# MICHIGAN REPORTS

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## CASES DECIDED

IN THE

# SUPREME COURT

OF

# MICHIGAN

FROM

January 8, 2009 to July 17, 2009


## DANILO ANSELMO
REPORTER OF DECISIONS



**VOL. 483**
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## SUPREME COURT

| | Term Expires January 1 of |
|---|---|
| Chief Justice | |
| MARILYN KELLY | 2013 |
| Justices | |
| MICHAEL F. CAVANAGH | 2015 |
| ELIZABETH A. WEAVER | 2011 |
| MAURA D. CORRIGAN | 2015 |
| ROBERT P. YOUNG, Jr. | 2011 |
| STEPHEN J. MARKMAN | 2013 |
| DIANE M. HATHAWAY | 2017 |

Commissioners

MICHAEL J. SCHMEDLEN, Chief Commissioner
SHARI M. OBERG, Deputy Chief Commissioner

| | |
|---|---|
| JOHN K. PARKER | DANIEL C. BRUBAKER |
| TIMOTHY J. RAUBINGER | MICHAEL S. WELLMAN |
| LYNN K. RICHARDSON | GARY L. ROGERS |
| KATHLEEN A. FOSTER | RICHARD B. LESLIE |
| NELSON S. LEAVITT | FREDERICK M. BAKER, Jr. |
| DEBRA A. GUTIERREZ-McGUIRE | KATHLEEN M. DAWSON |
| ANNE-MARIE HYNOUS VOICE | RUTH E. ZIMMERMAN |
| DON W. ATKINS | SAMUEL R. SMITH |
| JÜRGEN O. SKOPPEK | ANNE E. ALBERS |

State Court Administrator: CARL L. GROMEK

Clerk: CORBIN R. DAVIS
Crier: DAVID G. PALAZZOLO

# COURT OF APPEALS

| | Term Expires January 1 of |
|---|---|
| **Chief Judge** | |
| HENRY WILLIAM SAAD | 2015 |
| **Chief Judge Pro Tem** | |
| CHRISTOPHER M. MURRAY | 2015 |
| **Judges** | |
| DAVID H. SAWYER | 2011 |
| WILLIAM B. MURPHY | 2013 |
| MARK J. CAVANAGH | 2009 |
| KATHLEEN JANSEN | 2013 |
| E. THOMAS FITZGERALD | 2015 |
| RICHARD A. BANDSTRA | 2015 |
| JOEL P. HOEKSTRA | 2011 |
| JANE E. MARKEY | 2015 |
| PETER D. O'CONNELL | 2013 |
| WILLIAM C. WHITBECK | 2011 |
| MICHAEL J. TALBOT | 2015 |
| KURTIS T. WILDER | 2011 |
| BRIAN K. ZAHRA | 2013 |
| PATRICK M. METER | 2015 |
| DONALD S. OWENS | 2011 |
| KIRSTEN FRANK KELLY | 2013 |
| PAT M. DONOFRIO | 2011 |
| KAREN FORT HOOD | 2015 |
| STEPHEN L. BORRELLO | 2013 |
| ALTON T. DAVIS | 2015 |
| DEBORAH A. SERVITTO | 2013 |
| JANE M. BECKERING | 2013 |
| ELIZABETH L. GLEICHER | 2013 |
| CYNTHIA DIANE STEPHENS | 2011 |
| DOUGLAS B. SHAPIRO | 2013[1] |

Chief Clerk: SANDRA SCHULTZ MENGEL
Research Director: LARRY S. ROYSTER

[1] From February 2, 2009.

# CIRCUIT JUDGES

| | | Term Expires January 1 of |
|---|---|---|
| 1. | MICHAEL R. SMITH | 2015 |
| 2. | ALFRED M. BUTZBAUGH | 2013 |
| | JOHN E. DEWANE | 2015 |
| | JOHN M. DONAHUE | 2011 |
| | CHARLES T. LaSATA | 2011 |
| 3. | DEBORAH ROSS ADAMS | 2013 |
| | DAVID J. ALLEN | 2015 |
| | WENDY M. BAXTER | 2013 |
| | ANNETTE J. BERRY | 2013 |
| | GREGORY D. BILL | 2013 |
| | SUSAN D. BORMAN | 2015 |
| | ULYSSES W. BOYKIN | 2015 |
| | MARGIE R. BRAXTON | 2011 |
| | MEGAN MAHER BRENNAN | 2015 |
| | BILL CALLAHAN | 2015 |
| | JAMES A. CALLAHAN | 2011 |
| | MICHAEL J. CALLAHAN | 2015 |
| | JEROME C. CAVANAGH | 2013 |
| | JAMES R. CHYLINSKI | 2011 |
| | ROBERT J. COLOMBO, Jr. | 2013 |
| | DAPHNE MEANS CURTIS | 2015 |
| | CHRISTOPHER D. DINGELL | 2015 |
| | GERSHWIN ALLEN DRAIN | 2011 |
| | PRENTIS EDWARDS | 2013 |
| | CHARLENE M. ELDER | 2015 |
| | VONDA R. EVANS | 2015 |
| | EDWARD EWELL, Jr. | 2013 |
| | PATRICIA SUSAN FRESARD | 2011 |
| | SHEILA ANN GIBSON | 2011 |
| | JOHN H. GILLIS, Jr. | 2015 |
| | DAVID ALAN GRONER | 2011 |
| | RICHARD B. HALLORAN, Jr. | 2013 |
| | AMY PATRICIA HATHAWAY | 2013 |
| | CYNTHIA GRAY HATHAWAY | 2011 |

| | | Term Expires January 1 of |
|---|---|---|
| | MICHAEL M. HATHAWAY | 2011 |
| | MURIEL D. HUGHES | 2011 |
| | THOMAS EDWARD JACKSON | 2013 |
| | VERA MASSEY JONES | 2015 |
| | MARY BETH KELLY | 2015 |
| | TIMOTHY MICHAEL KENNY | 2011 |
| | ARTHUR J. LOMBARD | 2015 |
| | KATHLEEN I. MACDONALD | 2011 |
| | KATHLEEN M. McCARTHY | 2013 |
| | WADE H. McCREE | 2015 |
| | BRUCE U. MORROW | 2011 |
| | JOHN A. MURPHY | 2011 |
| | MARIA L. OXHOLM | 2013 |
| | LINDA V. PARKER | 2013 |
| | LYNNE A. PIERCE | 2015 |
| | LITA MASINI POPKE | 2011 |
| | DANIEL P. RYAN | 2013 |
| | MICHAEL F. SAPALA | 2013 |
| | RICHARD M. SKUTT | 2015 |
| | MARK T. SLAVENS | 2011 |
| | LESLIE KIM SMITH | 2013 |
| | VIRGIL C. SMITH | 2013 |
| | JEANNE STEMPIEN | 2011 |
| | CRAIG S. STRONG | 2015 |
| | BRIAN R. SULLIVAN | 2011 |
| | DEBORAH A. THOMAS | 2013 |
| | ISIDORE B. TORRES | 2011 |
| | CAROLE F. YOUNGBLOOD | 2013 |
| | ROBERT L. ZIOLKOWSKI | 2015 |
| 4. | SUSAN E. BEEBE | 2011 |
| | JOHN G. McBAIN, Jr. | 2015 |
| | CHAD C. SCHMUCKER | 2011 |
| | THOMAS D. WILSON | 2013 |
| 5. | JAMES H. FISHER | 2015 |
| 6. | JAMES M. ALEXANDER | 2015 |
| | MARTHA ANDERSON | 2015 |
| | LEO BOWMAN | 2013 |
| | RAE LEE CHABOT | 2011 |
| | MARK A. GOLDSMITH | 2013 |
| | LISA ORTLIEB GORCYCA | 2015 |
| | NANCI J. GRANT | 2015 |
| | SHALINA D. KUMAR | 2015 |
| | DENISE LANGFORD MORRIS | 2013 |

| | | Term Expires January 1 of |
|---|---|---|
| | CHERYL A. MATTHEWS | 2011 |
| | JOHN JAMES McDONALD | 2011 |
| | RUDY J. NICHOLS | 2015 |
| | COLLEEN A. O'BRIEN | 2011 |
| | DANIEL PATRICK O'BRIEN | 2011 |
| | WENDY LYNN POTTS | 2013 |
| | EDWARD SOSNICK | 2013 |
| | MICHAEL D. WARREN, Jr. | 2013 |
| | JOAN E. YOUNG | 2011 |
| 7. | DUNCAN M. BEAGLE | 2011 |
| | JOSEPH J. FARAH | 2011 |
| | JUDITH A. FULLERTON | 2013 |
| | JOHN A. GADOLA | 2015 |
| | ARCHIE L. HAYMAN | 2013 |
| | GEOFFREY L. NEITHERCUT | 2013 |
| | DAVID J. NEWBLATT | 2011 |
| | MICHAEL J. THEILE | 2015 |
| | RICHARD B. YUILLE | 2015 |
| 8. | DAVID A. HOORT | 2011 |
| | SUZANNE KREEGER | 2015 |
| 9. | GARY C. GIGUERE, Jr. | 2015 |
| | STEPHEN D. GORSALITZ | 2011 |
| | J. RICHARDSON JOHNSON | 2011 |
| | PAMELA L. LIGHTVOET | 2013 |
| | ALEXANDER C. LIPSEY | 2011 |
| 10. | JANET M. BOES | 2013 |
| | FRED L. BORCHARD | 2011 |
| | WILLIAM A. CRANE | 2011 |
| | DARNELL JACKSON | 2013 |
| | ROBERT L. KACZMAREK | 2009 |
| 11. | WILLIAM W. CARMODY | 2015 |
| 12. | CHARLES R. GOODMAN | 2015 |
| 13. | THOMAS G. POWER | 2011 |
| | PHILIP E. RODGERS, Jr. | 2015 |
| 14. | JAMES M. GRAVES, Jr. | 2013 |
| | TIMOTHY G. HICKS | 2011 |
| | WILLIAM C. MARIETTI | 2011 |
| | JOHN C. RUCK | 2015 |
| 15. | PATRICK W. O'GRADY | 2015 |
| 16. | JAMES M. BIERNAT, Sr. | 2011 |
| | RICHARD L. CARETTI | 2011 |
| | MARY A. CHRZANOWSKI | 2011 |
| | DIANE M. DRUZINSKI | 2015 |
| | JOHN C. FOSTER | 2015 |

| | | Term Expires January 1 of |
|---|---|---|
| | PETER J. MACERONI | 2015 |
| | DONALD G. MILLER | 2013 |
| | EDWARD A. SERVITTO, Jr. | 2013 |
| | MARK S. SWITALSKI | 2013 |
| | MATTHEW S. SWITALSKI | 2015 |
| | ANTONIO P. VIVIANO | 2011 |
| | DAVID VIVIANO | 2013 |
| | TRACEY A. YOKICH | 2013 |
| 17. | GEORGE S. BUTH | 2011 |
| | KATHLEEN A. FEENEY | 2015 |
| | DONALD A. JOHNSTON, III | 2013 |
| | DENNIS B. LEIBER | 2013 |
| | STEVEN MITCHELL PESTKA | 2011[1] |
| | JAMES ROBERT REDFORD | 2011 |
| | PAUL J. SULLIVAN | 2015 |
| | MARK A. TRUSOCK | 2013 |
| | CHRISTOPHER P. YATES | 2013 |
| | DANIEL V. ZEMAITIS | 2015 |
| 18. | WILLIAM J. CAPRATHE | 2011 |
| | KENNETH W. SCHMIDT | 2013 |
| | JOSEPH K. SHEERAN | 2015 |
| 19. | JAMES M. BATZER | 2015 |
| 20. | CALVIN L. BOSMAN | 2011 |
| | JON H. HULSING | 2015 |
| | EDWARD R. POST | 2011 |
| | JON VAN ALLSBURG | 2013 |
| 21. | PAUL H. CHAMBERLAIN | 2011 |
| | MARK H. DUTHIE | 2013 |
| 22. | ARCHIE CAMERON BROWN | 2011 |
| | TIMOTHY P. CONNORS | 2013 |
| | MELINDA MORRIS | 2013 |
| | DONALD E. SHELTON | 2015 |
| | DAVID S. SWARTZ | 2015 |
| 23. | RONALD M. BERGERON | 2015 |
| | WILLIAM F. MYLES | 2009 |
| 24. | DONALD A. TEEPLE | 2015 |
| 25. | JENNIFER MAZZUCHI | 2015 |
| | THOMAS L. SOLKA | 2011 |
| 26. | MICHAEL G. MACK | 2015 |
| 27. | ANTHONY A. MONTON | 2013 |
| | TERRENCE R. THOMAS | 2015 |
| 28. | WILLIAM M. FAGERMAN | 2015 |

[1] To July 10, 2009.

| | | Term Expires January 1 of |
|---|---|---|
| 29. | MICHELLE M. RICK | 2011 |
| | RANDY L. TAHVONEN | 2015 |
| 30. | ROSEMARIE ELIZABETH AQUILINA | 2015 |
| | LAURA BAIRD | 2013 |
| | WILLIAM E. COLLETTE | 2015 |
| | JOYCE DRAGANCHUK | 2011 |
| | JAMES R. GIDDINGS | 2011 |
| | JANELLE A. LAWLESS | 2015 |
| | PAULA J.M. MANDERFIELD | 2013 |
| 31. | JAMES P. ADAIR | 2013 |
| | PETER E. DEEGAN | 2011 |
| | DANIEL J. KELLY | 2015 |
| 32. | ROY D. GOTHAM | 2015 |
| 33. | RICHARD M. PAJTAS | 2015 |
| 34. | MICHAEL J. BAUMGARTNER | 2011 |
| 35. | GERALD D. LOSTRACCO | 2015 |
| 36. | WILLIAM C. BUHL | 2013 |
| | PAUL E. HAMRE | 2015 |
| 37. | ALLEN L. GARBRECHT | 2011 |
| | JAMES C. KINGSLEY | 2015 |
| | STEPHEN B. MILLER | 2011 |
| | CONRAD J. SINDT | 2013 |
| 38. | JOSEPH A. COSTELLO, JR. | 2015 |
| | MICHAEL W. LABEAU | 2013 |
| | MICHAEL A. WEIPERT | 2011 |
| 39. | MARGARET MURRAY-SCHOLZE NOE | 2015 |
| | TIMOTHY P. PICKARD | 2013 |
| 40. | MICHAEL P. HIGGINS | 2015 |
| | NICK O. HOLOWKA | 2011 |
| 41. | MARY BROUILLETTE BARGLIND | 2011 |
| | RICHARD J. CELELLO | 2015 |
| 42. | MICHAEL J. BEALE | 2015 |
| | JONATHAN E. LAUDERBACH | 2013 |
| 43. | MICHAEL E. DODGE | 2011 |
| 44. | MICHAEL P. HATTY | 2013 |
| | STANLEY J. LATREILLE | 2013[2] |
| | DAVID READER | 2011 |
| 45. | PAUL E. STUTESMAN | 2013 |
| 46. | JANET M. ALLEN | 2011 |
| | DENNIS F. MURPHY | 2015 |
| 47. | STEPHEN T. DAVIS | 2011 |
| 48. | GEORGE R. CORSIGLIA | 2011 |

[2] To April 3. 2009.

| | | Term Expires January 1 of |
|---|---|---|
| | KEVIN W. CRONIN | 2015 |
| 49. | SCOTT P. HILL-KENNEDY | 2013 |
| | RONALD C. NICHOLS | 2015 |
| 50. | NICHOLAS J. LAMBROS | 2013 |
| 51. | RICHARD I. COOPER | 2015 |
| 52. | M. RICHARD KNOBLOCK | 2015 |
| 53. | SCOTT LEE PAVLICH | 2011 |
| 54. | PATRICK REED JOSLYN | 2013 |
| 55. | THOMAS R. EVANS | 2015 |
| | ROY G. MIENK | 2013 |
| 56. | THOMAS S. EVELAND | 2013 |
| | CALVIN E. OSTERHAVEN | 2015 |
| 57. | CHARLES W. JOHNSON | 2013 |

# DISTRICT JUDGES

| | | Term Expires January 1 of |
|---|---|---|
| 1. | MARK S. BRAUNLICH | 2015 |
| | TERRENCE P. BRONSON | 2013 |
| | JACK VITALE | 2011 |
| 2A. | NATALIA M. KOSELKA | 2011 |
| | JAMES E. SHERIDAN | 2015 |
| 2B. | DONALD L. SANDERSON | 2015 |
| 3A. | BRENT R. WEIGLE | 2015 |
| 3B. | JEFFREY C. MIDDLETON | 2015 |
| | WILLIAM D. WELTY | 2013 |
| 4. | STACEY A. RENFROW | 2015 |
| 5. | GARY J. BRUCE | 2011 |
| | ANGELA PASULA | 2015 |
| | SCOTT SCHOFIELD | 2015 |
| | STERLING R. SCHROCK | 2013 |
| | DENNIS M. WILEY | 2011 |
| 7. | ARTHUR H. CLARKE, III | 2015 |
| | ROBERT T. HENTCHEL | 2011 |
| 8-1. | ANNE E. BLATCHFORD | 2011 |
| | PAUL J. BRIDENSTINE | 2013 |
| | CAROL A. HUSUM | 2011 |
| 8-2. | ROBERT C. KROPF | 2015 |
| 8-3. | RICHARD A. SANTONI | 2015 |
| | VINCENT C. WESTRA | 2011 |
| 10. | SAMUEL I. DURHAM, Jr. | 2011 |
| | JOHN A. HALLACY | 2015 |
| | JOHN R. HOLMES | 2013 |
| | FRANKLIN K. LINE, Jr. | 2015 |
| 12. | JOSEPH S. FILIP | 2011 |
| | JAMES M. JUSTIN | 2013 |
| | MICHAEL J. KLAEREN | 2015 |
| | R. DARRYL MAZUR | 2015 |
| 14A. | RICHARD E. CONLIN | 2015 |
| | J. CEDRIC SIMPSON | 2013 |
| | KIRK W. TABBEY | 2011 |
| 14B. | CHARLES POPE | 2015 |
| 15. | JULIE CREAL | 2013 |
| | CHRISTOPHER S. EASTHOPE | 2015 |

| | | Term Expires January 1 of |
|---|---|---|
| | ELIZABETH POLLARD HINES | 2011 |
| 16. | SEAN P. KAVANAGH | 2015 |
| | KATHLEEN J. McCANN | 2013 |
| 17. | KAREN KHALIL | 2011 |
| | CHARLOTTE L. WIRTH | 2015 |
| 18. | SANDRA A. CICIRELLI | 2013 |
| | MARK A. McCONNELL | 2015 |
| 19. | WILLIAM C. HULTGREN | 2011 |
| | MARK W. SOMERS | 2015 |
| | RICHARD WYGONIK | 2013 |
| 20. | MARK J. PLAWECKI | 2015 |
| | DAVID TURFE | 2013 |
| 21. | RICHARD L. HAMMER, Jr. | 2015 |
| 22. | SYLVIA A. JAMES | 2013 |
| 23. | GENO SALOMONE | 2013 |
| | WILLIAM J. SUTHERLAND | 2015 |
| 24. | JOHN T. COURTRIGHT | 2015 |
| | RICHARD A. PAGE | 2011 |
| 25. | DAVID A. BAJOREK | 2015 |
| | DAVID J. ZELENAK | 2011 |
| 26-1. | RAYMOND A. CHARRON | 2015 |
| 26-2. | MICHAEL F. CIUNGAN | 2015 |
| 27. | RANDY L. KALMBACH | 2013 |
| 28. | JAMES A. KANDREVAS | 2015 |
| 29. | LAURA REDMOND MACK | 2013 |
| 30. | BRIGETTE R. OFFICER | 2011 |
| 31. | PAUL J. PARUK | 2015 |
| 32A. | ROGER J. La ROSE | 2015 |
| 33. | JAMES KURT KERSTEN | 2015 |
| | MICHAEL K. McNALLY | 2013 |
| | EDWARD J. NYKIEL | 2011 |
| 34. | TINA BROOKS GREEN | 2013 |
| | BRIAN A. OAKLEY | 2011 |
| | DAVID M. PARROTT | 2015 |
| 35. | MICHAEL J. GEROU | 2011 |
| | RONALD W. LOWE | 2013 |
| | JAMES A. PLAKAS | 2015 |
| 36. | LYDIA NANCE ADAMS | 2011 |
| | ROBERTA C. ARCHER | 2013 |
| | MARYLIN E. ATKINS | 2013 |
| | JOSEPH N. BALTIMORE | 2015 |
| | NANCY McCAUGHAN BLOUNT | 2015 |
| | IZETTA F. BRIGHT | 2011 |
| | ESTHER LYNISE BRYANT-WEEKES | 2008 |
| | RUTH C. CARTER | 2011 |
| | DONALD COLEMAN | 2013 |
| | NANCY A. FARMER | 2013 |
| | DEBORAH GERALDINE FORD | 2011 |

| | | Term Expires January 1 of |
|---|---|---|
| | RUTH ANN GARRETT | 2013 |
| | RONALD GILES | 2015 |
| | KATHERINE HANSEN | 2011 |
| | BEVERLY J. HAYES-SIPES | 2015 |
| | PAULA G. HUMPHRIES | 2011 |
| | PATRICIA L. JEFFERSON | 2015 |
| | VANESA F. JONES-BRADLEY | 2013 |
| | KENNETH J. KING | 2015 |
| | DEBORAH L. LANGSTON | 2013 |
| | WILLIE G. LIPSCOMB, Jr. | 2015 |
| | LEONIA J. LLOYD | 2011 |
| | MIRIAM B. MARTIN-CLARK | 2011 |
| | DONNA R. MILHOUSE | 2013 |
| | B. PENNIE MILLENDER | 2011 |
| | CYLENTHIA L. MILLER | 2011 |
| | MARK A. RANDON | 2015[1] |
| | KEVIN F. ROBBINS | 2013 |
| | DAVID S. ROBINSON, Jr. | 2013 |
| | C. LORENE ROYSTER | 2013 |
| | BRENDA KAREN SANDERS | 2015 |
| 37. | JOHN M. CHMURA | 2013 |
| | JENNIFER FAUNCE | 2015 |
| | DAWNN M. GRUENBURG | 2011 |
| | WALTER A. JAKUBOWSKI, Jr. | 2013 |
| | MATTHEW P. SABAUGH | 2013 |
| 38. | CARL F. GERDS III | 2015 |
| 39. | JOSEPH F. BOEDEKER | 2015 |
| | MARCO A. SANTIA | 2013 |
| | CATHERINE B. STEENLAND | 2011 |
| 40. | MARK A. FRATARCANGELI | 2013 |
| | JOSEPH CRAIGEN OSTER | 2015 |
| 41A. | MICHAEL S. MACERONI | 2015 |
| | DOUGLAS P. SHEPHERD | 2013 |
| | STEPHEN S. SIERAWSKI | 2011 |
| | KIMBERLEY ANNE WIEGAND | 2013 |
| 41B. | LINDA DAVIS | 2015 |
| | SEBASTIAN LUCIDO | 2013 |
| | SHEILA A. MILLER | 2011 |
| 42-1. | DENIS R. LeDUC | 2015 |
| 42-2. | PAUL CASSIDY | 2013[2] |
| 43. | KEITH P. HUNT | 2013 |
| | JOSEPH LONGO | 2011 |
| | ROBERT J. TURNER | 2009 |
| 44. | TERRENCE H. BRENNAN | 2015 |
| | DANIEL SAWICKI | 2013 |

[1] To July 6, 2009.

