellee: WILLIAM M. WORDEN.

For ANDREW DAVID GRANT, Defendant - Appellant: JONATHAN B.D. SIMON.

Judges: Before: N. P. HOOD, P.J., and REDFORD and MALDONADO, JJ.

Opinion

PER CURIAM.

Defendant appeals by right his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227, and possession of a dangerous weapon (silencer), MCL 750.224(1)(a).[1] Defendant was sentenced to concurrent terms of 6 months' probation for each conviction. We vacate defendant's conviction and remand for additional proceedings.

I. BACKGROUND

Defendant acted *in propria persona*, and this appeal revolves entirely around his lack of representation. Accordingly, the facts underlying the offense are not relevant to this appeal. Defendant initially retained Donald Neville, who filed his appearance on July 18, 2022. However, defendant subsequently filed a motion to have Neville withdraw, and the court allowed the withdrawal due to a "breakdown in communication" at a hearing on September 8, 2022. Defendant expressed uncertainty regarding whether he could afford a new attorney despite having spent $8,000 on Neville, explaining that he was "currently not employed" because he was "between [*2] contracts." Defendant was determined to be eligible for a public defender, and the Buttrey Law Office was appointed to represent him on September 26, 2022.

William Livingston represented defendant for several months, but defendant retained Bradley Friedman on March 29, 2023. However, on May 12, Friedman informed the court that he wished to withdraw. On June 2, he filed a motion to that effect. A hearing was conducted on June 9, within a week of defendant's trial date, and Friedman explained that there was "a breakdown in communication" following "a major argument about strategy" in the case. Friedman explained that he and defendant had "a significant difference of opinion in overall case strategy" and that he was "uncomfortable with how [defendant] want[ed] to proceed." Defendant indicated that Friedman demanded that defendant accept a plea agreement and that Friedman was unwilling to proceed to trial. The trial court was initially reluctant to grant a withdrawal request so close to trial. Defendant stated that he could not afford to retain a new attorney because he had lost his job, so he needed to seek another public defender. The trial court said:

> I don't believe that you needed a [*3] public defender. . . . I don't believe that you have zero in

[1] Defendant was also charged with stalking, MCL 750.411h, the jury found him not guilty of this charge.

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> savings. . . . The question is if I release this attorney . . . I don't know what to tell you. You're not going to be able to keep an attorney and yourself out of trial. Do you understand that? . . . [Y]ou have a trial on Monday. Are you ready? Do you want to represent yourself?

Defendant indicated that he did not want to represent himself. At a hearing on June 16, 2023, defendant informed the court that he had applied for a public defender, he was awaiting income verification, that he lost his job in April, and that he found temporary employment paying $25 an hour. Defendant testified to having significant expenses arising from having two kids in college. The court adjourned defendant's trial so that he could seek an attorney.

Defendant was denied a public defender on June 20, 2023, because he was not eligible. At a hearing on June 23, defendant explained his poor financial situation and indicated that he had obtained the information needed to prove his eligibility. However, defendant was once again denied a public defender on June 28, 2023. A pretrial hearing occurred on July 14, 2023, and defendant appeared *in propria persona [*4]* . The trial court stated that the situation "has gotten kind of ridiculous" and expressed a sense of urgency to proceed to trial. The court told defendant that he was free to represent himself if he so chose, but defendant clarified: "It would not be my preference to proceed that way, but . . . I don't have the funds to hire an attorney. There's been miscommunication between myself and the public defender's office." The trial court stated: "You need to get another job. You need the money if you're going to hire your own attorney." The court continued:

> [Y]ou've been on this slow path. And pretty soon, you're going to be lodged until your jury trial unless you get an attorney. I'd like you to get an attorney. If you don't have the wherewithal to get an attorney, then we will continue without an attorney, but then you represent yourself. And you are told that you're acting as an attorney; you'll have to read the rules and present evidence, witnesses, et cetera. . . ."

Defendant insisted that he was attempting to find additional work, and the trial court clarified:

> I don't care where you work, get another job if you need an attorney and you don't have the funds. I expect you to work at Burger [*5] King if necessary. . . . I have no problems with you getting another job but this is ridiculous. I mean, we've been doing this for years now. This case . . . was authorized, I guess, in [20]22. And we've gone from one attorney to another. And I'm not blaming you for your first attorney, but then you had another attorney and that attorney said there was a breakdown in communications and I allowed him to withdraw. So[,] there were two instances where you were able to afford an attorney. We need to get this case heard.