[2] To May 31, 2009.

| | | Term Expires January 1 of |
|---|---|---|
| 45A. | JAMES L. WITTENBERG | 2015 |
| 45B. | MICHELLE FRIEDMAN APPEL | 2015 |
| | DAVID M. GUBOW | 2015 |
| 46. | SHEILA R. JOHNSON | 2015 |
| | SUSAN M. MOISEEV | 2013 |
| | WILLIAM J. RICHARDS | 2011 |
| 47. | JAMES BRADY | 2015 |
| | MARLA E. PARKER | 2011 |
| 48. | MARC BARRON | 2011 |
| | DIANE D'AGOSTINI | 2013 |
| | KIMBERLY SMALL | 2015 |
| 50. | RONDA FOWLKES GROSS | 2013 |
| | MICHAEL C. MARTINEZ | 2015 |
| | PRESTON G. THOMAS | 2011 |
| | CYNTHIA THOMAS WALKER | 2015 |
| 51. | RICHARD D. KUHN, JR. | 2015 |
| | PHYLLIS C. MCMILLEN | 2013 |
| 52-1. | ROBERT BONDY | 2013 |
| | BRIAN W. MACKENZIE | 2015 |
| | DENNIS N. POWERS | 2011 |
| 52-2. | JOSEPH G. FABRIZIO | 2015 |
| | KELLEY RENAE KOSTIN | 2011 |
| 52-3. | LISA L. ASADOORIAN | 2013 |
| | NANCY TOLWIN CARNIAK | 2011 |
| | JULIE A. NICHOLSON | 2015 |
| 52-4. | WILLIAM E. BOLLE | 2015 |
| | DENNIS C. DRURY | 2013 |
| | MICHAEL A. MARTONE | 2011 |
| 53. | THERESA M. BRENNAN | 2015 |
| | L. SUZANNE GEDDIS | 2011 |
| | CAROL SUE READER | 2013 |
| 54A. | LOUISE ALDERSON | 2011 |
| | PATRICK F. CHERRY | 2015 |
| | FRANK J. DELUCA | 2013 |
| | CHARLES F. FILICE | 2015 |
| | AMY R. KRAUSE | 2011 |
| 54B. | RICHARD D. BALL | 2011 |
| | DAVID L. JORDON | 2013 |
| 55. | DONALD L. ALLEN | 2015 |
| | THOMAS P. BOYD | 2015 |
| 56A. | HARVEY J. HOFFMAN | 2011 |
| | JULIE H. REINCKE | 2015 |
| 56B. | GARY R. HOLMAN | 2013 |
| 57. | WILLIAM A. BAILLARGEON | 2013 |
| | STEPHEN E. SHERIDAN | 2013 |
| | JOSEPH S. SKOCELAS | 2015 |
| 58. | SUSAN A. JONAS | 2015 |
| | RICHARD J. KLOOTE | 2013 |
| | BRADLEY S. KNOLL | 2015 |

| | | Term Expires January 1 of |
|---|---|---|
| | KENNETH D. POST | 2011 |
| 59. | PETER P. VERSLUIS | 2011 |
| 60. | HAROLD F. CLOSZ, III | 2015 |
| | MARIA LADAS HOOPES | 2015 |
| | MICHAEL JEFFREY NOLAN | 2013 |
| | ANDREW WIERENGO | 2011 |
| 61. | DAVID J. BUTER | 2015 |
| | J. MICHAEL CHRISTENSEN | 2011 |
| | JEANINE NEMESI LaVILLE | 2013 |
| | BEN H. LOGAN, II | 2013 |
| | DONALD H. PASSENGER | 2011 |
| | KIMBERLY A. SCHAEFER | 2015 |
| 62A. | PABLO CORTES | 2015 |
| | STEVEN M. TIMMERS | 2013 |
| 62B. | WILLIAM G. KELLY | 2015 |
| 63-1. | STEVEN R. SERVAAS | 2015 |
| 63-2. | SARA J. SMOLENSKI | 2015 |
| 64A. | RAYMOND P. VOET | 2015 |
| 64B. | DONALD R. HEMINGSEN | 2015 |
| 65A. | RICHARD D. WELLS | 2015 |
| 65B. | STEWART D. McDONALD | 2015 |
| 66. | WARD L. CLARKSON | 2013 |
| | TERRANCE P. DIGNAN | 2015 |
| 67-1. | DAVID J. GOGGINS | 2015 |
| 67-2. | JOHN L. CONOVER | 2015 |
| | RICHARD L. HUGHES | 2011 |
| 67-3. | LARRY STECCO | 2015 |
| 67-4. | MARK C. McCABE | 2015 |
| | CHRISTOPHER ODETTE | 2013 |
| 68. | TRACY L. COLLIER-NIX | 2015 |
| | WILLIAM H. CRAWFORD, II | 2013 |
| | MARY CATHERINE DOWD | 2011 |
| | HERMAN MARABLE, Jr. | 2013 |
| | NATHANIEL C. PERRY, III | 2015 |
| 70-1. | TERRY L. CLARK | 2013 |
| | M. RANDALL JURRENS | 2011 |
| | M. T. THOMPSON, Jr. | 2015 |
| 70-2. | CHRISTOPHER S. BOYD | 2011 |
| | ALFRED T. FRANK | 2015 |
| | KYLE HIGGS TARRANT | 2013 |
| 71A. | LAURA CHEGER BARNARD | 2015 |
| | JOHN T. CONNOLLY | 2013 |
| 71B. | KIM DAVID GLASPIE | 2015 |
| 72. | RICHARD A. COOLEY, Jr. | 2011 |
| | JOHN D. MONAGHAN | 2013 |
| | CYNTHIA SIEMEN PLATZER | 2015 |
| 73A. | GREGORY S. ROSS | 2015 |
| 73B. | DAVID B. HERRINGTON | 2015 |
| 74. | CRAIG D. ALSTON | 2015 |

| | | Term Expires January 1 of |
|---|---|---|
| | TIMOTHY J. KELLY | 2013 |
| | SCOTT J. NEWCOMBE | 2011 |
| 75. | STEVEN CARRAS | 2011 |
| | JOHN HENRY HART | 2015 |
| 76. | WILLIAM R. RUSH | 2015 |
| 77. | SUSAN H. GRANT | 2015 |
| 78. | H. KEVIN DRAKE | 2015 |
| 79. | PETER J. WADEL | 2015 |
| 80. | JOSHUA M. FARRELL | 2015 |
| 81. | ALLEN C. YENIOR | 2015 |
| 82. | RICHARD E. NOBLE | 2015 |
| 83. | DANIEL L. SUTTON | 2015 |
| 84. | DAVID A. HOGG | 2015 |
| 85. | BRENT V. DANIELSON | 2015 |
| 86. | JOHN D. FORESMAN | 2011 |
| | MICHAEL J. HALEY | 2015 |
| | THOMAS J. PHILLIPS | 2013 |
| 87. | PATRICIA A. MORSE | 2015 |
| 88. | THEODORE O. JOHNSON | 2015 |
| 89. | MARIA L. BARTON | 2015 |
| 90. | RICHARD W. MAY | 2015 |
| 91. | ELIZABETH BIOLETTE CHURCH | 2015 |
| 92. | BETH GIBSON | 2015 |
| 93. | MARK E. LUOMA | 2009 |
| 94. | GLENN A. PEARSON | 2015 |
| 95A. | JEFFREY G. BARSTOW | 2015 |
| 95B. | CHRISTOPHER S. NINOMIYA | 2015 |
| 96. | DENNIS H. GIRARD | 2011 |
| | ROGER W. KANGAS | 2015 |
| 97. | MARK A. WISTI | 2015 |
| 98. | ANDERS B. TINGSTAD, Jr. | 2015 |

# MUNICIPAL JUDGES

| | Term Expires January 1 of |
|---|---|
| RUSSELL F. ETHRIDGE | 2012 |
| CARL F. JARBOE | 2010 |
| MATTHEW R. RUMORA | 2010 |

# PROBATE JUDGES

| County | | Term Expires January 1 of |
|---|---|---|
| Alcona | LAURA A. FRAWLEY | 2013 |
| Alger/Schoolcraft | CHARLES C. NEBEL | 2013[1] |
| Allegan | MICHAEL L. BUCK | 2013 |
| Alpena | THOMAS J. LaCROSS | 2013 |
| Antrim | NORMAN R. HAYES | 2013 |
| Arenac | JACK WILLIAM SCULLY | 2013 |
| Baraga | TIMOTHY S. BRENNAN | 2013 |
| Barry | WILLIAM M. DOHERTY | 2013 |
| Bay | KAREN TIGHE | 2013 |
| Benzie | NANCY A. KIDA | 2013 |
| Berrien | MABEL JOHNSON MAYFIELD | 2009 |
| Berrien | THOMAS E. NELSON | 2013 |
| Branch | FREDERICK L. WOOD | 2013 |
| Calhoun | PHILLIP E. HARTER | 2011 |
| Calhoun | GARY K. REED | 2013 |
| Cass | SUSAN L. DOBRICH | 2013 |
| Cheboygan | ROBERT JOHN BUTTS | 2013 |
| Chippewa | LOWELL R. ULRICH | 2013 |
| Clare/Gladwin | THOMAS P. McLAUGHLIN | 2013 |
| Clinton | LISA SULLIVAN | 2013 |
| Crawford | MONTE BURMEISTER | 2013 |
| Delta | ROBERT E. GOEBEL, Jr. | 2013 |
| Dickinson | THOMAS D. SLAGLE | 2013 |
| Eaton | MICHAEL F. SKINNER | 2013 |
| Emmet/Charlevoix | FREDERICK R. MULHAUSER | 2013 |
| Genesee | JENNIE E. BARKEY | 2015 |
| Genesee | F. KAY BEHM | 2013[2] |
| Gogebic | JOEL L. MASSIE | 2013 |
| Grand Traverse | DAVID L. STOWE | 2013 |
| Gratiot | JACK T. ARNOLD | 2013 |

[1] From March 17, 2009.

[2] From May 11, 2009.

| | | |
|---|---|---|
| Hillsdale | MICHAEL E. NYE | 2013 |
| Houghton | FRASER T. STROME | 2013[3] |
| Huron | DAVID L. CLABUESCH | 2013 |
| Ingham | R. GEORGE ECONOMY | 2013 |
| Ingham | RICHARD JOSEPH GARCIA | 2015 |
| Ionia | ROBERT SYKES, JR. | 2013 |
| Iosco | JOHN D. HAMILTON | 2013 |
| Iron | C. JOSEPH SCHWEDLER | 2013 |
| Isabella | WILLIAM T. ERVIN | 2013 |
| Jackson | DIANE M. RAPPLEYE | 2013 |
| Kalamazoo | CURTIS J. BELL, JR. | 2013 |
| Kalamazoo | PATRICIA N. CONLON | 2015 |
| Kalamazoo | DONALD R. HALSTEAD | 2011 |
| Kalkaska | LYNNE MARIE BUDAY | 2013 |
| Kent | NANARUTH H. CARPENTER | 2011 |
| Kent | PATRICIA D. GARDNER | 2013 |
| Kent | G. PATRICK HILLARY | 2013 |
| Kent | DAVID M. MURKOWSKI | 2015 |
| Keweenaw | JAMES G. JAASKELAINEN | 2013 |
| Lake | MARK S. WICKENS | 2013 |
| Lapeer | JUSTUS C. SCOTT | 2013 |
| Leelanau | JOSEPH E. DEEGAN | 2013 |
| Lenawee | GREGG P. IDDINGS | 2013[4] |
| Livingston | CAROL HACKETT GARAGIOLA | 2013 |
| Luce/Mackinac | W. CLAYTON GRAHAM | 2013 |
| Macomb | KATHRYN A. GEORGE | 2015 |
| Macomb | PAMELA GILBERT O'SULLIVAN | 2013 |
| Manistee | THOMAS N. BRUNNER | 2013 |
| Marquette | MICHAEL J. ANDEREGG | 2013 |
| Mason | MARK D. RAVEN | 2013 |
| Mecosta/Osceola | LaVAIL E. HULL | 2013 |
| Menominee | WILLIAM A. HUPY | 2013 |
| Midland | DORENE S. ALLEN | 2013 |
| Missaukee | CHARLES R. PARSONS | 2013 |
| Monroe | JOHN A. HOHMAN, JR. | 2013 |
| Monroe | PAMELA A. MOSKWA | 2015 |
| Montcalm | CHARLES W. SIMON, III | 2013 |
| Montmorency | JOHN E. FITZGERALD | 2013 |
| Muskegon | NEIL G. MULLALLY | 2011 |
| Muskegon | GREGORY C. PITTMAN | 2013 |
| Newaygo | GRAYDON W. DIMKOFF | 2013 |

[3] From March 20, 2009.

[4] From April 13, 2009.

| | | |
|---|---|---|
| Oakland | LINDA S. HALLMARK | 2013 |
| Oakland | EUGENE ARTHUR MOORE | 2011 |
| Oakland | DANIEL A. O'BRIEN | 2015 |
| Oakland | ELIZABETH M. PEZZETTI | 2011 |
| Oceana | BRADLEY G. LAMBRIX | 2013 |
| Ogemaw | SHANA A. LAMBOURN | 2013 |
| Ontonagon | JOSEPH D. ZELEZNIK | 2013 |
| Oscoda | KATHRYN JOAN ROOT | 2013 |
| Otsego | MICHAEL K. COOPER | 2013 |
| Ottawa | MARK A. FEYEN | 2013 |
| Presque Isle | DONALD J. McLENNAN | 2013 |
| Roscommon | DOUGLAS C. DOSSON | 2013 |
| Saginaw | FAYE M. HARRISON | 2015 |
| Saginaw | PATRICK J. McGRAW | 2013 |
| St. Clair | ELWOOD L. BROWN | 2015 |
| St. Clair | JOHN TOMLINSON | 2013 |
| St. Joseph | THOMAS E. SHUMAKER | 2013 |
| Sanilac | R. TERRY MALTBY | 2013 |
| Shiawassee | JAMES R. CLATTERBAUGH | 2013 |
| Tuscola | W. WALLACE KENT, JR. | 2013 |
| Van Buren | FRANK D. WILLIS | 2013 |
| Washtenaw | NANCY CORNELIA FRANCIS | 2015 |
| Washtenaw | DARLENE A. O'BRIEN | 2013 |
| Wayne | JUNE E. BLACKWELL-HATCHER | 2013 |
| Wayne | FREDDIE G. BURTON, JR. | 2013 |
| Wayne | JUDY A. HARTSFIELD | 2015 |
| Wayne | MILTON L. MACK, JR. | 2011 |
| Wayne | CATHIE B. MAHER | 2011 |
| Wayne | MARTIN T. MAHER | 2015 |
| Wayne | DAVID J. SZYMANSKI | 2015 |
| Wayne | FRANK S. SZYMANSKI | 2013 |
| Wexford | KENNETH L. TACOMA | 2013 |

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| Baraga | L'Anse | 12 |
| Barry | Hastings | 5 |
| Bay | Bay City | 18 |
| Benzie | Beulah | 19 |
| Berrien | St. Joseph | 2 |
| Branch | Coldwater | 15 |
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| Cass | Cassopolis | 43 |
| Charlevoix | Charlevoix | 33 |
| Cheboygan | Cheboygan | 53 |
| Chippewa | Sault Ste. Marie. | 50 |
| Clare | Harrison | 55 |
| Clinton | St. Johns | 29 |
| Crawford | Grayling | 46 |
| Delta | Escanaba | 47 |
| Dickinson | Iron Mountain | 41 |
| Eaton | Charlotte | 5 |
| Emmet | Petoskey | 33 |
| Genesee | Flint | 7 |
| Gladwin | Gladwin | 55 |
| Gogebic | Bessemer | 32 |
| Grand Traverse | Traverse City | 13 |
| Gratiot | Ithaca | 29 |
| Hillsdale | Hillsdale | 1 |
| Houghton | Houghton | 12 |
| Huron | Bad Axe | 52 |
| Ingham | Mason, Lansing. | 30 |
| Ionia | Ionia | 8 |
| Iosco | Tawas City | 23 |
| Iron | Crystal Falls | 41 |
| Isabella | Mount Pleasant. | 21 |
| Jackson | Jackson | 4 |
| Kalamazoo | Kalamazoo | 9 |
| Kalkaska | Kalkaska | 46 |
| Kent | Grand Rapids | 17 |
| Keweenaw | Eagle River | 12 |
| Lake | Baldwin | 51 |
| Lapeer | Lapeer | 40 |
| Leelanau | Leland | 13 |
| Lenawee | Adrian | 39 |
| Livingston | Howell | 44 |
| Luce | Newberry | 11 |
| Mackinac | St. Ignace | 50 |
| Macomb | Mount Clemens | 16 |
| Manistee | Manistee | 19 |
| Marquette | Marquette | 25 |
| Mason | Ludington | 51 |
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| Ontonagon | Ontonagon | 32 |
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| Oscoda | Mio | 23 |
| Otsego | Gaylord | 46 |
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# ADMINISTRATIVE ORDER No. 2009-2

Entered January 14, 2009 (File No. 2006-25)—REPORTER.

On order of the Court, the provisions of the pilot project authorized in Administrative Order No. 2008-1, relating to the use of parenting time plans and nonadversarial language in domestic relations proceedings in the 17th Circuit Court, are continued in effect through February 28, 2011.

# ADMINISTRATIVE ORDER No. 2009-1

EXTENSION AND EXPANSION OF E-FILING PILOT PROJECT

Entered January 20, 2009 (File No. 2002-37)—REPORTER.

On order of the Court, the provisions of the e-filing pilot project authorized in Administrative Order No. 2007-3 in the Oakland Circuit Court are continued in effect through July 30, 2013.

Further, the Oakland Circuit Court shall file an annual report with the Court within 90 days of this order covering the project to date and by January 1 of each following year (or more frequently or on another date as specified by the Court) that outlines the following:

1. Detailed financial data that shows the total amount of money collected in fees for documents filed and/or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

2. Detailed financial information regarding the distribution/retention of collected fees, including the amount paid to Wiznet per document and in total for the subject period and the amount retained by the court per document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

3. A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

4. A detailed itemization of all cost savings to the court whether by reduced personnel or otherwise and a statement of whether any cost savings to the court are reflected in the fee structure charged to the parties.

5. Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

6. A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

Further, the Oakland Circuit Court is authorized to expand the case-type codes eligible for participation in the e-filing pilot project to those that begin with "A" and "P."

# ADMINISTRATIVE ORDER No. 2009-3

ADOPTION OF CONCURRENT JURISDICTION PLAN FOR THE 53RD CIRCUIT COURT OF CHEBOYGAN AND PRESQUE ISLE COUNTIES AND THE PRESQUE ISLE COUNTY PROBATE COURT

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Entered March 10, 2009, effective July 1, 2009 (File No. 2004-04)—REPORTER.

Administrative Order No. 2003-1 and MCL 600.401 *et seq*. authorize Michigan trial courts to adopt concurrent jurisdiction plans within a county or judicial circuit, subject to approval of the Court.

The Court hereby approves adoption of the following concurrent jurisdiction plan effective July 1, 2009:

• The 53rd Circuit Court of Cheboygan and Presque Isle Counties and the Presque Isle County Probate Court.

The plan shall remain on file with the state court administrator.