The trial court also noted that defendant was living at his sister's house and not paying rent. The court then stated that "people usually have savings." Defendant offered to show the court his bank statements; however, the court declined this offer, reasoning that defendant "could show [the court] one bank statement and it's empty and another bank statement that wouldn't be." The court also declined defendant's offer to present his "correspondence with the public defender's office trying to get this taken care of" because the court was "not in the middle of that." Defendant told the court that he only had $217 in his checking account and that he did not anticipate it would [*6] be possible to retain an attorney. Regarding the public defender's denial of defendant's request, the trial court stated: "[Y]ou've got to do something else. Go to plan B." The court then reminded defendant that he was previously held in contempt for playing golf while appearing remotely at a hearing, stating that "[n]ot very many indigent people can afford to play golf."

The trial court held a pretrial hearing on August 4, 2023, and defendant again appeared *in propria persona*. When asked if he planned to proceed without an attorney, defendant stated: "[I]t looks like I'm going to have to. I haven't been able to secure an attorney." Defendant indicated that he filed his paperwork with the public defender's office a day late, so they did not review the additional information he submitted. Defendant explained he found employment and was working "between 35 and 45" hours weekly for $20 an hour. Defendant then explained his expenses, which included his car payment, car insurance, phone bill, and some support provided to his college-age children. The court did not consider his children to be a valid expense because defendant was no longer legally obligated to support them. Defendant estimated [*7] that he had spoken with "between 12 and 20" attorneys, but none were willing to take his case. The court, noting that defendant "appear[ed] to have enough money to hire an attorney," criticized defendant for calling attorneys rather than physically going to their offices to request representation. The trial court stated: "I'd like to know how you're going to do your opening statement, voir dire, and get in evidence and present witnesses without having an attorney." Defendant replied, "I've been

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reading up on how to do it." The trial court asked if defendant was comfortable representing himself, and defendant answered: "No, I don't feel comfortable, but I don't have another option." Then the court interjected to say that defendant is "not that destitute," and defendant said "Your honor, calling attorneys and saying that I've got a trial on Monday and by the way, I don't have even $1,000 to give you as a retainer, nobody wants to hear about it."

The trial finally proceeded on August 28, 2023, and the court appointed William Livingston to serve as advisory counsel for defendant. At the start of his opening statement, defendant said, "I have no idea what I'm doing. . . . When the Court [*8] says that I'm exercising my right to defend myself, this is not my choice to defend myself." The prosecution objected, and the court chastised defendant in the presence of the jury:

> [T]hat's totally inappropriate. We've given you every opportunity to retain or get your own attorney. You said no. You wanted to represent yourself. That's the reason you're here today, representing yourself. I did assign Mr. Livingston to be . . . extra cautious. It's your right to try the case by yourself. You can't tell the jury, oh, this isn't my decision; it was your decision. I don't know why you said that because I think this case has been going on for years. And I think I made it very clear to you or tried to make it clear to you to get an attorney; get an attorney if you want one; get an attorney if you want one. So don't tell the jury that this isn't your choice. It was your choice.

Defendant was ultimately found guilty as described above, and this appeal followed.

II. ANALYSIS

Defendant did not waive his right to the assistance of counsel, and the record before us does not establish that defendant forfeited his right to the assistance of counsel. Therefore, defendant's conviction must be vacated. [*9]

Whether a criminal defendant's right to counsel has been violated is a constitutional question that we review de novo. *People v Hieu Van Hoang*, 328 Mich App 45, 54; 935 NW2d 396 (2019).

The United States and Michigan Constitutions each guarantee a criminal defendant the right to counsel at every critical stage of the criminal proceedings. *Hieu Van Hoang*, 328 Mich App at 55. Criminal defendants are likewise entitled to waive the right to counsel and proceed *in propria persona*. Prior to allowing a defendant to waive the right to counsel, the trial court must find (1) that the request was unequivocal; (2) that the defendant's assertion of the right to proceed without counsel was knowing, intelligent, and voluntary; and (3) that the decision to proceed without counsel "will not disrupt, unduly inconvenience[,] and burden the court and the administration of the court's business." *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). Additionally, the court must comply with MCR 6.005(D), which provides in relevant part:

> 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 [*10] the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

"[T]rial courts must substantially comply with the requirements of *Anderson* and MCR 6.005(D)." *People v Williams*, 470 Mich 634, 656; 683 NW2d 597 (2004). "Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures." *People v Adkins (After Remand)*, 452 Mich 702, 726-727; 551 NW2d 108 (1996), overruled in part on other grounds *Williams*, 470 Mich at 641 n 7. "[I]f the trial court fails to substantially comply with the requirements in *Anderson* and the court rule, then the defendant has not effectively waived his Sixth Amendment right to the assistance of counsel." *People v Russell*, 471 Mich 182, 191-192; 684 NW2d 745 (2004).

Despite insisting in the jury's presence that defendant freely chose to represent himself, it is undisputed that the court did not substantially comply with *Anderson* and the court rule. The court did repeatedly advise defendant regarding "the risk involved in self-representation," and the court afforded numerous opportunities to consult with private attorneys or seek representation from a public defender. See MCR 6.005(D). However, this was not done during "a short colloquy" as directed by the Supreme Court in *Adkins*, 452 Mich at 726-727. Further, [*11] the court did not make any inquiry into the three requirements for waiver

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of the right to counsel articulated by the Supreme Court in *Anderson*. Had the *Anderson* inquiry been conducted, the first requirement would not have been met because defendant's statements regarding self-representation were always equivocal and based on the belief that he had no other choice.

While defendant did not waive his right to counsel, this Court held in *People v Kammeraad*, 307 Mich App 98; 858 NW2d 490 (2014), that the right to counsel can be forfeited.[2] In that case, the defendant refused to participate in the proceedings in any way, to accept the assistance of a public defender, to represent himself, and to cooperate or communicate in any way with any appointed attorneys. *Id.* at 126. In the context of this "unique situation," this Court concluded that the "defendant's constitutional protections were forfeited and there was no constitutional obligation to impose a court-appointed attorney upon the unwilling defendant." *Id.* at 126-127. This Court also acknowledged the possibility that a forfeiture could occur if "a defendant is warned that he or she will lose counsel if the defendant engages in dilatory tactics, with any misconduct thereafter being treated as an implied request for self-representation." [*12] *Id.* at 133.

> These are not "waiver" cases in the true sense of the word. In many situations there will be defendants who engage in dilatory conduct but who vehemently object to being forced to proceed *pro se*. These defendants cannot truly be said to be "waiving" their Sixth Amendment rights because although they are voluntarily engaging in misconduct knowing what they stand to lose, they are not affirmatively requesting to proceed *pro se*. [*Id.* at 134 (quotation marks and citation omitted).]

This Court concluded by warning "that a finding of forfeiture of this venerable constitutional right should only be made in *the rarest of circumstances* and as necessary to address *exceptionally egregious conduct*." *Id.* at 137 (emphasis added).

The prosecution contends that defendant forfeited his right to counsel by engaging in dilatory conduct. Specifically, the prosecution faults defendant for perpetually failing to retain an attorney despite repeated warnings that doing so would lead to self-representation. The prosecution's position is not supported by the record. Instead, the record before this Court suggests that defendant was caught between a rock and a hard place because he was unable to establish eligibility for a public defender but also [*13] unable to pay a private attorney's retainer. While nothing in the record suggests that the aim was to delay the proceedings, defendant was certainly responsible for the first few months of delay due to attorney turnover. Defendant requested the withdrawal of his initial attorney, who was retained in July 2022, after less than two months due to communication issues. This attorney was replaced with a public defender. Approximately six months later, defendant dismissed this attorney in favor of Bradley Friedman, whom defendant retained. Nevertheless, trial was scheduled for June 2023, and defendant was prepared to proceed.

The wheels came off on June 2, 2023, when Friedman moved to withdraw within a week of trial on the basis of feeling "uncomfortable" with defendant's preferred strategy. The court could have denied Friedman's motion to withdraw and ordered him to continue representing defendant, but it instead granted the motion and adjourned the trial. This was the beginning of a months' long cycle of defendant reporting to the court that he was denied by the public defender office and turned down by private attorneys. Despite the prosecution's assertion that defendant was engaging in [*14] dilatory conduct to draw out the proceedings and delay the trial, defendant's statements that he contacted dozens of attorneys but could not get anyone to take the case went unrebutted. Despite openly questioning defendant's credibility, the court did nothing to assess the veracity of defendant's statements.[3]