Amendments of concurrent jurisdiction plans may be implemented by local administrative order pursuant to MCR 8.112. Plan amendments shall conform to the requirements of Administrative Order No. 2003-1 and MCL 600.401 *et seq*.

# ADMINISTRATIVE ORDER No. 2009-4

E-FILING PILOT PROJECT IN THE 42ND CIRCUIT COURT OF THE MICHIGAN COURT RULES.

Entered May 19, 2009 (File No. 2002-37)—REPORTER.

On order of the Court, the 42nd Circuit Court is authorized to implement an electronic filing pilot project to study, in asbestos cases, the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin May 19, 2009, or as soon thereafter as is possible, and shall remain in effect until July 30, 2013, or further order of this Court. The 42nd Circuit Court acknowledges that certain rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of this pilot project, the 42nd Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 42nd Circuit Court will track the participation in and effectiveness of this pilot project and shall report to and provide such information upon request by the State Court Administrative Office.

1. Construction

The purpose of the pilot project is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot project.

This court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. The Michigan Court Rules govern all other aspects of the cases involved in the pilot project, except for matters related to electronically filing documents during the pilot project.

2. Definitions

(a) "Clerk" means the Midland County Clerk.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot project.

(c) "LAO" means all local administrative orders governing the 42nd Circuit Court.

(d) "MCR" means the Michigan Court Rules.

(e) "Pilot project" means the initiative by the 42nd Circuit Court, the Clerk, and the Midland County Information Systems Department in conjunction with Wiznet, Inc., CherryLAN Systems, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents.

(f) "Asbestos" means the matters that the pilot project will test and are described as all pending cases identified as an "NP" Case Type based in whole or in part on a claim of injury as a result of exposure to asbestos.

(g) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

3. Participation in the Pilot Project

(a) Participation in the pilot project shall be mandatory in all pending "Asbestos" type cases. Participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to the participating judge.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the court recognizes that circumstances may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the 42nd Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the pilot project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

(a) In an effort to facilitate uniform service within the scope of this pilot project, the 42nd Circuit Court strongly recommends electronic service.

(b) Program participants must submit e-filings pursuant to these rules and the pilot project's technical requirements. The clerk may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing

by the Office of the Clerk during the normal business hours of 8:00 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process e-filings on a first-in, first-out basis.

(d) E-filings shall be treated as if they were hand-delivered to the court for all purposes under statute, the MCR, and the LAO.

(e) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

(i) Signatures submitted electronically shall use the following form: /s/ *John L. Smith*.

(ii) A document that requires a signature under penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(f) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory, or opposing party.

(g) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot project. The court and the clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(h) By electronically filing the document, the electronic filer affirms compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies; Hearings on Motions; Fees

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR, and the LAO as if the e-filings were hand-delivered.

(b) The electronic submission of a motion and brief through this pilot project satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

(c) Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the clerk at the same time and in the same amount as required by statute, court rule, or administrative order.

(i) Each e-filing is subject to the following e-filing fees;

| **Type of Filing** | **Fee** |
|---|---|
| EFO (e-filing only) | $5.00 |
| EFS (e-filing with service) | $8.00 |
| SO (service only) | $5.00 |

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall provide the court and opposing parties with one e-mail address with the functionality required for the pilot project. All service shall originate from and be perfected upon this e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the

e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

(i) the parties shall provide the court and the opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation of delivery, and

(iv) parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

(d) Proof of service shall be submitted to the 42nd Circuit Court according to MCR 2.104 and this administrative order.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case in each transaction.

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

(c) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(d) All e-filings, subject to subsection 6(c) above, shall be served on the parties in the same format and form as submitted to the court.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the pilot project and must be filed by the traditional methods provided in the MCR and the LAO:

(a) documents to be filed under seal (pursuant to court order),

(b) initiating documents, and

(c) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) For purposes of this pilot project, e-filings are the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified or true copies of e-filed documents shall be issued in the conventional manner by the clerk in compliance with the Michigan Trial Court Case File Management Standards.

(c) At the conclusion of the pilot project, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

(d) At the conclusion of the pilot project, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and public access in a manner consistent with the instructions of the Court and the court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may

agree to accept service from the court via facsimile pursuant to the procedures set forth in Section 6(c) above.

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as format or conversion problems or inability to access the pilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the 42nd Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) With respect to any e-filing, the following requirements for personal information shall apply:

(i) Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

(ii) Names of Minor Children. Unless named as a party, the identity of a minor child shall not be included in e-filings. If a nonparty minor child must be mentioned, only the initials of that child's name may be used.

(iii) Dates of Birth. An individual's full birth date shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

(iv) Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

(v) Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

(vi) Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state shall be used.

(b) Parties wishing to file a complete personal data identifier listed above may:

(i) Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal, may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files, or

(ii) Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

(c) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

(i) Medical records, treatment and diagnosis;

(ii) Employment history;

(iii) Individual financial information;

(iv) Insurance information;

(v) Proprietary or trade secret information;

(vi) Information regarding an individual's cooperation with the government; and

(vii) Personal information regarding the victim of any criminal activity.

13. Records and Reports: Further, the 42nd Circuit Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each

year (or more frequently or on another date as specified by the Court) that outlines the following:

(a) Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to Wiznet per document and in total for the subject period, the amount paid to CherryLAN in total for the subject period, the amount retained by the court per document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

(c) A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

(d) A detailed itemization of all cost savings to the court whether by reduced personnel or otherwise and a statement of whether any cost savings to the court are reflected in the fee structure charged to the parties.

(e) Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

(f) A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the state court administrator.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot project, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 30, 2013.

# ADMINISTRATIVE ORDER No. 1985-5

ADOPTION OF AMENDMENTS OF JUVENILE COURT STANDARDS AND ADMINISTRATIVE GUIDELINES FOR THE CARE OF CHILDREN

Entered May 19, 2009, effective September 1, 2009 (File No. 2008-40) —REPORTER.

[The present language is amended as indicated below. Underlining indicates new text and strikeover indicates text that has been deleted.]

Pursuant to Administrative Order No. 1985-5, this Court adopted the *Juvenile Court Standards and Administrative Guidelines for the Care of Children,* ~~the Standards to take effect on May 1, 1985 and to expire on May 1, 1988~~ as amended by Administrative Order No. 1988-3. We now order that the ~~Juvenile Court Standards and Administrative Guidelines~~ *Juvenile Court Standards and Administrative Guidelines* continue in effect, as modified ~~infra~~ below, until the further order of this Court:

Juvenile Court Standards and Administrative Guidelines for the Care of Children

I. Court administrators, supervisory personnel, county juvenile officers, probation officers, caseworkers, and personnel of court-operated child care facilities shall meet the following minimum standards in order to qualify for employment, unless the state court admin-

istrator grants an exception under I(G). *Desired standards are those preferred qualifications that extend beyond minimal standards but are not required to perform the job function.*

These standards shall apply only to new staff hired by the juvenile court on or after the effective date of these standards. A court employee who is currently in a position that was approved under regulations that preceded the implementation of these standards shall be deemed qualified for that position. A court-appointed person hired ~~subsequent to~~ after the effective date of these standards shall meet the minimum qualification of these standards for that position.

A. *Court Administrator/Director*

The person in the juvenile court who is directly responsible to the chief or presiding probate judge and who is delegated administrative responsibilities for the operation of the court.

A court administrator, at the time of appointment, shall possess the following qualifications:

1. Education and EXPERIENCE

a. Desired Standards

(1) Master's degree in social sciences, business or public administration, education, criminal justice, a related field that qualifies the person to manage or supervise the delivery of juvenile services, or a law degree, with a minimum of four years of supervisory experience with juvenile court staff.

b. Minimum Standards

(1) Master's degree in social sciences, business or public administration, education, criminal justice, a related field that qualifies the person to manage or supervise the delivery of juvenile services, or a law

degree, with a minimum of one year of experience working with juvenile court staff or related human service field.

(2) A bachelor's degree in those same areas and two years of supervisory experience working with juvenile court staff or related human services field. (Courts with only one level of supervision may use two years of casework experience in lieu of supervisory experience.)

c. [Unchanged.]

B. *Supervisory Personnel*

Those directly responsible for ongoing supervision of professional and support staff providing direct services to children, youth, and their families.

A supervisor, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1) Master's degree in social work, education, ~~or~~ a human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with one year of professional experience in juvenile court work.

b. Minimum Standards

(1) A bachelor's degree in social sciences, education, ~~or~~ a human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with two years of professional experience with a juvenile court staff or in a child welfare agency.

c. [Unchanged.]

*C. Direct Services: Probation Officers/Casework Staff*

The professional staff who work directly with children and their families and other relevant individuals

and who are primarily responsible for the development, implementation and review of plans for children, youth and their families.

Each county shall provide for a minimum of one delinquency probation officer/casework staff person (but exclusive of clinical staff and detention home personnel) for every 6,000 (or major fraction thereof) children under 19 years of age in the county.

A probation officer/caseworker, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1) Bachelor's degree in social work, criminal justice, education, ~~or~~ behavioral sciences, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, with two years of casework experience in juvenile court or a related child welfare agency and must complete the Michigan Judicial Institute certification training for juvenile court staff within two years after date of employment.

b. Minimum Standards

(1) Bachelor's degree in social sciences, education, ~~or~~ a related human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and must complete the Michigan Judicial Institute certification training for juvenile court staff within two years after date of employment.

c. [Unchanged.]

*D. Administrator of County Child Care Facility*

The person responsible to the chief or presiding probate judge or to the juvenile court administrator and to whom is delegated overall administrative responsi-

bility for the day-to-day operation of county child care facilities operated by the court.

The administrator, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1) Master's degree in social work, sociology, psychology, guidance and counseling, education, business administration, criminal justice, ~~or~~ public administration, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and two years of supervisory experience in a juvenile court, public or private child care facility.

b. Minimum Standards

(1) Same as above with a minimum of one year of supervisory experience in a juvenile court, public or private child care facility.

(2) Bachelor's degree in social science, education, ~~or~~ human service field, or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and two years of experience in a juvenile court, public or private child care facility.

c. [Unchanged.]

*E. Child Care Staff Supervisor*

The child care supervisor is directly responsible for supervision of child care workers in the facility.

The child care supervisor, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1) Bachelor's degree in social work, psychology, sociology, education, criminal justice, ~~or~~ related human services field, or a related field that qualifies the person

to manage or supervise the delivery of juvenile services, with two years of experience with a juvenile court or a public or private child care agency.

b. Minimum Standards

(1) Two years of college in a human services or education field or a related field that qualifies the person to manage or supervise the delivery of juvenile services, and two years of work experience in a child care institution.

c. [Unchanged.]

*F. Child Care Worker*

The person who provides direct care of children in the facility.

A child care worker, at the time of appointment, shall possess the following qualifications:

1. Education and Experience

a. Desired Standards

(1) Bachelor's degree in social sciences, ~~or~~ human services, or a related field, that qualifies the person to work with juveniles.

b. Minimum Standards

(1) A high school diploma or its equivalent.

c. [Unchanged.]

*G. Exceptions*

The state court administrator may authorize a court to hire an employee who does not meet the education requirements established in these standards if the court provides a reasonable period within which the candidate must meet the education standards.

H. A bachelor's degree or other post-secondary degree is a degree from a college or university that is

accredited by an accrediting body of the Council for Higher Education Accreditation.

II. [Unchanged.]

*Staff Comment*: These amendments expand the eligible education categories prospective employees (including administrators, supervisory personnel, county juvenile officers, probation officers, caseworkers, and personnel of court-operated child care facilities) must meet to be considered for employment. In addition, the amendments allow the state court administrator to waive the employment standards if the court provides a reasonable period within which the candidate must meet the education standards, and establish minimum accreditation requirements.

The staff comment is not an authoritative construction by the Court.

# AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted January 14, 2009, effective May 1, 2009 (File No. 2005-37)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underlining and deletions by strikeover, unless otherwise indicated below:]

RULE 5.105. MANNER AND METHOD OF SERVICE.

(A)-(C) [Unchanged.]

(D) Service on Persons Under Legal Disability or Otherwise Legally Represented. In a guardianship or conservatorship proceeding, a petition or notice of hearing asking for an order that affects the ward or protected individual must be served on that ward or protected individual if he or she is 14 years of age or older. In all other circumstances~~matters~~, service on an interested person under legal disability or otherwise legally represented must~~may~~ be made ~~instead~~ on the following:

(1) The guardian of an adult, conservator, or guardian ad litem of a minor or other legally ~~disabled person~~ incapacitated individual, except with respect to:

(a) a petition for commitment or

(b) a petition, account, inventory, or report made as the guardian, conservator, or guardian ad litem.

(2) The trustee of a trust with respect to a beneficiary of the trust, except that the trustee may not be served on behalf of the beneficiary on petitions, accounts, or reports made by the trustee as trustee or as personal representative of the settlor's estate.

(3) The guardian ad litem of any unascertained or unborn person.

(4) A parent of a minor with whom the minor resides, provided the interest of the parent in the outcome of the hearing is not in conflict with the interest of the minor and provided the parent has filed an appearance on behalf of the minor.

(5) The attorney for an interested person who has filed a written appearance in the proceeding. If the appearance is in the name of the office of the United States attorney, the counsel for the Veterans' Administration, the Attorney General, the prosecuting attorney, or the county or municipal corporation counsel, by a specifically designated attorney, service must be directed to the attention of the designated attorney at the address stated in the written appearance.

(6) The agent of an interested person under an unrevoked power of attorney filed with the court. A power of attorney is deemed unrevoked until written revocation is filed or it is revoked by operation of law.

For purposes of service, an emancipated minor without a guardian or conservator is not deemed to be under legal disability.

(E) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A) [Unchanged.]

(B) Special Conditions for Interested Persons.

(1) Claimant. Only a claimant who has properly presented a claim and whose claim has not been disallowed and remains ~~files a claim with the court, with a personal representative, or with a trustee of a trust required to give notice to creditors pursuant to MCL 700.7504, and whose claim remains undetermined or~~ unpaid need be notified of specific proceedings under subrule (C).

(2) Devisee. Only a devisee whose devise remains unsatisfied need be notified of specific proceedings under subrule (C).

(3) Trust as Devisee. If either a trust or a trustee is a devisee, the trustee is the interested person. If no trustee has qualified, the interested persons are the current trust beneficiaries and the nominated trustee, if any.

(4) Father of a Child Born out of Wedlock. Except as otherwise provided by law, the natural father of a child born out of wedlock need not be served notice of proceedings in which the child's parents are interested persons unless his paternity has been determined in a manner provided by law.

(5) Decedent as Interested Person. If a decedent is an interested person, the personal representative of the decedent's estate is the interested person. If there is no personal representative, the interested persons are the known heirs of the estate of the decedent, and the known devisees. If there are no known heirs, the Attorney General must receive notice.

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(2) [Unchanged.]

(3) The persons interested in a petition to determine the heirs of a decedent are the presumptive heirs.

(4)-(5) [Unchanged.]

(6) The persons interested in a proceeding for examination of an account of a fiduciary are the

(a) devisees of a testate estate, and if one of the devisees is a trustee or a trust, the persons referred to in MCR 5.125(B)(3),

(b) heirs of an intestate estate,

(c) protected person and presumptive heirs of the protected person in a conservatorship,

(d) ward and presumptive heirs of the ward in a guardianship,

~~(d)~~(e) claimants,

~~(e)~~(f) current trust beneficiaries in a trust accounting, and

~~(f)~~(g) ~~such~~ other persons whose interests would be adversely affected by the relief requested, including insurers and sureties who might be subject to financial obligations as the result of the approval of the account.

(7)–(25) [Unchanged.]

(26) The persons interested in a petition by a conservator for instructions or approval of sale of real estate or other assets are

(a) the protected individual and

(b) those persons listed in subrule (C)(~~23~~24) who will be affected by the instructions or order.

(27) The persons interested in receiving a copy of an inventory or account of a conservator or of a guardian are:

(a) the protected individual or ward, if he or she is 14 years of age or older and can be located,

(b) the presumptive heirs of the protected individual or ward, ~~and~~

(c) the claimants~~.~~, and

(d) the guardian ad litem.

(28)–(31) [Unchanged.]

(32) The persons interested in a proceeding affecting a trust other than those already covered by subrules (C)(6) and (C)(28) are:

(a) the trust beneficiaries affected by the relief requested,

(b) the current trustee,

(c) the proposed successor trustee, if any, and

(d) other persons whose interests are affected by the relief requested.

(D)-(E) [Unchanged.]

RULE 5.206. DUTY TO COMPLETE ADMINISTRATION.

A fiduciary and an attorney for a fiduciary must take all actions reasonably necessary to regularly administer an estate and close administration of an estate. If the fiduciary or the attorney fails to take such actions, the court may act to regularly close the estate and assess costs against the fiduciary or attorney personally.

RULE 5.302. COMMENCEMENT OF DECEDENT ESTATES.

(A) [Unchanged.]

(B) Sworn Testimony Form. At least one ~~A~~ sworn testimony form sufficient to establish the identity of ~~interested persons~~ heirs and devisees must be submitted with the application or petition that commences proceed-

ings. ~~The~~ A sworn testimony form must be executed before a person authorized to administer oaths.

(C)-(D) [Unchanged.]

RULE 5.306. NOTICE TO CREDITORS, PRESENTMENT OF CLAIMS.

(A)-(C) [Unchanged.]

(D) Presentment of Claims. A claim shall ~~may~~ be presented to the personal representative by mailing or delivering the claim to the personal representative, or the personal representative's attorney, or by filing the claim with the court and mailing or delivering a copy of the claim to the personal representative.

(E) A claim is considered presented

(1) on mailing, if addressed to the personal representative~~,~~ or the personal representative's attorney ~~or the court~~, or

(2) in all other cases, when received by the personal representative or the personal representative's attorney or when filed with the court.

For purposes of this subrule, personal representative includes a proposed personal representative.

RULE 5.307. REQUIREMENTS APPLICABLE TO ALL DECEDENT ESTATES.

(A) [Unchanged.]

(B) Notice of Continued Administration. If unable to complete estate administration within one year of the original personal representative's appointment, the personal representative must file with the court and serve on all interested persons a notice that the estate remains under administration, specifying the reason for the continuation of the administration. The notice must be given within 28 days of the first anniversary of

appointment and all subsequent anniversaries during which the administration remains uncompleted.

(B)-(D) [Relettered (C)-(E) only.]

RULE 5.309. INFORMAL PROCEEDINGS.

(A)-(B) [Unchanged.]

(C) Notice of Intent to Seek Informal Appointment as Personal Representative.

(1) A person who desires to be appointed personal representative in informal proceedings must give notice of intent to seek appointment and a copy of the application to each person having a prior or equal right to appointment who does not renounce ~~waive~~ this right in writing before the appointment is made.

(2)-(3) [Unchanged.]

(D) [Unchanged.]

RULE 5.403. PROCEEDINGS ON TEMPORARY GUARDIANSHIP.

(A)-(B) [Unchanged.]

(C) Temporary Guardian for Incapacitated Individual Where no Current Appointment; Guardian Ad Litem. A petition for a temporary guardian for an alleged incapacitated individual shall specify in detail the emergency situation requiring the temporary guardianship. For the purpose of an emergency hearing ~~for appointment of a temporary guardian of an alleged incapacitated individual~~, the court shall appoint a guardian ad litem unless such appointment would cause delay and the alleged incapacitated individual would likely suffer serious harm if immediate action is not taken. The duties of the guardian ad litem are to visit the alleged incapacitated individual, report to the court and take such other action as directed by the court. The requirement of MCL 700.5312(1) that the court hold

the fully noticed hearing within 28 days applies only when the court grants temporary relief.

(D) Temporary Guardian for Minor.

(1) ~~Prior to~~Before Appointment of Guardian. If necessary during proceedings for the appointment of a guardian for a minor, the court may appoint a temporary guardian after a hearing at which testimony is taken. The petition for a temporary guardian shall specify in detail the conditions requiring a temporary guardianship. Where a petition for appointment of a limited guardian had been filed, the court, before the appointment of a temporary guardian, shall take into consideration the limited guardianship placement plan in determining the powers and duties of the parties during the temporary guardianship.

(2) [Unchanged.]

RULE 5.411. BOND OF CONSERVATOR. [NEW RULE.]

In all conservatorships in which there are unrestricted assets, the court may require a bond in the amount the court finds necessary to protect the estate or as required by statute. No bond shall be required of trust companies organized under the laws of Michigan or of banks with trust powers unless the court orders that a bond be required.

*Staff Comment*: These amendments were adopted primarily as a result of submissions by the Michigan Probate Judges Association and the State Bar of Michigan's Probate and Estate Planning Section. This was a joint effort to increase the oversight of guardianship and conservatorship proceedings, as well as to improve other procedures in probate court.

The staff comment is not an authoritative construction by the Court.

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Adopted January 20, 2009, effective May 1, 2009 (File No. 2007-31)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underlining and deletions by strikeover, unless otherwise indicated below:]

RULE 4.201. SUMMARY PROCEEDINGS TO RECOVER POSSESSION OF PREMISES.

(A)-(F) [Unchanged.]

(G) Claims and Counterclaims.

(1) Joinder.

(a) A party may join:

(i) A money claim or counterclaim described by MCL 600.5739. A money claim must be separately stated in the complaint. A money counterclaim must be labeled and separately stated in a written answer.

(ii) A claim or counterclaim for equitable relief.