Additionally, it is clear from the record that defendant

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[2] We note that forfeiture in this context is not the same type of forfeiture as was discussed by the Supreme Court when it decided *People v King*, 512 Mich 1; 999 NW2d 670 (2023). In *King*, the Supreme Court held that a criminal defendant cannot forfeit the right to counsel. *Id.* at 12-17. However, the term was used in that case to refer to "the failure to make the timely assertion of a right" in the context of the plain error rule. *Id.* at 15 (quotation marks and citation omitted). The Supreme Court held in *King* that "a defendant who did not make a knowing and intelligent waiver of the right to counsel" did not need to "object to their own waiver" in order to preserve the issue for appellate review. *Id.* at 14-15. Therefore, while the Supreme Court used the term "forfeiture" when deciding *King*, the term was used in a different context, and *King* is not applicable here.

[3] The court did ask defendant at one point if he had a list of the attorneys he had contacted. Defendant indicated that he did have such a list but left it at home because he did not know he would be asked to produce it.

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was repeatedly and persistently attempting to obtain the assistance of a public defender. By no means do we suggest that a well-off defendant can indefinitely postpone his trial by repeatedly submitting futile applications for a public defender, but the record was bereft of information regarding why he was being turned away. Defendant at one point came to court with the information he had been providing to the public defender office, but the court declined to examine this documentation because it did not view assessment of his eligibility as its proper role. There likewise is nothing in the record regarding the possibility that the court could have ordered the public defender office to appoint an attorney then subsequently order defendant to compensate the public defender office upon completion of a closer examination of his [*15] finances.

It is well-established that publicly-funded attorneys are only available to criminal defendants who are indigent. Clearly, a person who refuses to retain an attorney despite not being indigent and also refuses to act pro se would forfeit the right to counsel. The trial court believed defendant to fall within this category, and it is certainly possible that he does,[4] but the record is not sufficient to support such a finding. The record regarding defendant's income was spotty, and it appears as though his employment status varied throughout the pendency of this case. However, the record does establish that defendant lost his high-paying job around the outset of this case, and there is nothing in the record disputing the fluctuating wage information that defendant provided over the course of the proceedings. There is likewise nothing in the record regarding defendant's assets aside from his own statements regarding the balances in his bank accounts. When defendant offered to produce bank statements, the court refused to examine them on the basis of its assumption that he would conceal records from other, more lucrative accounts. Early in the proceedings, defendant made the poor [*16] decision to appear remotely for a hearing while playing golf, and the court repeatedly referenced this incident as proof that defendant was not indigent. However, while the court was justifiably infuriated by this disrespect for judicial proceedings, common sense suggests that it does not follow from the ability to pay for a round of golf that a person can also pay to retain an attorney. In sum, while it is possible that defendant could afford an attorney but delayed the proceedings by perpetually failing to retain one, the record before us is insufficient to support such a finding.

III. CONCLUSION

In conclusion, defendant did not waive his right to the assistance of counsel, and the record does not support the conclusion that this right was forfeited. Therefore, we vacate defendant's convictions and remand for additional proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Noah P. Hood

/s/ James Robert Redford

/s/ Allie Greenleaf Maldonado

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[4] Notably, defendant has a court-appointed attorney in this appeal.

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Appendix 23: United States v. Dobbins, 2022 U.S. Dist. LEXIS 181836

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United States v. Dobbins

United States District Court for the Southern District of Illinois

October 4, 2022, Decided; October 4, 2022, Filed

Case No. 21-cr-30003-DWD-03

Reporter
2022 U.S. Dist. LEXIS 181836 *; 2022 WL 4960309

UNITED STATES OF AMERICA, Plaintiff, vs. ANTHONY DOBBINS, Defendant.

Counsel: [*1] For Anthony Dobbins, aka: Tony Rome, Crazy, Defendant: Lupita Thompson, LEAD ATTORNEY, Thompson Law, LLC, Effingham, IL USA; Jean D. Barrett, Ruhnke & Barrett, Montclair, NJ USA.

U.S. Attorneys: Ali M. Summers, LEAD ATTORNEY, Assistant U.S. Attorney - Fairview Heights, Fairview Heights, IL USA; Conor Mulroe, US Dept. of Justice, Criminal Division - New York Avenue, Washington, DC USA; Jeremy I. Franker, United States Department of Justice, Washington, DC USA.

Judges: DAVID W. DUGAN, United States District Judge.