(b) ~~If personal jurisdiction over the defendant was not obtained~~ Unless service of process under MCR 2.105 was made on the defendant, a money claim must be

(i) dismissed without prejudice ~~if the defendant does not answer or appear~~, or

(ii) adjourned until ~~personal jurisdiction over the defendant is obtained~~ service of process is complete if the defendant does not appear or file an answer to the complaint.

(c) A court with a territorial jurisdiction which has a population of more than 1,000,000 may provide, by local rule, that a money claim or counterclaim must be tried separately from a claim for possession unless joinder is allowed by leave of the court pursuant to subrule (G)(1)(e).

(d) If trial of a money claim or counterclaim

(i) might substantially delay trial of the possession claim, or

(ii) requires that the premises be returned before damages can be determined, the court must adjourn the trial of the money claim or counterclaim to a date no later than 28 days after the time expires for issuing an order of eviction. A party may file and serve supplemental pleadings no later than 7 days before trial, except by leave of the court.

(e) If adjudication of a money counterclaim will affect the amount the defendant must pay to prevent issuance of an order of eviction, that counterclaim must be tried at the same time as the claim for possession, subrules (G)(1)(c) and (d) notwithstanding, unless it appears to the court that the counterclaim is without merit.

(2) Removal.

(a) A summary proceedings action need not be removed from the court in which it is filed because an equitable defense or counterclaim is interposed.

(b) If a money claim or counterclaim exceeding the court's jurisdiction is introduced, the court, on motion of either party or on its own initiative, shall order removal of that portion of the action to the circuit court, if the money claim or counterclaim is sufficiently shown to exceed the court's jurisdictional limit.

(H)-(O) [Unchanged.]

CORRIGAN, J. (*concurring*). I support the proposed amendment of MCR 4.201. I write separately to suggest that the Property Management Association of Michigan (PMAM) first present to the Legislature its proposed changes to the existing statutes that govern service of process. I appreciate PMAM's sensible desire to reduce unnecessary and redundant court appearances by property managers. Nevertheless, PMAM should direct its

efforts to consolidate existing service of process provisions to the Legislature before seeking a remedy in this Court.

Currently, service of process for possession of rented premises must be personal. MCL 600.5718. The Legislature also allows a party to bring a separate claim or counterclaim for a money judgment. MCL 600.5739. No statutory authority, however, permits service for a money judgment in the same manner as is allowed for possession of rented premises. Stated slightly differently, while statutory authority permits a landlord to file a claim for possession and a claim for a money judgment, no statutory authority allows service for possession of rented premises to be considered as service for a money judgment. Therefore, despite PMAM's proposed amendment of MCR 4.201, no existing statute states that service for possession is sufficient for purposes of service for a money judgment. Instead, our statutes require personal service for possession of rented premises, and PMAM's proposed amendment to simplify the existing requirements governing service for a money judgment would create inconsistency between current statutes and court rules.

Because of this inconsistency, I suggest that PMAM seek relief from the Legislature to amend the service provisions in our existing statutes.

*Staff Comment*: The amendment of MCR 4.201(G)(1)(b) clarifies that service of process for purposes of a money claim is sufficient if completed pursuant to MCR 2.105; otherwise, if the defendant does not appear or file an answer to the complaint, a money claim must be dismissed without prejudice, or adjourned until service of process is complete.

The staff comment is not an authoritative construction by the Court.

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Adopted January 20, 2009, effective May 1, 2009 (File No. 2007-41)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underlining and deletions by strikeover, unless otherwise indicated below:]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(J) [Unchanged.]

(K) Fault of Nonparties; Notice.

(1) Applicability. This subrule~~rule~~ applies to actions based on tort or another legal theory seeking damages for personal injury, property damage, ~~and~~or wrongful death to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply.

(2)-(4) [Unchanged.]

(L)-(M) [Unchanged.]

RULE 2.403. CASE EVALUATION.

(A)-(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1)-(9) [Unchanged.]

(10) ~~In an action filed on or after March 28, 1996, for~~For the purpose of subrule (O)(1), in an action filed on or after March 28, 1996, and ~~a verdict awarding damages for~~ based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, a verdict awarding damages shall be adjusted for relative fault as provided by MCL 600.6304.

(11) [Unchanged.]

*Staff Comment*: The amendment of MCR 2.112 clarifies that the subrule provisions apply to actions based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death to which MCL 600.2957 and MCL 600.6304 apply, and more closely

parallels the statutory provisions on which it is based. A similar change has been made in MCR 2.403(O)(10), which was also based on MCL 600.6304.

The staff comment is not an authoritative construction by the Court.

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Adopted January 20, 2009, effective May 1, 2009 (File No. 2007-42)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underlining and deletions by strikeover, unless otherwise indicated below:]

RULE 7.302. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) If, on its own initiative or on a party's motion, the court concludes that a brief does not substantially comply with the requirements of this rule, it may order the party who filed the brief to file a supplemental brief within a specified time correcting the deficiencies, or it may strike the nonconforming brief.

(F)-(H) [Unchanged but relettered (G)-(I).]

RULE 7.314. APPEALS IN WHICH NO PROGRESS HAS BEEN MADE.

(A)-(B) [Unchanged.]

(C) The court may dismiss an appeal, application, or an original proceeding for lack of jurisdiction or failure of a party to pursue the case in substantial conformity with the rules.

RULE 7.316. MISCELLANEOUS RELIEF OBTAINABLE IN SUPREME COURT.

(A) Relief Obtainable. The Supreme Court may, at any time, in addition to its general powers:

(1)-(8) [Unchanged.]

(9) dismiss an appeal, application, or an original proceeding for lack of jurisdiction or failure of a party to pursue the case in substantial conformity with the rules.

(B)-(D) [Unchanged.]

*Staff Comment*: These amendments authorize the Supreme Court to require a party to submit a corrective brief or to strike a nonconforming brief, similar to the authority given the Court of Appeals in MCR 7.212(I). The amendments also allow the Supreme Court to dismiss a case that the appellant failed to pursue in substantial conformity with the rules.

The staff comment is not an authoritative construction by the Court.

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Adopted January 20, 2009, effective May 1, 2009 (File No. 2007-24)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underlining and deletions by strikeover, unless otherwise indicated below:]

RULE. 2.614. STAY OF PROCEEDINGS TO ENFORCE JUDGMENT.

(A) Automatic Stay; Exceptions: Injunctions, Receiverships, and Family Litigation.

(1) Except as provided in this rule, execution may not issue on a judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after its entry. If a motion for new trial, a motion ~~to alter or amend the judgment, a motion for judgment notwithstanding the verdict, or a motion to amend or for additional findings of the court~~ for rehearing or reconsideration, or a motion for other relief from judgment is filed and served within 21 days after entry of the judgment or within further time the trial court has allowed for good cause during

that 21-day period, execution may not issue on the judgment and proceedings may not be taken for its enforcement until the expiration of 21 days after the entry of the order ~~on~~ deciding the motion, unless otherwise ordered by the court on motion for good cause. Nothing in this rule prohibits the court from enjoining the transfer or disposition of property during the 21-day period.

(2)-(3) [Unchanged.]

(B)-(G) [Unchanged.]

*Staff Comment*: The amendments of MCR 2.614 conform to recent amendments of MCR 2.119, MCR 7.204, and MCR 7.205, adopted May 28, 2008, which clarified that a party seeking leave to appeal in the Court of Appeals has 21 days after the entry of an order deciding a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the order or judgment appealed to file a claim of appeal or an application for leave to appeal, if the motion is filed within the initial 21-day appeal period, or within further time the trial court has allowed for good cause during that 21-day period.

The staff comment is not an authoritative construction by the Court.

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Adopted March 10, 2009, effective May 1, 2009 (File No. 2007-40)—REPORTER.

[The present language is repealed and replaced by the following language, with additions indicated by underlining and deletions by strikeover, unless otherwise indicated below:]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(E) [Unchanged.]

(F) Late Appeal.

(1) When an appeal of right was not timely filed or was dismissed for lack of jurisdiction, or when an application for leave was not timely filed, the appellant may file an application as prescribed in subrule (B), file

5 copies of a statement of facts explaining the delay, and serve 1 copy on all other parties. The answer may challenge the claimed reasons for delay. The court may consider the length of and the reasons for delay in deciding whether to grant the application. In all other respects, submission, decision, and further proceedings are as provided in subrule (D).

(2) [Unchanged.]

(3) Except as provided in subrules (F)(4) and (F)(5), leave to appeal may not be granted if an application for leave to appeal is filed more than 12 months after the later of:

(a) [Unchanged.]

(b) [Unchanged.]

(4) [Unchanged.]

(5) Notwithstanding the 12-month limitation period otherwise provided in subrule (F)(3), leave to appeal may be granted if a party's claim of appeal is dismissed for lack of jurisdiction within 21days before the expiration of the 12-month limitation period, or at any time after the 12-month limitation period has expired, and the party files a late application for leave to appeal from the same lower court judgment or order within 21 days of the dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration. A party filing a late application in reliance on this provision must note the dismissal of the prior claim of appeal in the statement of facts explaining the delay.

(6)~~(5)~~ [Unchanged, but renumbered.]

(G) [Unchanged.]

*Staff Comment*: The amendment of MCR 7.205(F)(5) allows a party to file a late application for leave to appeal after the 12-month limitation period in MCR 7.205(F)(3) if the party's claim of appeal was dismissed for lack of jurisdiction within 21 days before the 12-month period expires or

after it expires. A party must file its late application for leave to appeal within 21 days of dismissal of the claim of appeal or within 21 days of denial of a timely filed motion for reconsideration.

The staff comment is not an authoritative construction by the Court.

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Adopted April 14, 2009, effective July 1, 2009 (File No. 2008-29)—REPORTER.

[The present language is amended as indicated below, with underlining used to designate new text and strike-over used to show text that has been deleted.]

RULE 3.901. APPLICABILITY OF RULES.

(A) [Unchanged.]

(B) Application. Unless the context otherwise indicates:

(1) MCR 3.901-3.928, 3.980, and 3.991-3.993 apply to delinquency proceedings and child protective proceedings;

(2) MCR 3.931-3.950 apply only to delinquency proceedings;

(3) MCR 3.951-3.956 apply only to designated proceedings;

(4) MCR 3.961-~~3.978~~3.979 apply only to child protective proceedings;

(5) MCR 3.981-3.989 apply only to minor personal protection order proceedings.

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2) [Unchanged.]

(3) "Confidential file" means:

(a) [Unchanged.]

(b) the contents of a social file maintained by the court, including materials such as

(i)-(vi) [Unchanged from the language of the September 30, 2008, order, which will become effective January 1, 2009.]

(vii) information regarding the identity or location of a foster parent, preadoptive parent, ~~or~~ relative caregiver, or juvenile guardian.

(4)-(10) [Unchanged.]

(11) "Guardian" means a person appointed as guardian of a child by a Michigan court pursuant to MCL 700.5204 or 700.5205, by a court of another state under a comparable statutory provision, or by parental or testamentary appointment as provided in MCL 700.5202, or a juvenile guardian appointed pursuant to MCL 712A.19a or MCL 712A.19c.

(12) "Juvenile Code" means 1944 (1st Ex Sess) PA 54, MCL 712A.1 *et seq*., as amended.

(13) "Juvenile Guardian" means a person appointed guardian of a child by a Michigan court pursuant to MCL 712A.19a or MCL 712A.19c. A juvenile guardianship is distinct from a guardianship authorized under the Estates and Protected Individuals Code.

(13)-(26) [Former (13)-(26) are renumbered (14)-(27), but otherwise unchanged.]

(B)-(E) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A)-(B) [Unchanged.]

(C) Juvenile Guardianships. In a juvenile guardianship, the following persons shall be entitled to notice:

(1) the child, if 11 years old or older;

(2) the Department of Human Services;

(3) the parents of the child, unless parental rights over the child have been terminated;

(4) the juvenile guardian or proposed juvenile guardian;

(5) any court that previously had jurisdiction over the child in a child protective proceeding, if different than the court that entered an order authorizing a juvenile guardianship;

(6) the attorneys for any party;

(7) the prosecuting attorney, if the prosecuting attorney has appeared in the case;

(8) if the child is a member of a federally recognized Indian tribe, the child's tribe, Indian custodian, or if the tribe is unknown, the Secretary of the Interior;

(9) the Michigan Children's Institute superintendent;

(10) any other person the court may direct to be notified.

(C)-(D) [Former (C)-(D) are relettered (D)-(E), but otherwise unchanged.]

RULE 3.965. PRELIMINARY HEARING.

(A)-(D) [Unchanged.]

(E) Advice; Initial Service Plan. If placement is ordered, the court must, orally or in writing, inform the parties:

(1) that the agency designated to care and supervise the child will prepare an initial service plan no later than 30 days after the placement;

(2) that participation in the initial service plan is voluntary unless otherwise ordered by the court;

(3) that the general elements of an initial service plan include:

(a) the background of the child and the family,

(b) an evaluation of the experiences and problems of the child,

(c) a projection of the expected length of stay in foster care, and

(d) an identification of specific goals and projected time frames for meeting the goals; ~~and~~

(4) that, on motion of a party, the court will review the initial service plan and may modify the plan if it is in the best interests of the child; and ~~.~~

(5) that the case may be reviewed for concurrent planning.

The court shall direct the agency to identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests, as required by MCL 722.954a(2). In a case to which MCL 712A.18f(6) applies, the court shall require the agency to provide the name and address of the child's attending physician of record or primary care physician.

RULE 3.975. POST-~~D~~DISPOSITIONAL PROCEDURES: CHILD IN FOSTER CARE.

(A)-(E) [Unchanged.]

(F) Criteria.

(1) Review of Case Service Plan. The court, in reviewing the progress toward compliance with the case service plan, must consider:

(a) the services provided or offered to the child and parent, guardian, or legal custodian of the child;

(b) whether the parent, guardian, or legal custodian has benefited from the services provided or offered;

(c) the extent of parenting time or visitation, including a determination regarding the reasons either was not frequent or never occurred;

(d) the extent to which the parent, guardian, or legal custodian complied with each provision of the case service plan, prior court orders, and any agreement between the parent, guardian, or legal custodian and the agency;

(e) any likely harm to the child if the child continues to be separated from his or her parent, guardian, or custodian; and

(f) any likely harm to the child if the child is returned to the parent, guardian, or legal custodian.

(2) Progress Toward Returning Child Home. The court must decide the extent of the progress made toward alleviating or mitigating conditions that caused the child to be, and to remain, in foster care. The court shall also review the concurrent plan, if applicable.

(G)-(H) [Unchanged.]

RULE 3.976. PERMANENCY PLANNING HEARINGS.

(A)-(C) [Unchanged.]

(D) Hearing Procedure; Evidence.

(1) Procedure. Each permanency planning hearing must be conducted by a judge or a referee. Paper reviews, ex parte hearings, stipulated orders, or other actions that are not open to the participation of (a) the parents of the child, unless parental rights have been terminated; (b) the child, if of appropriate age; and (c) foster parents or preadoptive parents, if any, are not permanency planning hearings.

(2) Evidence. The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the permanency planning hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied

upon to the extent of its probative value. The court must consider any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, or relative with whom the child is placed, in addition to any other evidence offered at the hearing. The court shall obtain the child's views regarding the permanency plan in a manner appropriate to the child's age. The parties must be afforded an opportunity to examine and controvert written reports ~~so~~ received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(E) Determinations; Permanency Options.

(1) In the case of a child who will not be returned home, the court shall consider in-state and out-of-state placement options. In the case of a child placed out of state, the court shall determine whether the out-of-state placement continues to be appropriate and in the child's best interests. The court shall ensure that the agency is providing appropriate services to assist a child who will transition from foster care to independent living.

~~(1)~~(2) Determining Whether to Return Child Home. At the conclusion of a permanency planning hearing, the court must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child. Failure to substantially comply with the case service plan is evidence that the return of the child to the parent may cause a substantial risk of harm to the child's life, physical health, or mental well-being. In addition, the court shall consider any condition or circumstance of the child that may be evidence that a return to the parent would cause a

substantial risk of harm to the child's life, physical health, or mental well-being.

~~(2)~~(3) Continuing Foster Care Pending Determination on Termination of Parental Rights. If the court determines at a permanency planning hearing that the child should not be returned home, it ~~must~~ may order the agency to initiate proceedings to terminate parental rights~~., unless the agency demonstrates to the court and the court finds that it is clearly not in the best interests of the child to presently begin proceedings to terminate parental rights. The order must specify the time within which the petition must be filed, which may not be more than 42 days after the date of the order~~. Except as otherwise provided in this subsection, if the child has been in foster care under the responsibility of the state for 15 of the most recent 22 months, the court shall order the agency to initiate proceedings to terminate parental rights. If the court orders the agency to initiate proceedings to terminate parental rights, the order must specify the date, or the time within which the petition must be filed. In either case, the petition must be filed no later than 28 days after the date the permanency planning hearing is concluded. The court is not required to order the agency to initiate proceedings to terminate parental rights if one or more of the following apply:

(a) The child is being cared for by relatives.

(b) The case service plan documents a compelling reason for determining that filing a petition to terminate parental rights would not be in the best interests of the child. A compelling reason not to file a petition to terminate parental rights includes, but is not limited to, any of the following:

(i) Adoption is not the appropriate permanency goal for the child.

(ii) No grounds to file a petition to terminate parental rights exist.

(iii) The child is an unaccompanied refugee minor as defined in 45 CFR 400.111.

(iv) There are international legal obligations or compelling foreign policy reasons that preclude terminating parental rights.

(c) The state has not provided the child's family, during the period set in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts to reunify the family are required.

~~(3)~~(4) Other Permanency Plans. If the court does not return the child to the parent, guardian, or legal custodian, and if the agency demonstrates that termination of parental rights is not in the best interests of the child, the court may

(a) continue the placement of the child in foster care for a limited period to be set by the court while the agency continues to make reasonable efforts to finalize the court-approved permanency plan for the child, ~~or~~

(b) place the child with a fit and willing relative, ~~or~~

(c) upon a showing of compelling reasons, place the child in an alternative planned permanent living arrangement~~.~~, or

(d) appoint a juvenile guardian for the child pursuant to MCL 712A.19a and MCR 3.979.

The court must articulate the factual basis for its determination in the court order adopting the permanency plan.

RULE 3.977. TERMINATION OF PARENTAL RIGHTS.

(A)-(C) [Unchanged.]

(D) Suspension of Parenting Time. If a petition to terminate parental rights to a child is filed, the court may suspend parenting time for a parent who is a subject of the petition. ~~is automatically suspended and, except as otherwise provided in this subsection, remains suspended at least until a decision is issued on the termination petition. If a parent whose parenting time is suspended establishes, and the court determines, that parenting time will not harm the child, the court may order parenting time in the amount and under the conditions the court determines appropriate.~~

(E) Termination of Parental Rights at the Initial Disposition. The court shall order termination of the parental rights of a respondent at the initial dispositional hearing held pursuant to MCR 3.973, and shall order that additional efforts for reunification of the child with the respondent shall not be made, if

(1) the original, or amended, petition contains a request for termination;

(2) at the trial or plea proceedings, the trier of fact finds by a preponderance of the evidence that one or more of the grounds for assumption of jurisdiction over the child under MCL 712A.2(b) have been established;

(3) at the initial disposition hearing, the court finds on the basis of clear and convincing legally admissible evidence that had been introduced at the trial or plea proceedings, or that is introduced at the dispositional hearing, that one or more facts alleged in the petition:

(a) are true, and

(b) establish grounds for termination of parental rights under MCL 712A.19b(3)(a), (b), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), or (n);

(4) termination of parental rights is in the child's best interests.

~~; unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule (G)(2), that termination of parental rights is not in the best interests of the child.~~

(F) Termination of Parental Rights on the Basis of Different Circumstances. The court may take action on a supplemental petition that seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction.

(1) The court must order termination of the parental rights of a respondent, and must order that additional efforts for reunification of the child with the respondent must not be made, if

(a) the supplemental petition for termination of parental rights contains a request for termination;

(b) at the hearing on the supplemental petition, the court finds on the basis of clear and convincing legally admissible evidence that one or more of the facts alleged in the supplemental petition:

(i) are true; and

(ii) come within MCL 712A.19b(3)(a), (b), (c)(ii), (d), (e), (f), (g), (i), (j), (k), (l), (m), or (n); and

(c) termination of parental rights is in the child's best interests.

~~unless the court finds by clear and convincing evidence, in accordance with the rules of evidence as provided in subrule G(2), that termination of parental rights is not in the best interests of the child.~~

(2) Time for Hearing on Petition. The hearing on a supplemental petition for termination of parental rights under this subrule shall be held within 42 days

after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(G) Termination of Parental Rights; Other. If the parental rights of a respondent over the child were not terminated pursuant to subrule (E) at the initial dispositional hearing or pursuant to subrule (F) at a hearing on a supplemental petition on the basis of different circumstances, and the child is within the jurisdiction of the court, the court must, if the child is in foster care, or may, if the child is not in foster care, following a dispositional review hearing under MCR 3.975, a progress review under MCR 3.974, or a permanency planning hearing under MCR 3.976, take action on a supplemental petition that seeks to terminate the parental rights of a respondent over the child on the basis of one or more grounds listed in MCL 712A.19b(3).

(1) Time.

(a) Filing Petition. The supplemental petition for termination of parental rights may be filed at any time after the initial dispositional review hearing, progress review, or permanency planning hearing, whichever occurs first.

(b) Hearing on Petition. The hearing on a supplemental petition for termination of parental rights under this subrule must be held within 42 days after the filing of the supplemental petition. The court may, for good cause shown, extend the period for an additional 21 days.

(2) Evidence. The Michigan Rules of Evidence do not apply, other than those with respect to privileges, except to the extent such privileges are abrogated by MCL 722.631. At the hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the

extent of its probative value. The parties must be afforded an opportunity to examine and controvert written reports ~~so~~ received by the court and shall be allowed to cross-examine individuals who made the reports when those individuals are reasonably available.

(3) Order. The court must order termination of the parental rights of a respondent and must order that additional efforts for reunification of the child with the respondent must not be made, if the court finds~~on the basis of clear and convincing evidence admitted pursuant to subrule (G)(2) that one or more facts alleged in the petition~~

(a) on the basis of clear and convincing evidence admitted pursuant to subrule (G)(2) that one or more facts alleged in the petition:

(i) are true;~~,~~ and

(ii) come within MCL 712A.19b(3).~~,~~

(b) that termination of parental rights is in the child's best interests.

~~unless the court finds by clear and convincing evidence that termination of parental rights to the child is not in the best interest of the child.~~

(H)-(J) [Unchanged.]

RULE 3.978. POST-~~T~~TERMINATION REVIEW HEARINGS.

(A)-(B) [Unchanged.]

(C) Findings. The court must make findings on whether reasonable efforts have been made to establish permanent placement for the child, and may enter such orders as it considers necessary in the best interests of the child, including appointment of a juvenile guardian pursuant to MCL 712A.19c and MCR 3.979.

(D) Termination of Jurisdiction. The jurisdiction of the court in the child protective proceeding may terminate when a court of competent jurisdiction enters an order ~~terminating the rights of the entity with legal custody and enters an order placing the child for adoption.~~

(1) terminating the rights of the entity with legal custody and enters an order placing the child for adoption, or

(2) appointing a juvenile guardian under MCR 3.979 after conducting a review hearing under subsection (A) of this rule.

[MCR 3.979 is a new rule.]

RULE 3.979. JUVENILE GUARDIANSHIPS.

(A) Appointment of Juvenile Guardian; Process. If the court determines at a posttermination review hearing or a permanency planning hearing that it is in the child's best interests, the court may appoint a juvenile guardian for the child pursuant to MCL 712A.19a or MCL 712A.19c.

(1) Under MCR 3.979(A), the court shall order the Department of Human Services to:

(a) conduct a criminal record check and central registry clearance of the residents of the home and submit the results to the court within 7 days; and

(b) perform a home study with a copy to be submitted to the court within 28 days, unless a home study has been performed within the immediately preceding 365 days, in which case a copy of that home study shall be submitted to the court.

(2) If a child for whom a juvenile guardianship is proposed is in foster care, the court shall continue the

child's placement and order the information required above about the proposed juvenile guardian. If the information required above has already been provided to the court, the court may issue an order appointing the proposed juvenile guardian pursuant to subrule (B).

(3) If the parental rights over a child who is the subject of a proposed juvenile guardianship have been terminated, the court shall not appoint a guardian without the written consent of the Michigan Children's Institute (MCI) superintendent. The court may order the Department of Human Services to seek the consent of the MCI superintendent. The consent must be filed with the court no later than 28 days after the permanency planning hearing or the posttermination review hearing, or such longer time as the court may allow for good cause shown.

(a) If a person denied consent believes that the decision to withhold consent by the MCI superintendent is arbitrary or capricious, the person may file a motion with the court within 56 days of receipt of the decision to deny consent. A motion under this subsection shall contain information regarding both of the following:

(i) the specific steps taken by the person or agency to obtain the consent required and the results, if any, and

(ii) the specific reasons why the person or agency believes that the decision to withhold consent was arbitrary or capricious.

(b) If a motion alleging that the MCI superintendent's failure to consent was arbitrary or capricious, the court shall set a hearing date and ensure that notice is provided to the MCI superintendent and all parties entitled to notice under MCR 3.921.

(c) If a hearing is held and the court finds by clear and convincing evidence that the decision to withhold consent was arbitrary or capricious, the court may approve the guardianship without the consent of the MCI superintendent.

The court shall determine the continuing necessity and appropriateness of the child's placement.

(B) Order Appointing Juvenile Guardian. After receiving the information ordered by the court under subsection (A)(1), and after finding that appointment of a juvenile guardian is in the child's best interests, the court may enter an order appointing a juvenile guardian. The order appointing a juvenile guardian shall be on a form approved by the state court administrator. Within 7 days of receiving the information, the court shall enter an order appointing a juvenile guardian or schedule the matter for a hearing. A separate order shall be entered for each child.

(1) Acceptance of Appointment. A juvenile guardian appointed by the court shall file an acceptance of appointment with the court on a form approved by the state court administrator. The acceptance shall state, at a minimum, that the juvenile guardian accepts the appointment, submits to personal jurisdiction of the court, will not delegate the juvenile guardian's authority, and will perform required duties.

(2) Letters of Authority. On the filing of the acceptance of appointment, the court shall issue letters of authority on a form approved by the state court administrator. Any restriction or limitation of the powers of the juvenile guardian must be set forth in the letters of authority, including but not limited to, not moving the domicile of the child from the state of Michigan without court approval.

(3) Certification. Certification of the letters of authority and a statement that on a given date the letters are in full force and effect may appear on the face of copies furnished to the juvenile guardian or interested persons.

(4) Notice. Notice of a proceeding relating to the juvenile guardianship shall be delivered or mailed to the juvenile guardian by first-class mail at the juvenile guardian's address as listed in the court records and to his or her address as then known to the petitioner. Any notice mailed first class by the court to the juvenile guardian's last address on file shall be considered notice to the juvenile guardian.

(C) Court Jurisdiction; Review Hearings; Lawyer Guardian ad Litem. The court's jurisdiction over a juvenile guardianship shall continue until terminated by court order. The court's jurisdiction over a juvenile under section 2(b) of the Juvenile Code, MCL 712A.2(b), and the jurisdiction of the MCI under section 3 of 1935 PA 220, MCL 400.203, shall be terminated after the court appoints a juvenile guardian under this section and conducts a review hearing pursuant to MCR 3.975 when parental rights to the child have not been terminated, or a review hearing pursuant to MCR 3.978 when parental rights to the child have been terminated. The review hearing following appointment of the juvenile guardian must be conducted within 91 days of the most recent review hearing if it has been one year or less from the date the child was last removed from the home, or within 182 days of the most recent review hearing if it has been more than one year from the date the child was last removed from the home. The appointment of the lawyer-guardian ad litem in the child protective proceeding terminates upon entry of the order terminating the court's jurisdiction pursuant to

MCL 712A.2(b). At any time after a juvenile guardian is appointed, the court may reappoint the lawyer-guardian ad litem or may appoint a new lawyer-guardian ad litem if the court is satisfied that such action is warranted. A lawyer-guardian ad litem appointed under this subrule is subject to the provisions of MCL 712A.17d.

(D) Court Responsibilities.

(1) Annual Review. The court shall conduct a review of a juvenile guardianship annually. The review shall be commenced within 63 days after the anniversary date of the appointment of the guardian. The court may conduct a review of a juvenile guardianship at any time it deems necessary. If the report of the juvenile guardian has not been filed as required by subrule (E)(1), the court shall take appropriate action.

(2) Investigation. The court shall appoint the Department of Human Services or another person to conduct an investigation of the juvenile guardianship of a child when deemed appropriate by the court or upon petition by the Department of Human Services or an interested person. The investigator shall file a written report with the court within 28 days of such appointment and shall serve it on the other interested parties listed in MCR 3.921(C). The report shall include a recommendation regarding whether the juvenile guardianship should continue or be modified and whether a hearing should be scheduled. If the report recommends modification, the report shall state the nature of the modification.

(3) Judicial Action. After informal review of the report provided in subrule (D)(2), the court shall enter an order denying the modification or set a date for a hearing to be held within 28 days.

(4) Upon notice of a child's death the court shall enter an order of discharge. The court may schedule a hearing on the matter before entering an order of discharge.

(E) Duties and Authority of Guardian Appointed to Juvenile Guardianship. A juvenile guardianship approved under these rules is authorized by the Juvenile Code and is distinct from a guardianship authorized under the Estates and Protected Individuals Code. A juvenile guardian has all the powers and duties of a guardian set forth under section 5215 of the Estates and Protected Individual's Code.

(1) Report of Juvenile Guardian. A juvenile guardian shall file a written report annually within 56 days after the anniversary of appointment and at other times as the court may order. Reports must be on a form approved by the state court administrator. The juvenile guardian must serve the report on the persons listed in MCR 3.921.

(2) Petition for Conservator. At the time of appointing a juvenile guardian or during the period of the juvenile guardianship, the court shall determine whether there would be sufficient assets under the control of the juvenile guardian to require a conservatorship. If so, the court shall order the juvenile guardian to petition the probate court for a conservator pursuant to MCL 700.5401 *et seq*.

(3) Address of Juvenile Guardian. The juvenile guardian must keep the court informed in writing within 7 days of any change in the juvenile guardian's address.

(4) The juvenile guardian shall provide the court and interested persons with written notice within 14 days of the child's death.

(F) Revocation or Termination of Guardianship.

(1) Motion or Petition.

(a) Revocation of Juvenile Guardianship. The court shall, on its own motion or upon petition from the Department of Human Services or the child's lawyer-guardian ad litem, hold a hearing to determine whether a juvenile guardianship established under this section shall be revoked.

(b) Termination of Juvenile Guardian and Appointment of Successor. A juvenile guardian or other interested person may petition the court for permission to terminate the guardianship. A petition may include a request for appointment of a successor juvenile guardian.

(2) Hearing. If a petition for revocation or termination is filed with the court, the court shall hold a hearing within 28 days to determine whether to grant the petition to revoke or terminate the juvenile guardianship. The court may order temporary removal of the child under MCR 3.963 to protect the health, safety, or welfare of the child, pending the revocation or termination hearing. If the court orders removal of the child from the juvenile guardian to protect the child's health, safety, or welfare, the court must proceed under MCR 3.974(B).

(3) Investigation and Report. In preparation for the revocation or termination hearing, the court shall order the Department of Human Services to perform an investigation and file a written report of the investigation. The report shall be filed with the court no later than 7 days before the hearing. The report shall include the reasons for terminating a juvenile guardianship or revoking a juvenile guardianship, and a recommendation regarding temporary placement, if necessary.

(4) Notice. The court shall ensure that interested persons are given notice of the hearing as provided in MCR 3.920 and MCR 3.921. The court may proceed in the absence of interested persons provided that proper notice has been given. The notice must inform the interested persons of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, and an attorney for one of the parties.

(5) Action Following Motion or Petition to Revoke Juvenile Guardianship. After notice and a hearing on a petition to revoke the juvenile guardianship, if the court finds by a preponderance of evidence that continuation of the juvenile guardianship is not in the child's best interests, and upon finding that it is contrary to the welfare of the child to be placed in or remain in the juvenile guardian's home and that reasonable efforts were made to prevent removal, the court shall revoke the juvenile guardianship. The court shall enter an order revoking the juvenile guardianship and placing the child under the care and supervision of the Department of Human Services on a form approved by the state court administrator. Jurisdiction over the child under MCL 712A.2(b) is reinstated under the previous child protective proceeding upon entry of the order revoking the juvenile guardianship.

(6) Action Following Petition to Terminate Appointment of Juvenile Guardian. After notice and a hearing on a petition to terminate the appointment of a juvenile guardian, if the court finds it is in the child's best interests to terminate the appointment and if there is:

(a) no successor, the court shall proceed according to subrule (F)(5); or

(b) a successor, the court shall terminate the appointment of the juvenile guardian and proceed with an investigation and appointment of a successor juvenile guardian in accordance with the requirements of this rule, and the court's jurisdiction over the juvenile guardianship shall continue. An order terminating a juvenile guardianship and appointing a successor juvenile guardian shall be entered on a form approved by the state court administrator.

(7) Dispositional Review Hearing. The court shall hold a dispositional review hearing pursuant to MCR 3.973 or MCR 3.978 within 42 days of revocation of a juvenile guardianship. The Department of Human Services shall prepare a case service plan and file it with the court no later than 7 days before the hearing. Subsequent postdispositional review hearings shall be scheduled in conformity with MCR 3.974 and MCR 3.975.

*Staff Comment*: The amendments of Rules 3.901, 3.903, 3.921, 3.965, 3.975, 3.976, 3.977, and 3.978, and new Rule 3.979 of the Michigan Court Rules reflect the enactment of 2008 PA 199-203.

The staff comment is not an authoritative construction by the Court.

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Adopted May 19, 2009, effective September 1, 2009 (File No. 2008-41)—REPORTER.

[The present language is amended as indicated below by underlining to indicate new text and strikeover to indicate where text has been deleted.]

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(G) [Unchanged.]

(H) Disclosure. The garnishee shall mail or deliver to the court, the plaintiff, and the defendant, a verified disclosure within 14 days after being served with the writ.

(1) Nonperiodic Garnishments.

(a)-(b) [Unchanged.]

(c) If the garnishee is indebted to the defendant, but claims that withholding is exempt under MCR 3.101(I)(6), the garnishee shall indicate on the disclosure the specific exemption. If the garnishee is indebted, but claims that withholding is exempt for some reason other than those set forth in MCR 3.101(I)(6), the garnishee shall indicate on the disclosure the basis for its claim of exemption and cite the legal authority for the exemption.

(2) [Unchanged.]

(I) Withholding. This subrule applies only if garnishee is indebted to or obligated to make periodic payments to the defendant.

(1)-(5) [Unchanged.]

(6) A bank or other financial institution, as garnishee, shall not withhold exempt funds of the debtor from an account into which only exempt funds are directly deposited and where such funds are clearly identifiable upon deposit as exempt Social Security benefits, Supplemental Security Income benefits, Railroad Retirement benefits, Black Lung benefits, or Veterans Assistance benefits.

(J)-(T) [Unchanged.]

*Staff Comment*: The amendments of MCR 3.101 add language to protect exempt funds from garnishment and require financial institutions to provide authority stating why certain funds are exempt.

The staff comment is not an authoritative construction by the Court.

Adopted June 30, 2009, effective September 1, 2009 (File No. 2008-33)—REPORTER.

[The present language is repealed and replaced by the following language unless otherwise indicated below, with additions indicated by underline and deletions by strikethrough.]

RULE 2.511. IMPANELING THE JURY.

(A)-(G) [Unchanged.]

(H) Oath of Jurors; Instruction regarding prohibited actions.

(1) The jury must be sworn by the clerk substantially as follows:

"Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God."

(2) The court shall instruct the jurors that until their jury service is concluded, they shall not

(a) discuss the case with others, including other jurors, except as otherwise authorized by the court;

(b) read or listen to any news reports about the case;

(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;

(d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case

when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:

(i) information about a party, witness, attorney, or court officer;

(ii) news accounts of the case;

(iii) information collected through juror research on any topics raised or testimony offered by any witness;

(iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.

*Staff Comment*: This amendment requires judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom. The instruction shall be given when the jury is empaneled.

The amendment prohibits jurors from reading about or listening to news reports about the case and prohibits discussion among jurors until deliberation. The prohibition on juror discussion does not apply to courts participating in the jury reform pilot project, which specifically allows jurors to discuss a case before the close of evidence.

The staff comment is not an authoritative construction by the Court.

# AMENDMENTS OF RULES CONCERNING THE STATE BAR OF MICHIGAN

Adopted January 20, 2009, effective October 1, 2008 (File No. 2008-26)—REPORTER.

By order dated July 3, 2008, this Court amended Rule 4 of the Rules Concerning the State Bar of Michigan, effective October 1, 2008. 481 Mich lxxxii (2008). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment, which authorized the waiver of annual bar dues for active duty military personnel who are members of the State Bar of Michigan. Notice and an opportunity for comment at a public hearing having been provided, the amendment of Rule 4 of the Rules Concerning the State Bar of Michigan is retained.

# INVESTITURE CEREMONY FOR THE HONORABLE DIANE M. HATHAWAY

JANUARY 8, 2009

CHIEF JUSTICE MARILYN KELLY: Good afternoon, most distinguished ladies and gentlemen. It's a great privilege for me on behalf of my colleagues to welcome you to our courtroom. We appreciate your attendance here today as we officially welcome our newest justice and she becomes a member of this Court.

At this time it's my pleasure to introduce to you the other justices of the Court, aside from our newest member, and they are in order of seniority: Justice MICHAEL CAVANAGH, Justice ELIZABETH WEAVER, Justice MAURA CORRIGAN, Justice STEPHEN MARKMAN, and Justice ROBERT YOUNG. I'm sorry, Robert, I got that wrong; ROBERT YOUNG and STEPHEN MARKMAN. Now I understand that Mr. Gaffney is acting as master of ceremonies here today and that he will introduce the speakers, so I will turn the proceedings over to him.

MR. MARK GAFFNEY: Thank you, Chief Justice KELLY. With the Court's permission, I would like to introduce myself. I'm Mark Gaffney, the president of the Michigan AFL-CIO and the master of ceremonies for today's historic and happy events. We are proud to be part of this historic investiture of DIANE HATHAWAY as justice of our great state's Supreme Court. So, if it may please the Court, let me now introduce to you Ms. Alexandra

Golden, Justice HATHAWAY's niece, for the purpose of leading us in the Pledge of Allegiance.

MS. ALEXANDRA GOLDEN: I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

MR. GAFFNEY: Thank you, Alexandra. Now, with the Court's permission, it is my honor at this time to introduce Kym L. Worthy, the Wayne County Prosecutor. Ms. Worthy, like DIANE HATHAWAY, began her career as an assistant prosecutor and then became a judge. She's a graduate of the University of Michigan and Notre Dame Law School. She was appointed county prosecutor and reelected twice. Prosecutor Worthy.

MS. KYM L. WORTHY: Thank you very much. It's my pleasure to introduce the dignitaries and the judges that are here in the audience today.

Let me first say I've spent the better part of last year informing the public about the importance of the tenets of the system of American justice—some of you may know why—and it's my pleasure to be here. I'm going to make very, very short remarks.

Initially, I want to thank Justice HATHAWAY for embarking on this road. I want to congratulate her. And you know, if you meet the Hathaway family, they all take you into their bosom. They've been very gracious to me; I'm very gracious to them. I love and adore all of them, and I thank you, Diane. Congratulations.

Let me start with the judges of the Court of Appeals; if they would all stand please. We can hold our applause to the end. The judges of the circuit court, all circuits. Thank you. Would all the district court judges stand, please? Thank you. The Lieutenant Governor will be speaking later on if he is here, John Cherry. Attorney General [Michael] Cox is here. And I believe—all other

state officials would you please stand—state officials? Would all county officials please stand? Any local elected officers, please stand. And also I believe that we have Justice Chuck LEVIN here as well. I believe I see Judge Milton Mack from the probate court. Any other probate court judges here? I thank you very much, and enjoy the rest of the program. Again, I thank you very much, and congratulations.

MR. GAFFNEY: Thank you, Prosecutor Worthy. Now, with the Court's indulgence, I would like to introduce to you Edward Ewell, Jr., judge of Michigan's Third Circuit Court. Judge Ewell is the presiding judge of the Third Circuit's criminal division, which was, of course, DIANE HATHAWAY's former court. Judge.

JUDGE EDWARD EWELL, JR.: May it please the Court. Good afternoon, everybody. Before I make the request that the Chief Justice come down to administer the oath, I just want to also, as Prosecutor Worthy stated, thank Justice HATHAWAY for allowing me to participate on this very auspicious occasion. At this point in time, I humbly request or ask the Chief Justice to come down and administer the oath.

COURT CRIER: All rise.

CHIEF JUSTICE KELLY: You know, I was going to make a couple of remarks, but I can't do it with everybody standing, so why don't you sit down for just a minute. I just can't resist, you know. I can't resist the opportunity to say a few words just before the swearing in, if you don't mind too much.

JUSTICE DIANE M. HATHAWAY: Okay.

CHIEF JUSTICE KELLY: Actually, *you* don't have to sit down.

You know, it doesn't seem all that long ago that I was in the same spot that Justice HATHAWAY is in here today.

It was January 8th in 1997 that I was sworn in. And Patty BOYLE was on the Court at that time, and she observed that day that she looked back over her own tenure on the Court. And she said, "You know, this is a day for, obviously for the incoming justice and for her friends and supporters and family, but it's more than that. It's also a day for history—it's a day in history." One of Patty BOYLE's famous stories was that shortly after she joined the Court in 1983, she—there were all men but her at that point—they were in the conference room working on an opinion. It was her opinion. They agreed to sign it if she made a few changes. So she rushed back to her chambers, made the changes, rushed back to the conference room, only to find it empty except for one staff person—one male staff person who, as it turned out, had lingered—and he told her that the others, the justices, were off on a prior commitment. They had a golf date, and she hadn't been invited. So she went back to her office and wrote a memo as follows: "On today's date you unfortunately had to leave the conference early because of a prior commitment. I think it only fair to advise you that at next week's conference, I similarly will have a prior commitment and will be leaving early. I'm attending a Tupperware party." And after that Patty BOYLE was always invited to the outings with the other justices.

Well, needless to say, a good deal has changed since then. And today we have a majority of women on the Court. This has only happened once before, and that was in 1997 and it didn't last long—it only lasted nine months. It bears remembering that of the 104 justices who have served on this Court, only 7 have been women. But each of them has in her own way made a contribution to the jurisprudence of the state—to its history and the betterment of the administration of

justice in Michigan. And I fully hope and expect that the same will be true for Justice HATHAWAY.