Opinion by: DAVID W. DUGAN

Opinion

ORDER

This matter is before the Court on Defendant Anthony Dobbins' Motion to Proceed with Motion Hearings via Video Teleconferencing (Doc. 497). For the reasons set forth below, the motion is **GRANTED**.

This case is set for trial on January 23, 2023. Presently, Dobbins has two pretrial motions pending: (1) Motion to Exclude Cellphone Evidence (Doc. 398) and (2) Motion to Suppress (Doc. 494). Dobbins has also joined in Co-Defendant Sean Clemon's Motion to Strike Surplusage (Doc. 393), Motion for a Written Proffer and Pre-Trial Determination of Admissibility of Co-Conspirators Statements (Doc. 391), and Motion to Produce (Doc. 326), as well as Co-Defendant Frank Smith's Motion [*2] to Strike Surplusage (Doc. 440), Motion for Disclosure of Brady and Giglio Evidence (Doc. 443), and Motion for a Written Proffer and Pre-Trial Determination of Admissibility of Co-Conspirators Statements (Doc. 444).

The Court has set aside the week of November 14, 2022 for oral argument on Dobbins' and his co-defendants' pretrial motions. In anticipation of this, the Court issued a Writ of Habeas Corpus Ad Prosequendum for Dobbins' presence the week of November 14, 2022. On October 21, 2022, Dobbins' counsel filed the instant motion, stating that, after consultation with counsel, Dobbins has indicated that he does not wish to be physically present for oral argument the week of November 14, 2022. Instead, he states that he wishes to participate in the motion hearing by way of video teleconferencing, and if video teleconferencing fails or technical issues arise during the hearing, he wishes to proceed by telephone conferencing. Counsel further states that Dobbins understands that the Court has already issued a writ for his presence and that he "has a right to be present" for the motion hearings scheduled the week of November 14, 2022.

"[A]n accused person has a right to be present at every [*3] critical stage of a criminal proceeding against him." *United States v. Johnson*, 859 F.2d 1289, 1294 (7th Cir. 1988). The Seventh Circuit has indicated that "a pretrial suppression hearing is a critical stage" of a criminal proceeding. *Id.* Nonetheless, the Seventh Circuit has explained that neither Federal Rule of Criminal Procedure 43 (to the extent that it applies to a conference or hearing on a pretrial motion),[1] nor the

[1] A number of courts have found Rule 43 inapplicable to a variety of pretrial hearings including suppression, *Daubert*, and motions *in limine*. *See e.g., United States v. Karmue*, 841 F.3d 24, 28 (1st Cir. 2016) (it was not clear error under Rule 43 for the district court to conduct the second day of a *Daubert*

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Constitution requires the presence of a defendant at such a hearing where the motion involves only questions of law. *Id.*

In the instant case, the Court has not yet evaluated each of Dobbins' pending motions to determine whether he has a right to be physically present for the same. Regardless, even assuming for purposes of this motion that Dobbins has a right to be physically present for oral argument on his motions, that right may be waived so long as the waiver is both knowing and voluntary. *See United States v. Watkins*, 983 F.2d 1413, 1418 (7th Cir. 1993). *See also Campbell v. Wood*, 18 F.3d 662, 671-72 (9th Cir. 1994) (a defendant may waive his or her constitutional right to be present at all critical stages of the proceeding "provided such waiver is voluntary, knowing, and intelligent.") (citing *Johnson v. Zerbst*, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938)).

Having reviewed Dobbins' Motion to Proceed with Motion Hearings via Video Teleconferencing (Doc. 497), the Court finds that [*4] Dobbins' waiver of his right to be physically present at oral argument on his pending pretrial motions is knowing, voluntary, and intelligent. Accordingly, the motion is **GRANTED**.

SO ORDERED.

Dated: October 4, 2022

/s/ David W. Dugan

DAVID W. DUGAN

United States District Judge

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hearing without the defendant's physical presence); *United States v. Burke*, 345 F.3d 416 (6th Cir. 2003) (noting that "the authorities are nearly unanimous that Rule 43's right to be present does not apply to pretrial suppression hearings"); *Taylor v. United States*, 385 F.2d 835, 836 (8th Cir. 1967) (no right to be present for a hearing on motions *in limine*). *But See United States v. Johnson*, 859 F.2d 1289, 1294 (7th Cir. 1998) (concluding that a pretrial suppression hearing is a "critical stage" of the judicial process and assuming without discussion that it is also part of the "trial" for purposes of Rule 43.