Now with that, Justice HATHAWAY, if you will come, and ladies and gentlemen, if you'd like to rise. Please raise your right hand and repeat after me. I DIANE MARIE HATHAWAY . . .

JUSTICE HATHAWAY: I DIANE MARIE HATHAWAY . . .

CHIEF JUSTICE KELLY: . . . do solemnly swear . . .

JUSTICE HATHAWAY: . . . do solemnly swear . . .

CHIEF JUSTICE KELLY: . . . that I will uphold the Constitution of the United States . . .

JUSTICE HATHAWAY: . . . that I will uphold the Constitution of the United States . . .

CHIEF JUSTICE KELLY: . . . and the Constitution of the state of Michigan . . .

JUSTICE HATHAWAY: . . . and the Constitution of the state of Michigan . . .

CHIEF JUSTICE KELLY: . . . and that I will faithfully perform the duties . . .

JUSTICE HATHAWAY: . . . and that I will faithfully perform the duties . . .

CHIEF JUSTICE KELLY: . . . of justice of the Michigan Supreme Court . . .

JUSTICE HATHAWAY: . . . of justice of the Michigan Supreme Court . . .

CHIEF JUSTICE KELLY: . . . to the best of my ability . . .

JUSTICE HATHAWAY: . . . to the best of my ability . . .

CHIEF JUSTICE KELLY: . . . so help me God.

JUSTICE HATHAWAY: . . . so help me God.

CHIEF JUSTICE KELLY: Congratulations, Diane.

[Applause.]

MR. GAFFNEY: They were willing to stand down there as long as you were willing to clap.

With the Court's continued permission, it's now my pleasure to introduce to you the Honorable Amy P. Hathaway, judge of the Third Circuit Court, who will present the gavel, and introduce to you Ryan and Allyson Hathaway, Nick Bobak and Dana Hathaway, Chris and Katie Sterr, Sarah Kingsley, and Mike Kingsley, who will present the robe to Justice DIANE HATHAWAY. Please come forward to the center podium.

JUDGE AMY P. HATHAWAY: I'm Judge Diane—excuse me, she's Diane. I'm Judge Amy, and this is my niece, Dana, Diane's daughter. It's an honor to be included, Diane, and we're very flattered and excited to be here. I just want to say a few words.

People often wonder how we're related, and we're not sisters, even though we look alike. But I've known Diane—she's been a part of our family for about 35 years, even though we're not 35 yet, either of us.

But I want to tell you all what Diane's going to bring to this Supreme Court. Diane will bring to this honorable bench honesty, fairness, and a humanistic analysis of each case—a perspective which may seem obvious, but she will always be true to her oath. Diane will bring to this honorable bench common sense—a reasonable person standard. Sometimes words don't always have to be looked up in the dictionary. And Diane will bring to this honorable bench kindness and respect, a reflection of her professionalism, which will inure to the whole bench and her colleagues.

But I really want to add on a personal note that Diane, she's the one who entered this race. She stepped up, and she may have had some apprehension at the beginning, but every day she got stronger and stronger. Today we honor you. What you did is a tremendous

legacy, for you, for our family, for our name, but for every citizen of the United States. From the bottom of our hearts, thank you.

MS. DANA HATHAWAY: I'm Dana Hathaway. I am Diane's daughter. [Picks up gavel.] This is a very nice gavel—Judge Amy—but [Judge Amy Hathaway produces a very large gavel as audience laughs] this gavel represents the huge effort on behalf of all the little people, all the grassroots people from Detroit to Grand Rapids, from Traverse City to Marquette. This gavel is for my mom on behalf of all those people, large and small, that have confidence in you, just as I do. My mom always has been a wonderful mom, an excellent trial judge, and I know she will be a superb Supreme Court justice. Mom, please accept this gavel on behalf of all the people, large and small, and God bless you in your decisions.

JUSTICE HATHAWAY: This wasn't part of the program, but I just have to share this with you because I want to cover my sister Amy's back. When I was about to meet my stepmother about 15 years ago, my father was coming over, and this was the first time I was going to meet her. So I was in the house, and all of a sudden I couldn't remember her name, and I'm saying, What's her name, what's her name? Oh yes, it's Virginia, Virginia, Virginia. So I walk outside, they pull up, and I go, "Hi, I'm Virginia." And my stepmother said, "Is this the daughter that's the judge?" [Laughter.]

MR. GAFFNEY: And now for the presenting of the robe.

[Presenters place robe on Justice HATHAWAY.]

JUSTICE HATHAWAY: I have to be careful; this one has holes in the arms. It's my old one. [Applause.] Thank you.

MR. GAFFNEY: Justices of many state supreme courts are very important individuals. The Michigan Legislature, and the Governor and the Lieutenant Governor, must keep a wary eye on the third branch of government, the judiciary, as they make their own policies and their own decisions. But when an incoming justice is of the same political party as the seated governor, I assume that watchfulness can be a bit less wary. Please welcome our Lieutenant Governor of the great state of Michigan, the great Lieutenant Governor John Cherry.

LIEUTENANT GOVERNOR JOHN D. CHERRY, JR.: Madame Chief Justice and distinguished members of the Court, thank you for the opportunity to address this audience in spite of my wary eye. I want to be able today to offer my personal congratulations, Justice HATHAWAY, and wish good afternoon to all of you here today. I'm proud to join you, your family, and distinguished guests assembled here today to offer—all of us—our best wishes to you on your new service to the people of the state of Michigan—here a Michigan Supreme Court.

I recall it was almost two months to the date that you and I were in a television studio, anxiously awaiting the outcome of the day's ballot. And I recall so vividly that you had such great confidence that evening, and it turns out you were exactly on point, and obviously that candidates feel that when they have the opportunity to go out and walk the beat and have direct opportunity to see voters. And last November, across the state, voters spoke out clearly for change. Change at all levels of government, and they asked DIANE HATHAWAY to be an agent for that change.

Justice HATHAWAY, I know that you will heed that call. I know that your service to the bench will not be defined by political or personal agenda, but by an unwavering commitment to our citizens and our justice system. I

know you will keep an open mind to evaluate both sides of an argument. I know that you will dispense justice equally and without delay. I know that you possess the strength of character to do what is right, just, even when it's unpopular. And I know that you will be guided by compassion, ethics, honor, humility, and fairness. And I know that you will never forget the people who sent you to the state Supreme Court bench, and that you will serve them with intellect, and purpose, and integrity, and heart. Congratulations, Justice HATHAWAY, and in the spirit of this journey you're about to commence on, Godspeed.

MR. GAFFNEY: Thank you, Lieutenant Governor Cherry. May it please the Court. Our next speaker will be Ryan Hathaway, Justice HATHAWAY's son and oldest child.

MR. RYAN HATHAWAY: Thank you, justices. Good afternoon, everyone. My name is Ryan Hathaway.

It has been a little over two years now since we lost someone very special in our family. Linda Golden was a wonderful woman. She was a wife and a mother. She was an aunt to me, a sister to her best friend and my mom, Justice DIANE HATHAWAY. She would have been so proud, so proud to be here today. She is still very much missed, but I know that she is with us here today in spirit.

The people of the state of Michigan have elected a most—if not the most—determined and hardworking individual that I have ever met. When my mom sets her goals on something, it is impossible to dissuade her, and she very rarely is unsuccessful. This is a woman who worked full-time while raising two children and going to law school in the evenings. However, amidst her busy schedule, she always found time to be there for her family, and she never let the stress get to her. She was

focused on accomplishing something, and when that happens she's very rarely unsuccessful. I wish I was more like her in that regard.

This same determination was clearly visible during her recent campaign. I cannot tell you how impressed I was with all the time, the effort, and the passion that she put forth towards that campaign. She lived it, she breathed it. She traversed the state multiple times and literally campaigned at several different events every evening for weeks on end. Her determination was so amazing. When others told her she couldn't do it, she worked that much harder. She sacrificed her free time, the time with her kids, the time with her grandson—oh, incidentally, Mom, we need a babysitter tomorrow night, to make up for lost time. But she'll be the first to tell you she couldn't have done it alone. She had a wonderful staff and friends—they were true miracle workers. They also put aside their lives, their personal time, to work on this campaign. They were as passionate about it as she was, and they cannot be thanked enough. What an accomplishment.

In closing, I'm very blessed to have the mother I have. She's a true role model to me, and I believe that this state is equally as blessed to have her as its next Supreme Court justice, to sit alongside the elite group you see in front of you. Congratulations, Mom. I love you, and I'm very proud of you.

MR. GAFFNEY: Thank you, Ryan. With the permission of the Court, the next person I am pleased to introduce to you is Justice HATHAWAY's husband, an attorney and, as we now know, the Hathaway campaign's number one supporter. Please welcome Mr. Michael Kingsley.

MR. MICHAEL KINGSLEY: Thank you, Mark. Good afternoon, everyone. I know this is a solemn and serious occasion, but I just can't wipe this smile off my face. It's

been on my face since Election Day. That's a day that I will never forget, and I'm sure many of you will never forget. I was working a poll in Southfield, and there was an electricity—it was a holiday at those polls. Those people were so thankful to be able to vote, and it was just something to be a part of that special day. And the people were wonderful. And some of them would come back, and they would give me the thumbs up, and some would say, "I voted for your wife." And I thanked them. And I worked those polls all day.

And after the polls closed, I went back to the Marriott, where there was an Obama reception, and at that point in time, Senator Obama had been declared the winner in Michigan and was overwhelmingly leading in the nation. And Diane gave a talk, but she didn't know if she had won. The polls, exit polls, indicated that she was ahead. And we were on our way up to a suite on the sixty-second floor, and it was just the two of us in the elevator, and she said to me, "What the heck is happening?" And I said, "Honey, I don't know."

Well, what was happening when we reached that suite was a group of people, many of whom I see in this crowd today, and it was a party atmosphere—there was happiness, there was joy. And the next day when I went to court, attorneys, both plaintiff and defense, court clerks, sheriff officers, all with a smile on their face, all shaking their head in disbelief at what you had accomplished. And what is happening today, I can tell you, is your investiture as the 104th Supreme Court justice of the state of Michigan.

I am a blessed person because I get to talk today about two things that I love—the law and my wife. I've been a practicing attorney for 39 years now, and I've been lucky enough to be married to Diane for 12 years.

My first job was in 1970 for the law firm of Weinstein, Kroll, and Gordon. Irving Kroll was the past president of the Michigan Trial Lawyers, and Bill Weinstein was, if not the best trial attorney in the state, certainly one of the best attorneys, and he was a two-star Marine general. He was one of the first attorneys who helped promulgate the Michigan Civil Jury Instructions. When he came into a room, he commanded respect. He was a man that had a presence about him. And I recall vividly, one day we were in federal court waiting for a jury to come back with a verdict. And he said to me, "Mike, if you learn two things from me, let them be these two things. As a lawyer, we are the seeker of truth. We often don't find it, but you will never find the truth unless you are a man of truth. Your word is your bond." He said, "Secondly, treat everyone with dignity and respect. If you treat everyone with dignity and respect—litigants, witnesses, judges, court reporters, opposing counsel—you will always operate out of strength. To do otherwise, to engage in name-calling and negativity, is a weakness. So always operate with dignity." And, unfortunately, over the last few years I have seen an erosion of those principles. What used to be bound by a handshake, now has to be memorialized in a letter. Depositions, court proceedings deteriorating to name-calling and raised voices is unseemly, it is unnecessary, it is unprofessional.

The reason that I talk about these things is because Diane lives her life in every way with my mentor's principles of truth, dignity, and respect. And she lives these every day of her life. And she treats everyone the same, whether it be someone she meets in her professional capacity, in her personal capacity, or with her family.

My daughter, Sarah, works with juveniles in the court system, and I recall a couple of years ago she told me that she was taking one of her clients to see her mother—his mother—who he hadn't seen in about six, seven months because she was in jail. He had no father. And I called her the next day and I said, "Well, how did it go, Sarah?" And she said, "Well, Dad, it was very interesting." You know they were very happy to see each other, and then they started talking with the mom, and the mom asked her, "Well, how did you happen to get into this line of work?" And Sarah said that she explained to her that she has a masters in forensic psychology and that she had always been interested in the law because her father was a lawyer and her stepmother was a judge. And the woman says, "Oh, your stepmother's a judge. What's her name?" "DIANE HATHAWAY." "Get out! She's the one who put me in here." But she said, "Don't worry, she was cool. She did what she had to; she did what was right. But let me tell you, when she was sentencing me, and she was admonishing me, and those glasses were at the end of her nose, and she was pointing that finger at me, I was scared." And Sarah goes, "Oh, I know that look."

Diane is a person with a very serious work ethic. If it can be done today, it will be done today because tomorrow she's going to have something else to do. And I think she gets this work ethic from her family. She grew up in a stereotypical American family. She had two brothers and two sisters. Her father was a Detroit police officer, and her mother was a homemaker. And the boys would do the yard work with their dad, they'd tinker around with motors, they would love to hunt and fish. And the girls would help their mom clean the house and do "womanly" things. And I think that Diane wanted to show her dad that she was just as good as the boys. Interestingly enough, you would find deers hanging

with the wash in the backyard. Diane told me that she never ate store-bought meat until she was 18 years old. And kindergarten through twelfth grade? Never missed a day of class. Never was late to class. She was going to show her dad that she was just as good as the boys. And we spent a lot of time with him before he passed away, and you could tell the pride that he had for her accomplishments and how proud he was of his daughter.

Diane has never been given anything. She has worked for whatever she has achieved. She has achieved all of this through determination, sweat, tears, hard work, and all this culminates with this investiture today. And she will bring to this Court needed experiences from the courtroom. She was a prosecutor for 5 years, a trial judge for 16 years. That experience is invaluable. It provides invaluable insights to the everyday practice of law—what attorneys and judges have to deal with on a daily basis. She will be very helpful to this Court with court rules, jury instructions, and procedural matters. But I think, most importantly, that what she will bring to this Court is a dignity and a grace. She will be a special justice. And, justices, I assure you she will be a special colleague. She may not agree with all of you all of the time—she may agree to disagree—but I promise you it will be done with class and respect. Her decisions will be based on the law and what is right, not any preconceived notions; she has no agenda. She's a justice and was elected by the people; she will be a justice of the people.

Congratulations, honey.

MR. GAFFNEY: Thank you, Michael. I have the opportunity in my job to see an awful lot of candidates. Some of you in this room, I've worked with. I have never seen a candidate become as good as fast as DIANE HATHAWAY

did. Of course, if you think back to the calendar, she was forced to do that and had to do that, but she measured up in every single way. And I was proud to be part of that campaign, and happy to be part of it, and I'll always have memories of an extremely small airplane ride to the Upper Peninsula. It's my honor, and it's every bit my happiness, to introduce to you Justice of the Supreme Court DIANE HATHAWAY.

[Applause.]

JUSTICE HATHAWAY: Good afternoon, ladies and gentlemen. I thank all of you for coming to my investiture. I especially want to thank my brother, Dr. Bruce Washington, and his wife, Dr. Rebecca Copf Washington, and my sister, Chris, and my brother-in-law, Ron, who traveled all the way from Tennessee, and my brother, Dr. Gary Washington, for coming from Indiana. It means so much to me that you all took time from your busy schedules and responsibilities to be here with me today.

I also want to thank the program participants for all of your kind words. Justice WEAVER once told me that an investiture is like a funeral for the living. People get up and say all these wonderful things about you, but because of God's grace, I still get to hear them.

I especially want to thank my husband, Michael Kingsley, and my family members for your support throughout my campaign. My core committee members deserve my sincere appreciation. Tricia Stein, my campaign manager, is obviously a political genius. She has also become one of my best friends. My intelligent and devoted assistants, Michelle Busuito and Jan Brandon, who are also excellent attorneys, have agreed to be part of my staff, along with Sima Patel, a seasoned Supreme Court law clerk, and Cathy Cecchini, a very able secretary. Patti and Jimmy Chylinski, Michele and Henry

Scharg, Deb Iconelli, Joumana Kayrouz, Osama Siblami, Nikhol Atkins, Emma Bell, Rebecca Baher-Cook, Shelly Beyer, Jason Ellenberg, Wanda Evans, Austin Garrett, and Debbie Squires worked tirelessly with great determination and skill. They all gave so generously of themselves.

It's not possible to name all of the individuals and organizations that participated in the campaign, but I would be remiss without acknowledging the Michigan Democratic Party, Governor Jennifer Granholm and Lieutenant Governor John Cherry, and Speaker Andy Dillon. Senators Debbie Stabenow and Carl Levin. President-elect Barack Obama and the Campaign for Change. Various labor unions, Michigan Association for Justice, Clean Water Action, the Justice Caucus, the Coalition for Progress, many law firms across the state, and all of you who hosted fundraisers, worked the polls, and supported my campaign.

People ask me how this race was won. Sometimes I think it was divine intervention on behalf of my deceased parents and my beloved sister, Linda, who were always so proud of me being a judge. But other times I realize that it was largely because of your dedication, motivation, and hard work. This truly was a team effort. I have been involved in many campaigns, but I have never had the occasion to participate in a mandate for change that was so evident in the 2008 election. Perhaps what Aristotle quotes in the card my friend Michelle Busuito gave me this morning describes my election best: "Where your talents and the needs of the world cross, there lies your vocation."

My parents taught me many things, but the message that I want to share with you most today is the message that I hope I conveyed to my son, Ryan, who is an attorney and also owns a very successful telecommuni-

cations company, and to my daughter, Dana, who is also an attorney and works for a very reputable defense law firm, Bowman and Brooke. I hope I conveyed that same message to my daughter, Katie, who has always been so wonderful with children, and she now teaches at the Grosse Pointe Academy, and she also runs summer camps for children. I hope that Sarah conveyed that same message. She has a masters in forensic psychology and works with criminal sexual deviants for the ENNIS Group. And I'm sure I conveyed that message to my son, Mikey, who will be starting law school next week. You were all given the privilege of a college education, and I'm so proud of what each and every one of you did with it. The message that I am speaking of can be summed up in one word: opportunity. We are given very few life-changing opportunities. My suggestion to you is to be keenly aware of when this type of opportunity presents itself to you. It is a special gift that you can either accept or reject. My experience has taught me to accept it only when you feel peace about it; only then can you take advantage of that opportunity.

When I was asked to be the Supreme Court candidate, I have to admit that I had to take a few days to think about it because while I realized it might be to me the opportunity of a lifetime, I also knew what a serious commitment this endeavor would demand. So I prayed on it, and I spoke with my husband and my family members, and when I was at peace with this opportunity, I accepted it, and it has now become a reality. I pray to God that I continue to have the passion, energy, and wisdom to handle the responsibilities that accompany this incredible opportunity.

When I was asked by the [*Detroit*] *Free Press* interviewer and others what my judicial philosophy is, I told them that it is still what I practiced throughout my 16

years as a trial judge, and that is to be fair and impartial and to follow the law. I believe that a justice should have no other judicial philosophy, because then she has an agenda and is allowing her personal beliefs to undermine her decisions. I promise you that I will uphold the trust and confidence that you have placed in me and that I will work collegially with my fellow justices in a professional and unbiased manner. I will make decisions based on the facts and the law, without regard to who the litigants are. I am truly honored to be a member of this outstanding group of jurists. Even though it was my name on the ballot, this victory really belongs to all of you. May God bless Michigan, and may God bless Michigan's new Supreme Court.

MR. GAFFNEY: And now, before I turn her Court back to Chief Justice MARILYN KELLY, I have to make a couple of announcements. You are all invited to join Justice HATHAWAY, Michigan's leaders, and today's presenters at a reception immediately following this ceremony. That reception will be in this building, on the first floor, in the rotunda, and in the conference room. It is being sponsored by the Michigan Supreme Court Historical Society, and I'd like to take a moment and thank them. Madame Chief Justice.

CHIEF JUSTICE KELLY: Thank you, Mr. Gaffney. And now we are adjourned.

SUPREME COURT CASES

PEOPLE v SWAFFORD

Docket No. 136751. Argued January 22, 2009 (Calendar No. 8). Decided March 18, 2009.

Kobeay Q. Swafford had been charged with three crimes in Michigan when he was arrested on an unrelated federal charge in Tennessee. The Wayne County Prosecutor's Office sent a written detainer to the United States Marshals in Tennessee. After the detainer was lodged, the defendant pleaded guilty to the federal charges and was sentenced to federal prison. The defendant requested disposition of the Michigan charges on March 7, 2005, but the prosecutor failed to bring the defendant to trial on these charges within 180 days as required by the Interstate Agreement on Detainers (IAD), MCL 780.601. The Wayne Circuit Court, Michael M. Hathaway, J., granted the defendant's motion to dismiss the charges with prejudice, and the prosecutor appealed. The Court of Appeals, ZAHRA, P.J., and BANDSTRA and OWENS, JJ., reversed in an unpublished opinion per curiam, issued March 27, 2007 (Docket No. 268499), holding that the IAD did not apply because the defendant was not serving a term of imprisonment when the detainer was lodged. The Supreme Court vacated the Court of Appeals judgment and remanded to that court for reconsideration in light of the documentation that the defendant had attached to his application for leave to appeal. 480 Mich 881 (2007). On remand, the Court of Appeals, BANDSTRA and OWENS, JJ. (ZAHRA, P.J., dissenting), again reversed the trial court's dismissal of the charges, this time on the ground that the IAD did not apply because the prosecutor had not delivered the detainer to the institution in which the defendant was serving his sentence. Unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket No. 268499). The Supreme Court granted the defendant's application for leave to appeal. 482 Mich 1015 (2008).

In a unanimous opinion by Justice MARKMAN, the Supreme Court *held*:

The prosecutor, after lodging a detainer against the defendant, failed to bring the defendant to trial within 180 days of receiving the defendant's request for a final disposition, which was made while the defendant was serving a term of imprisonment. Accord-

ingly, under the clear language of the IAD, the trial court was required to enter an order dismissing the complaint with prejudice.

1. Although the defendant must be serving a term of imprisonment when the out-of-state charges are pending and when he or she files a request for a final disposition, the defendant does not have to be serving a term of imprisonment when the detainer is first lodged against him or her to trigger the 180-day rule of the IAD.

2. A detainer that the prosecutor initially filed with another institution, but that nevertheless reaches the institution in which the defendant is serving his or her sentence, is a valid detainer for purposes of the IAD.

Reversed; trial court order reinstated.

1. PRISONS AND PRISONERS — DETAINERS — STATUTES — INTERSTATE AGREEMENT ON DETAINERS.

A complaint must be dismissed with prejudice pursuant to the Interstate Agreement on Detainers when a prosecutor fails to bring a defendant against whom a detainer has been lodged to trial within 180 days of receiving a request for a final disposition that the defendant made while serving a term of imprisonment (MCL 780.601).

2. PRISONS AND PRISONERS — DETAINERS — STATUTES — INTERSTATE AGREEMENT ON DETAINERS — TIMING OF DETAINERS.

The Interstate Agreement on Detainers applies to a case in which a detainer was lodged against a defendant who was not serving a term of imprisonment, as long as the defendant was serving a term of imprisonment when the out-of-state charges were pending and when the request for a final disposition was made (MCL 780.601).

3. PRISONS AND PRISONERS — DETAINERS — STATUTES — INTERSTATE AGREEMENT ON DETAINERS — LOCATION OF DETAINERS.

A detainer that the prosecutor initially filed with another institution, but that nevertheless reaches the institution in which the defendant is serving his sentence, is a valid detainer for purposes of the Interstate Agreement on Detainers (MCL 780.601).

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Train-

ing and Appeals, and *Frank J. Bernacki*, Assistant Prosecuting Attorney, for the people.

*Craig A. Daly, P.C.* (by *Craig A. Daly*), for the defendant.

MARKMAN, J. We granted leave to appeal in this case to consider whether the Interstate Agreement on Detainers (IAD), MCL 780.601, requires that a detainer be lodged at the institution where the defendant is incarcerated, and, if so, whether there was sufficient evidence in this case that the detainer was properly lodged. The trial court granted defendant's motion to dismiss the charges with prejudice as a result of the prosecutor's failure to bring defendant to trial within 180 days of receiving defendant's request for a final disposition, in violation of Article III(a) of the IAD. The Court of Appeals reversed, holding that the IAD is not applicable because the prosecutor lodged the detainer against the defendant with the United States Marshals rather than the federal prison in which defendant was incarcerated. However, there is no language in the IAD that indicates that it is only applicable when the detainer was originally lodged with the institution in which the defendant is incarcerated, and in this case it is undisputed that the institution in which defendant was incarcerated received the detainer. The clear language of the IAD states that if a "detainer has been lodged against the prisoner," and the prosecutor fails to bring a defendant to trial within 180 days of receiving the defendant's request for a final disposition made while the defendant is serving a term of imprisonment, the court "*shall* enter an order dismissing the [complaint] with prejudice," MCL 780.601 (emphasis added). That is precisely what happened in this case. Therefore, we have no choice but to reverse the Court of Appeals and reinstate

the trial court's order dismissing the charges with prejudice. However harsh and inflexible a remedy for failure to comply with the IAD this may be adjudged, it is plainly what our Legislature requires.

## I. FACTS AND PROCEDURAL HISTORY

Defendant was charged in Michigan with first-degree murder, assault with intent to commit murder, and possession of a firearm during the commission of a felony. He was subsequently arrested on an unrelated federal bank robbery charge in Tennessee. On June 1, 2004, the Wayne County Prosecutor's Office (hereinafter referred to as "the prosecutor") sent a written detainer against defendant to the U.S. Marshals in Tennessee. Defendant pleaded guilty to the federal charges and was sentenced to federal prison on November 19, 2004. On March 2, 2005, the federal prison authorities where defendant was imprisoned (hereinafter referred to as "the Bureau of Prisons") verified the detainer that was lodged against defendant with the prosecutor.[1] The Bureau of Prisons provided the prosecutor and the court clerk with notice of defendant's request for disposition of the Michigan charges.[2] This notice was received by the prosecutorand the court

[1] In a correspondence with defendant, a prison official stated, "I verified the request to lodge a detainer . . . ." Stamped on a copy of the letter that accompanied the detainer is a notation dated March 2, 2005, indicating that the detainer was verified with a paralegal in the Wayne County Prosecutor's extradition unit.

[2] This notice states:

> The above named defendant is requesting disposition on the outstanding charges you have filed against him as a detainer . . . . An inmate requesting disposition of detainers in accordance with Article III of the Interstate Agreement on Detainers Act must be brought to trial within 180 days of your receipt of this request.

clerk on March 7, 2005.[3] On June 15, 2005, the prosecutor signed an "Agreement on Detainers" that states, "I propose to bring this person to trial on the indictment, information or complaint named in the offer within the time specified in Article III(a) of the Agreement on Detainers."[4] However, defendant was not arraigned in Michigan until October 6, 2005, which every-

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At the same time, the Bureau of Prisons also submitted a document to the prosecutor that provides, "A detainer has been filed against this subject in your favor for: 1st Degree Murder, we will again notify you approximately 60 days prior to actual release." On June 4, 2005, the Bureau of Prisons sent a letter to the prosecutor that provides:

> The above named inmate has requested disposition on outstanding charges which were filed against him as a detainer . . . . As you know, once an inmate requests disposition under the IAD they must be brought to trial within 180 days of your receipt of the request. Ninety of the allotted 180 days elapsed effective June 25, 2005.

[3] *Fex v Michigan,* 507 US 43, 52; 113 S Ct 1085; 122 L Ed 2d 406 (1993), provides that the IAD's 180-day time limit begins running when the prosecutor receives the defendant's request for trial.

[4] At the top of this form, it states, "This form should only be used when an offer of temporary custody has been received as the result of a *prisoner's* request for disposition of a detainer." This form also indicates that it was "[i]n response to [the Bureau of Prisons'] letter of March 2, 2005." On September 16, 2005, when the prosecutor failed to bring defendant to trial within 180 days, the Bureau of Prisons sent the prosecutor a letter stating:

> The above named inmate requested disposition of the outstanding charges that you have filed against him as a detainer on 03-02-2005. Under Article III of the Interstate Agreement on Detainers, an inmate must be brought to trial within 180 days after he requests disposition and the forms are received by the appropriate officials. Our records indicate the forms required under the provisions of the IAD were received and signed for by your office on 03-07-2005. . . . Since 180 days have elapsed since you received this request for disposition, we have advised, by copy of this letter to the inmate, that he may petition the appropriate court for dismissal of the outstanding charges.

body agrees was more than 180 days after the prosecutor received defendant's request for a final disposition.

Defendant then filed a motion to dismiss the charges on the ground that the prosecutor had failed to bring him to trial within 180 days of receiving defendant's request for a final disposition in violation of Article III(a) of the IAD, MCL 780.601. The trial court granted this motion and dismissed the charges with prejudice. The prosecutor appealed, and the Court of Appeals reversed, holding that the IAD does not apply because defendant was not serving a term of imprisonment when the detainer was lodged against him. *People v Swafford*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2007 (Docket No. 268499) (*Swafford I*).

Defendant filed a timely application for leave to appeal in this Court. We vacated the Court of Appeals judgment and remanded the case to that court for reconsideration in light of the documentation that defendant had attached to his application for leave to appeal in this Court. *People v Swafford*, 480 Mich 881 (2007).[5]

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Finally, the Bureau of Prisons' "Release Authorization" indicates a "Release Date" of "10-05-05"; under the word "Method" appear the initials "IAD"; and after "Detainer," the "Yes" box is checked.

[5] In a concurring statement, Justice CORRIGAN raised specific questions for the Court of Appeals to address. Specifically, she asked:

> (1) Was the panel correct that *People v Monasterski*, 105 Mich App 645 (1981), and *People v Wilden (On Rehearing)*, 197 Mich App 533 (1992), hold that "a detainer filed against a jail inmate before he begins serving a prison sentence is insufficient to implicate the IAD," and, if so, (2) are the holdings in *Monasterski* and *Wilden* consistent with the language of article III of the IAD?

After the Court of Appeals rendered its first decision, but before this Court vacated that decision, defendant was brought to trial, convicted as charged, and sentenced to life in prison. Defendant should not have been

On remand, the Court of Appeals, in a split decision, again reversed the trial court's dismissal of the charges, holding that the IAD did not apply because the prosecutor had not delivered the detainer to the institution in which defendant was serving his sentence, i.e., the Bureau of Prisons. *People v Swafford (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued March 18, 2008 (Docket No. 268499) (*Swafford II*). However, the dissenting judge concluded that

> the correspondence sent by the prosecutor's office to the United States Marshal on June 1, 2004 . . . became a valid detainer for purposes of the IAD no later than March 2, 2005, when it accompanied defendant to federal prison, was verified, and the prosecutor was notified that defendant was requesting disposition on the outstanding charges filed against him. [*Id.* at 1 (ZAHRA, J., dissenting).]

Defendant again filed an application for leave to appeal in this Court, and this time, we granted defendant's application for leave to appeal. *People v Swafford,* 482 Mich 1015 (2008).

## II. STANDARD OF REVIEW

This case involves the interpretation of the Interstate Agreement on Detainers Act, MCL 780.601. Questions of statutory interpretation are questions of law that this Court reviews de novo. *People v Osantowski,* 481 Mich 103, 107; 748 NW2d 799 (2008).

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brought to trial at that time. The Court of Appeals decision reversing the trial court's dismissal of charges and remanding the case for trial had not taken effect, because defendant had filed a timely appeal to this Court. MCR 7.215(F)(1)(a). Moreover, during the pendency of a timely appeal to this Court, a Court of Appeals decision remanding to a lower court for further proceedings is automatically stayed, unless the Court of Appeals or this Court orders otherwise. MCR 7.302(C)(5). Neither this Court nor the Court of Appeals ordered further proceedings to begin notwithstanding defendant's timely appeal. Accordingly, the trial court did not have proper jurisdiction to bring defendant to trial or convict defendant.

III. ANALYSIS

"Forty-eight States, [including Michigan,] the Federal Government, and the District of Columbia . . . have entered into the Interstate Agreement on Detainers . . . ." *Alabama v Bozeman,* 533 US 146, 148; 121 S Ct 2079; 150 L Ed 2d 188 (2001). The IAD "creates uniform procedures for lodging and executing a detainer, *i.e.*, a legal order that requires a State in which an individual is currently imprisoned to hold that individual when he has finished serving his sentence so that he may be tried by a different State for a different crime." *Id.*[6] Article I of the IAD indicates that its purpose is to "encourage the expeditious and orderly disposition" of "charges outstanding against . . . prisoner[s]." MCL 780.601. Article III(a) of the IAD provides, in pertinent part:

> Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officers' jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint . . . . [*Id.*]

Article V(c) of the IAD states, in relevant part:

> [I]n the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III . . . , the appropriate court of the

[6] Article II(a) of the IAD defines "state" to include "the United States of America." MCL 780.601.

> jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect. [*Id*.]

In this case, the Wayne County Prosecutor lodged a detainer against defendant, and while defendant was serving a term of imprisonment at a federal institution, defendant made a written request with the prosecutor for a final disposition of the pending Michigan charges. Thereafter, the prosecutor failed to bring defendant to trial within 180 days as is required by Article III(a) of the IAD. Article V(c) of the IAD, MCL 780.601, states that if a trial is not brought within the period provided in Article III(a), "the . . . court . . . *shall* enter an order dismissing the [complaint] with prejudice . . . ." (Emphasis added.) Therefore, the trial court in this case properly dismissed the charges with prejudice.

In its first opinion, the Court of Appeals reversed the trial court on the basis that the IAD was not applicable because defendant was not serving a term of imprisonment when the prosecutor lodged the detainer against him. However, the IAD does not require that the detainer be lodged while the defendant is serving a term of imprisonment. Instead, Article III(a) requires that "during the continuance of the term of imprisonment," a charge must be "pending . . . on the basis of which a detainer *has been* lodged." (Emphasis added.) The Legislature's use of the passive voice makes *when* the detainer was lodged irrelevant as long as it was lodged before the defendant requested a final disposition. Furthermore, "a detainer *remains* lodged against a prisoner without any action being taken on it." *People v McLemore,* 411 Mich 691, 692 n 2; 311 NW2d 720 (1981) (citation and quotation marks omitted; emphasis added). See also *United States v Mauro,* 436 US 340, 360; 98 S Ct 1834; 56 L Ed 2d 329 (1978). Therefore, the

IAD applies as long as a "detainer has been lodged against the [defendant]," and the defendant, while serving a term of imprisonment in one party state, has charges pending against him in another party state, and causes a written request for a final disposition to be delivered to the prosecutor and the court. Upon receiving that request, the prosecutor must bring the defendant to trial within 180 days. That is, although the defendant must be serving a term of imprisonment when the out-of-state charges are pending and when he files a request for a final disposition, the defendant does not have to be serving a term of imprisonment when the detainer is first lodged. Because a detainer had been lodged against defendant, and because he was serving a term of imprisonment when he requested a final disposition on the pending out-of-state charges, the prosecutor was required to bring defendant to trial within 180 days of receiving defendant's request for trial.

As discussed earlier, this Court vacated that Court of Appeals judgment and remanded the case to the Court of Appeals for consideration of defendant's documentation. On remand, the Court of Appeals again reversed the trial court's dismissal of the charges. However, this time it did so on a different rationale. The Court of Appeals correctly recognized that the two cases that it had previously relied upon—*People v Monasterski,* 105 Mich App 645; 307 NW2d 394 (1981), and *People v Wilden (On Rehearing),* 197 Mich App 533; 496 NW2d 801 (1992)—are readily distinguishable from the instant case.[7] It further recognized that if the prosecutor

[7] In *Monasterski,* the defendants argued that the IAD had been violated because their trial was not commenced within 120 days of their arrival in Michigan, as required by Article IV(c) of the IAD. However, the Court of Appeals held that because the defendants never began serving terms of imprisonment in Indiana (they were simply held in a county jail in Indiana pending extradition), the IAD was not even applicable. *Monas-*

in this case had sent the detainer to the Bureau of Prisons, "the fact that the prosecutor lodged the detainer before defendant was imprisoned would be irrelevant" and "we would be compelled to find that the provisions of the IAD were violated and that the convictions against defendant must be vacated." *Swafford II, supra* at 5.

However, the Court of Appeals concluded that because the prosecutor never sent a detainer *directly* to the Bureau of Prisons, where defendant was serving his sentence, no valid detainer under the IAD was ever filed. It explained that, although the IAD does not define the term "detainer," several cases have defined the term "detainer" as a " 'notification filed with the

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*terski,* 105 Mich App at 653. In *Wilden,* the defendant argued that his return to a federal correctional facility on September 21, 1990, before trial, violated the IAD because Article IV(e) of the IAD provides that

> [i]f trial is not had on any . . . complaint . . . prior to the prisoner's being returned to the original place of imprisonment . . . such . . . complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice. [MCL 780.601.]

However, the Court of Appeals held that because the defendant had not "entered upon a term of imprisonment" as of September 21, 1990, the IAD was not even applicable. *Wilden,* 197 Mich App at 539. Moreover, the Court of Appeals in *Wilden* recognized that the prosecutor had lodged detainers against the defendant. *Id.* at 538. This recognition undercuts the prosecutor's argument in the instant case that communications sent before a prisoner begins a term of imprisonment are not detainers.

Unlike *Monasterski* and *Wilden*, the instant case involves Article III(a) of the IAD, which provides that when a defendant is serving a term of imprisonment in one state and another state has lodged a detainer against the defendant, the latter state has 180 days to bring the defendant to trial after it receives the defendant's written request for a final disposition of the outstanding charges. And, unlike the defendants in *Monasterski* and *Wilden*, the defendant in the instant case had begun to serve a term of imprisonment in the federal prison on the critical date, i.e., when defendant requested a final disposition of the outstanding charges.

institution in which a prisoner is serving a sentence . . . .' " *McLemore,* 411 Mich at 692 n 2, quoting *Mauro,* 436 US at 359 (quotation marks omitted). The Court of Appeals held that because the prosecutor sent the detainer to the U.S. Marshals rather than the Bureau of Prisons, the detainer was not valid, and, thus, the IAD did not apply.

The dissenting judge, on the other hand, recognized that,

> [a]lthough the June 1, 2004, correspondence was filed with the U.S. Marshal before defendant was imprisoned, it is without dispute that the correspondence followed defendant to federal prison, where a federal prison official verified "the request to lodge a detainer," the prosecutor's office caused the clerk of the court to certify the warrant and complaint, and the federal prison official subsequently sent the prosecutor a letter stating that "[a] detainer has been filed against this subject in your favor." [*Swafford II, supra* at 1 (ZAHRA, J., dissenting) (citation omitted).]

The dissenting judge emphasized that the "federal institution in which defendant was imprisoned regarded the detainer as lodged once it was verified, as evidenced by the sending of the detainer letter" and "the prosecutor's conduct supports the conclusion that [she] also viewed the detainer as being properly lodged," because "the prosecutor ultimately filed all the documents that would be consistent with the understanding that an IAD detainer had been lodged with the federal prison." *Id.* at 1-2. Accordingly, the dissent concluded that the detainer had been properly lodged with the Bureau of Prisons and that the IAD was violated when defendant was not brought to trial within 180 days.

We agree with the dissenting judge. Contrary to the conclusion of the Court of Appeals majority, there is no

requirement in the IAD that the prosecutor initially file the detainer with the institution in which the prisoner is serving his sentence. Article III(a) simply states that it is applicable where "a detainer has been lodged against the prisoner." MCL 780.601. There is no language in the IAD that requires the prosecutor to initially lodge the detainer with any specific institution. Although caselaw generally describes a detainer as a " 'notification filed with the institution in which a prisoner is serving a sentence,' " *McLemore,* 411 Mich at 692 n 2, quoting *Mauro,* 436 US at 359, these descriptions are merely meant to provide guidance on the meaning of "detainer" in the absence of a statutory definition. These cases do not support the proposition that a detainer that the prosecutor initially filed with another institution, i.e., the U.S. Marshals, but that nevertheless reaches the institution in which the prisoner is serving his sentence, is not a valid detainer for purposes of the IAD.[8] Further, as discussed earlier, nothing in the actual language of the IAD requires the prosecutor to initially file the detainer with the institution in which the defendant is serving his sentence. Instead, Article III(a) simply requires the prosecutor to bring the defendant to trial within 180 days when "a detainer has been lodged against the prisoner" and,

[8] The question at issue in both *McLemore* and *Mauro* was whether a writ of habeas corpus constitutes a detainer for purposes of the IAD. Further, *McLemore,* on which the prosecutor relies because it states that a detainer is a " 'notification filed with the institution in which a prisoner is serving sentence,' " *McLemore,* 411 Mich at 692 n 2, quoting *Mauro,* 436 US at 359, also states that "the provisions of the [IAD] apply if a participating jurisdiction which has untried charges against a prisoner lodges a detainer *with the jurisdiction where the prisoner is incarcerated* . . . ." *Id.* at 694, citing *Mauro* (emphasis added). In the instant case, there is no question that the prosecutor lodged a detainer with the jurisdiction in which defendant was incarcerated when it lodged the detainer with the U.S. Marshals and where defendant was incarcerated in a federal prison.

while serving a term of imprisonment, the defendant causes to be delivered to the prosecutor and the court a written request for a final disposition. In this case, (1) "a detainer [had] been lodged against [defendant]," and (2) while he was serving a term of imprisonment, defendant caused to be delivered to the prosecutor and the court a written request for a final disposition. Therefore, the IAD was breached when defendant was not brought to trial within 180 days.[9]

Finally, the facts of this case make it clear that both parties invoked the IAD for purposes of bringing defendant to trial. The institution in which defendant was serving his sentence received the prosecutor's detainer, the institution confirmed the detainer with the prosecutor, the prosecutor expressly agreed to bring defendant to trial within 180 days of receiving defendant's request for trial as is required by Article III(a), and the prosecutor obtained custody of defendant through the IAD. In a correspondence with defendant, a federal prison official stated, "I verified the request to lodge a detainer . . . ." Stamped on the letter that accompanied the June 1, 2004, detainer is a notation dated March 2, 2005, indicating that a federal prison official verified the detainer against defendant with the extradition unit of the Wayne County Prosecutor. The Bureau of Prisons further provided the prosecutor and the court clerk with notice of defendant's request for a final disposition of the Michigan charges that stated:

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[9] The Court of Appeals noted that "the parties provide only scant information indicating *how* the Bureau of Prisons received notification that defendant had outstanding criminal charges in Michigan." *Swafford II, supra* at 8 (emphasis added). However, *how* the Bureau received notice is not particularly relevant. All that is relevant for purposes of the IAD is that the Bureau received notice and passed it on to defendant, who, while serving a term of imprisonment, then filed a written request for a final disposition with the prosecutor and the court.

> The above named defendant is requesting disposition on the outstanding charges you have filed against him as a detainer. . . . An inmate requesting disposition of detainers in accordance with Article III of the Interstate Agreement on Detainers Act must be brought to trial within 180 days of your receipt of this request.

It is undisputed that the prosecutor received this notice on March 7, 2005. The Bureau of Prisons also submitted a document to the prosecutor that provides, "A detainer has been filed against this subject in your favor for: 1st Degree Murder, we will again notify you approximately 60 days prior to actual release." Subsequently, the Bureau of Prisons sent a letter to the prosecutor that stated:

> The above named inmate has requested disposition on outstanding charges which were filed against him as a detainer. . . . As you know, once an inmate requests disposition under the IAD they must be brought to trial within 180 days of your receipt of the request. Ninety of the allotted 180 days elapsed effective June 25, 2005.

In response, the prosecutor signed an "Agreement on Detainers" that states, "I propose to bring this person to trial on the indictment, information or complaint named in the offer within the time specified in Article III(a) of the Agreement on Detainers." This agreement also states that "[t]his form should only be used when an offer of temporary custody has been received as the result of a prisoner's request for disposition of a detainer" and that "[this form is] in response to [the Bureau of Prisons'] letter of March 2, 2005." When the prosecutor failed to bring defendant to trial within 180 days, the Bureau of Prisons sent the prosecutor a letter stating:

> The above named inmate requested disposition of the outstanding charges that you have filed against him as a

> detainer on 03-02-2005. Under Article III of the Interstate Agreement on Detainers, an inmate must be brought to trial within 180 days after he requests disposition and the forms are received by the appropriate officials. Our records indicate the forms required under the provisions of the IAD were received and signed for by your office on 03-07-2005. . . . Since 180 days have elapsed since you received this request for disposition, we have advised, by copy of this letter to the inmate, that he may petition the appropriate court for dismissal of the outstanding charges.

Finally, the Bureau of Prisons' "Release Authorization" indicates a "Release Date" of "10-05-05"; under the word "Method" appear the initials "IAD"; and after "Detainer," the "Yes" box is checked.

In this case, it is utterly clear that the prosecutor lodged a detainer against defendant, that both the Bureau of Prisons and defendant were aware of this detainer, that the prosecutor was aware that the Bureau of Prisons was in possession of the detainer, and that defendant caused a written request for a final disposition to be delivered to the prosecutor and the court while defendant was serving a term of imprisonment. Therefore, the IAD is clearly applicable, and Article III(a) was indisputably violated when defendant was not brought to trial within the proper time frame. Because Article V(c) expressly states that if the defendant is not "brought to trial within the period provided in Article III . . . , the appropriate court . . . shall enter an order dismissing the [charges] with prejudice," the trial court here properly dismissed the charges against defendant. "Any other reading of [the IAD] would allow the Government to gain the advantages of lodging a detainer against a prisoner without assuming the responsibilities that the [IAD] intended to arise from such an action." *Mauro,* 436 US at 364. The prosecutor here

failed to satisfy these responsibilities.

## IV. CONCLUSION

The clear language of the IAD, MCL 780.601, states that if the prosecutor fails to bring a defendant to trial within 180 days of receiving the defendant's request for a final disposition made while the defendant is serving a term of imprisonment if a "detainer has been lodged against the prisoner," the court "shall enter an order dismissing the [complaint] with prejudice." Because that is precisely what happened in this case, we reverse the Court of Appeals and reinstate the trial court's order dismissing the charges with prejudice.[10] However harsh and inflexible a remedy for failure to comply with the IAD this may be adjudged, it is plainly what our Legislature requires.

KELLY, C.J., and CAVANAGH, WEAVER, CORRIGAN, YOUNG, and HATHAWAY, JJ., concurred with MARKMAN, J.

[10] Because we are reinstating the trial court's order dismissing the charges against defendant, defendant's convictions and sentences arising from these charges must be set aside. Defendant's motion to remand for an evidentiary hearing is denied because it is now moot.

ROMAIN v FRANKENMUTH MUTUAL INSURANCE COMPANY

Docket No. 135546. Argued January 21, 2009 (Calendar No. 5). Decided March 31, 2009.

David and Joann Romain brought an action in the Wayne Circuit Court against Frankenmuth Mutual Insurance Company, IAQ Management, Inc., and Insurance Services Construction Corporation, seeking recovery of damages related to a mold remediation of the plaintiffs' home. The court, John A. Murphy, J., summarily dismissed IAQ from the action after concluding that IAQ did not owe the plaintiffs a duty under either the contract involved or general negligence principles. Insurance Services subsequently filed a notice under MCR 2.112(K), naming IAQ as a nonparty at fault. The court granted the plaintiffs' motion to strike the notice, concluding that a nonparty must be a proximate cause of the injured party's damage for the nonparty to be at fault. Insurance Services sought leave for an interlocutory appeal, which the Court of Appeals denied in an unpublished order, entered November 21, 2007 (Docket No. 278591). Insurance Services sought leave to appeal. The Supreme Court issued a memorandum opinion denying leave to appeal on July 23, 2008, but then vacated the opinion with an order granting leave to appeal. 482 Mich 992 (2008).

In an opinion per curiam signed by Chief Justice KELLY and Justices CAVANAGH, WEAVER, and HATHAWAY, the Supreme Court *held*:

IAQ did not owe the plaintiffs a duty, and thus its conduct could not have been a proximate cause of the damage the plaintiffs sustained. Therefore, the trial court properly granted the plaintiffs' motion to strike the notice, because a nonparty at fault must be a proximate cause of the damage sustained by the injured party. *Kopp v Zigich*, 268 Mich App 258 (2005), incorrectly stated that the comparative-fault statutes, MCL 600.2957 and 600.6304, do not require proof of a duty before fault can be apportioned and liability allocated, and that holding is overruled. *Jones v Enertel, Inc*, 254 Mich App 432 (2002), an earlier decision by which the *Kopp* Court was bound, correctly stated that, under Michigan law, a duty must be proved before the issue of fault or proximate cause can be considered. A legal duty is a threshold requirement before

there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another.

Affirmed.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, dissenting, stated that the majority conflates the common-law concepts of proximate causation and negligence, that duty and proximate causation are two separate elements of a negligence claim and differ from the concept of fault, and that the comparative-fault statutes, MCL 600.2957 and 600.6309, do not require proof of a duty before a person may be found to be a proximate cause of an injury and allocated fault. By requiring a duty as a precondition of determining fault or proximate causation, the majority imports principles of common-law negligence into the statutes, a result that the statutes did not contemplate. The trial court's order striking the notice of nonparty at fault should be reversed and the case remanded for further proceedings at which the relative fault of Insurance Services and IAQ can be considered.

NEGLIGENCE — DUTY — PROXIMATE CAUSE — NONPARTIES AT FAULT.

Unless a nonparty owed an injured party a duty, its conduct cannot be a proximate cause of the damage sustained by the injured party, and it cannot be considered a nonparty at fault for purposes of MCR 2.112(K), the court rule permitting a court to assess the fault of a nonparty.

*Blake, Kirchner, Symonds, Larson, Kennedy & Smith, P.C.* (by *Kevin T. Kennedy*, *Rebecca S. Austin*, and *Christopher W. Bowman*), for David and Joann Romain.

*Cardelli, Lanfear & Buikema, P.C.* (by *Anthony F. Caffrey III*), for Insurance Services Construction Corporation.

Amici Curiae:

*John A. Braden* for himself.

*Dickinson Wright PLLC* (by *Phillip J. DeRosier*, *Trent B. Collier*, and *Doron Yitzchaki*) for Michigan Defense Trial Counsel, Inc.

*Clark Hill PLC* (by *David D. Grande-Cassell* and *Kristin B. Bellar*) for the Michigan Manufacturers Association.

PER CURIAM. The Wayne Circuit Court summarily dismissed IAQ Management, Inc. (IAQ), from this action because IAQ did not owe plaintiffs a duty under the contract involved or under general negligence principles. Thereafter, defendant, Insurance Services Construction Corporation, filed a notice under MCR 2.112(K) naming IAQ as a nonparty at fault. Because IAQ did not owe plaintiffs a duty, IAQ's conduct could not have been "a proximate cause of damage sustained by a party."[1] Therefore, the circuit court properly granted plaintiffs' motion to strike the notice of IAQ as a nonparty at fault[2] because a nonparty at fault must be a proximate cause of the damage sustained by the injured party. We affirm the circuit court's ruling.

We write briefly to eliminate a conflict between two published Court of Appeals opinions. Specifically, we overrule the statement in *Kopp v Zigich*[3] that "a plain reading of the comparative fault statutes does not require proof of a duty before fault can be apportioned and liability allocated." That is an incorrect statement of Michigan law. In *Jones v Enertel, Inc*,[4] the Court of Appeals held that "a duty must first be proved before the issue of fault or proximate cause can be considered." Under the "first out" rule of MCR 7.215(J)(1), the *Kopp* panel should have followed *Jones* or declared a conflict under MCR 7.215(J)(2). Because the *Kopp* panel did not declare a conflict, *Jones* is the controlling precedent and

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[1] MCL 600.6304(8).

[2] MCR 2.112(K).

[3] *Kopp v Zigich*, 268 Mich App 258, 260; 707 NW2d 601 (2005).

[4] *Jones v Enertel, Inc*, 254 Mich App 432, 437; 656 NW2d 870 (2002).

proof of a duty *is* required "before fault can be apportioned and liability allocated" under the comparative fault statutes, MCL 600.2957[5] and MCL 600.6304.[6]

In addition to being the controlling precedent under the court rules, *Jones* correctly stated Michigan negligence law; *Kopp* did not. As noted by this Court in *Riddle v McLouth Steel Products Corp*:[7]

> "In a common law negligence action, before a plaintiff's fault can be compared with that of the defendant, it obviously must first be determined that the defendant was negligent. It is fundamental tort law that before a defendant can be found to have been negligent, it must first be determined that the defendant owed a legal duty to the plaintiff."

The same calculus applies to negligent actors under the comparative fault statutes. A common-law negligence claim requires proof of (1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causa-

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[5] MCL 600.2957(1) provides:

> In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

[6] MCL 600.6304(1) requires the fact-finder to make findings indicating the total amount of damages and each person's total percentage of fault. MCL 600.6304(8) defines "fault" to include "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a *proximate cause* of damage sustained by a party." (Emphasis added.)

[7] *Riddle v McLouth Steel Products Corp*, 440 Mich 85, 99; 485 NW2d 676 (1992), quoting *Ward v Kmart Corp,* 136 Ill 2d 132, 145; 554 NE2d 223 (1990).

tion; and (4) damages.[8] Therefore, under Michigan law, a legal duty is a threshold requirement before there can be any consideration of whether a person was negligent by breaching that duty and causing injury to another. Thus, when the Legislature refers to the common-law term "proximate cause" in the comparative fault statutes, it is clear that for claims based on negligence " 'it must first be determined that the [person] owed a legal duty to the plaintiff.' "[9] Additionally, MCL 600.6304(8) includes in the definition of fault "a breach of a legal duty . . . that is a proximate cause of damage sustained by a party." Before there can be "a breach of a legal duty," there must be a legal duty. Without owing a duty to the injured party, the "negligent" actor could not have proximately caused the injury and could not be at "fault" for purposes of the comparative fault statutes.

Affirmed.

KELLY, C.J., and CAVANAGH, WEAVER, and HATHAWAY, JJ., concurred.

YOUNG, J. (*dissenting*). I dissent from the readoption of our previously vacated July 23, 2008, memorandum opinion in today's opinion per curiam. I believe that we erred in our construction of the definition of "fault," as used in MCL 600.6304(8). Specifically, I believe that the majority opinion conflates the common-law concept of "proximate causation" with the common-law concept of "negligence," a result not contemplated by the plain language of the comparative fault statutes. On reconsideration, I do not believe that the statutes require proof of a duty before a person may be found to be a

[8] *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993).

[9] *Riddle*, *supra* at 99 (citation omitted).

proximate cause of an injury and allocated fault. Rather, duty and proximate causation are two separate elements of a negligence claim—a wholly different concept than "fault."

Accordingly, I would reverse the trial court's order striking Insurance Services Construction's (ISC) notice of nonparty at fault and remand for further proceedings at which the relative fault of both ISC and IAQ Management, Inc. (IAQ), should be taken into consideration.

## I. RELEVANT FACTS AND PROCEDURAL HISTORY

Plaintiffs, David and Joann Romain, are homeowners who filed a claim with their homeowner's insurance provider, Frankenmuth Mutual Insurance, for water and toxic mold damage. Frankenmuth referred plaintiffs to ISC to undertake the remodeling and mold remediation. After ISC completed the remodeling, Frankenmuth hired IAQ to test the air quality in the home. IAQ certified that the mold had been remediated and the home was safe for occupancy. Despite IAQ's certification, plaintiffs alleged that they began suffering from illnesses caused by toxic mold. Plaintiffs subsequently filed suit against Frankenmuth, IAQ, and ISC.

Of import to this appeal, the trial court dismissed plaintiffs' tort claims against IAQ because IAQ did not owe a duty to plaintiffs. This ruling has not been challenged on appeal. ISC subsequently filed a notice of nonparty at fault under MCR 2.112(K)[1] naming IAQ. Ultimately, the trial court struck the notice on the basis

[1] MCR 2.112(K) provides:

> (1) Applicability. This rule applies to actions for personal injury, property damage, and wrongful death to which MCL 600.2957 and MCL 600.6304, as amended by 1995 PA 249, apply.

of *Jones v Enertel, Inc*,[2] which held that the existence of a duty is a necessary condition precedent to a consideration of proximate causation and allocating fault under MCL 600.6304(8). The trial court recognized, however, that *Jones* was inconsistent with the subsequent Court of Appeals opinion in *Kopp v Zigich*,[3] which rejected a duty prerequisite to a finding of fault. Accordingly, the trial court stayed the proceedings to allow ISC to file an interlocutory application for leave to appeal.

The Court of Appeals denied ISC's application for leave "for failure to persuade the Court of the need for immediate appellate review."[4] ISC then sought leave to appeal in this Court. We initially affirmed the trial court's order striking the notice of nonparty at fault in a memorandum opinion, which is reproduced in the majority opinion. However, we unanimously granted ISC's motion for reconsideration or rehearing and vacated the earlier memorandum opinion. We asked the parties to address

> whether the Legislature's use of the term "proximate cause" in MCL 600.6304 conflicts with other statutory provisions, whether the Legislature intended to impose a legal duty requirement as a precondition for allocating fault under MCL 600.2957 and MCL 600.6304, and

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> (2) Notice Requirement. Notwithstanding MCL 600.6304, the trier of fact shall not assess the fault of a nonparty unless notice has been given as provided in this subrule.

Subsections 3 and 4 of the court rule outline the procedural and substantive requirements for the notice and allow a plaintiff to amend its complaint following the filing of a notice.

[2] 254 Mich App 432; 656 NW2d 870 (2002).

[3] 268 Mich App 258; 707 NW2d 601 (2005).

[4] *Romain v Frankenmuth Mut Ins*, unpublished order of the Court of Appeals, entered November 21, 2007 (Docket No. 278591).

whether, if MCL 600.6304 merely codified the common-law doctrine of negligence, a finding of duty is a prerequisite to a finding of fault.[5]

## II. STANDARD OF REVIEW

This case involves the proper application of various provisions of Michigan's "comparative fault" statutes. We review issues of statutory construction de novo. Our goal is to give effect to the Legislature's intent as expressed in the language of the statute.[6]

## III. ANALYSIS

In 1995, the Legislature enacted tort reform legislation. As part of that reform, the Legislature abolished joint liability while retaining several liability. MCL 600.2956 provides: "Except as provided in [MCL 600.6304], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint."[7]

The Legislature also enacted MCL 600.2957 and MCL 600.6304 regarding the comparative allocation of fault. Section 2957 provides, in relevant part:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, *the liability of each person shall be allocated* under this section by the trier of fact and, subject to section 6304, *in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person,*

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[5] *Romain v Frankenmuth Mut Ins*, 482 Mich 992 (2008).

[6] *Renny v Dep't of Transportation*, 478 Mich 490, 495; 734 NW2d 518 (2007).

[7] MCL 600.2956.

*regardless of whether the person is, or could have been, named as a party to the action.*

* * *

(3) [MCL 600.2956 to 600.2960] do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.[8]

Section 6304 provides:

(1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death involving fault of more than 1 person, including third-party defendants and nonparties, the court, unless otherwise agreed by all parties to the action, shall instruct the jury to answer special interrogatories or, if there is no jury, shall make findings indicating both of the following:

(a) The total amount of each plaintiff's damages.

(b) The percentage of the total fault of all persons that contributed to the death or injury, including each plaintiff and each person released from liability under [MCL 600.2925d], *regardless of whether the person was or could have been named as a party to the action.*

(2) In determining the percentages of fault under subsection (1)(b), the trier of fact shall consider both the nature of the conduct of each person at fault and the extent of the causal relation between the conduct and the damages claimed.

(3) The court shall determine the award of damages to each plaintiff in accordance with the findings under subsection (1), subject to any reduction under subsection (5) or [MCL 600.2955a] or [MCL 600.6303], and shall enter

[8] Emphasis added.

> judgment against each party, including a third-party defendant, except that judgment shall not be entered against a person who has been released from liability as provided in section 2925d.
>
> (4) Liability in an action to which this section applies is several only and not joint. Except as otherwise provided in subsection (6), a person shall not be required to pay damages in an amount greater than his or her percentage of fault as found under subsection (1). This subsection and section 2956 do not apply to a defendant that is jointly and severally liable under [MCL 600.6312].
>
> * * *
>
> (8) As used in this section, *"fault" includes an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party.*[9]

By requiring a duty as a precondition of determining "fault" or "proximate causation," the majority opinion imports principles of common-law "negligence" into the tort reform acts. This is not contemplated by the plain language of the statutes. By its plain language, the definition of "fault" in § 6304(8) does not require a party to establish the elements of a negligence claim or prove the existence of a duty before allocating fault to a nonparty.

When a statute employs a common-law term, such as "proximate cause," and expresses no intent to alter the common-law meaning of that term, this Court must interpret the statute consistently with that meaning.[10] When the Legislature uses a "legal term of art," we must give that term its "peculiar and appropriate legal meaning."[11]

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[9] Emphasis added.

[10] MCL 8.3a.

[11] *Brackett v Focus Hope, Inc*, 482 Mich 269, 276; 753 NW2d 207 (2008).

The meaning of "proximate cause" under the common law is easiest to ascertain in connection with its role as an element of a common-law negligence claim. In order to establish a negligence claim, a plaintiff must prove: (1) duty, (2) breach of duty, (3) causation, and (4) damages.[12] To establish the element of causation for a negligence action, a plaintiff must prove that the defendant's actions were both a cause in fact and legal cause of its injury.[13] The cause in fact component is established by showing that the injury or harm would not have occurred "but for" the defendant's action.[14] Legal, or proximate, cause, on the other hand, "involves examining the foreseeability of consequences, and whether a defendant should be held legally responsible for such consequences."[15]

As stated, a plaintiff must establish all four necessary elements, including duty and proximate cause, as a precondition for a finding of negligence. As this Court explained in *Moning v Alfono*, the elements of duty and proximate cause are related:[16]

> Duty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person. Proximate cause encompasses a number of distinct problems including the limits of liability for foreseeable consequences. In the *Palsgraf* case, the New York

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[12] *Lorencz v Ford Motor Co,* 439 Mich 370, 375; 483 NW2d 844 (1992).

[13] *Skinner v Square D Co*, 445 Mich 153, 162-163; 516 NW2d 475 (1994).

[14] *Id.* at 163.

[15] *Id*. See also *Stoll v Laubengayer*, 174 Mich 701, 705; 140 NW 532 (1913) ("[I]t must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in light of the attending circumstances.").

[16] 400 Mich 425, 438-439; 254 NW2d 759 (1977), citing *Palsgraf v Long Island R Co*, 248 NY 339; 162 NE 99 (1928) (Cardozo, J.).

> Court of Appeals, combining the questions of duty and proximate cause, concluded that no duty is owed to an unforeseeable plaintiff.
>
> The questions of duty and proximate cause are interrelated because the question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability—whether it is foreseeable that the actor's conduct may create a risk of harm to the victim, and whether the result of that conduct and intervening causes were foreseeable.

Initially, the interrelated nature of these elements led me to believe that proximate causation could not be established absent the existence of a duty. Although related by the common consideration of foreseeability, proximate cause and duty are *two separate elements* of a common-law negligence claim. Though the absence of foreseeability may defeat proof of both, proof of a duty does not require proof of proximate causation, nor, most important here, does proof of proximate cause require proof of a duty. The Legislature omitted the term "negligence" from the statutes. Therefore, we presume that the Legislature intended for courts to allocate "fault" solely on the basis of the listed options without importing omitted concepts of common-law negligence.[17]

More significant, the imposition of a duty requirement in § 6304(8) would be inconsistent with that subsection's definition of "fault": " 'fault' *includes* an act, an omission, conduct, including intentional misconduct, a breach of warranty, *or* a breach of a legal duty, or any conduct that could give rise to the imposition of

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[17] *Lamp v Reynolds*, 249 Mich App 591, 602; 645 NW2d 311 (2002). See also *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003) ("[W]e may not read into the statute what is not within the Legislature's intent as derived from the language of the statute.").

strict liability, that is a proximate cause of damage sustained by a party." By using the term "includes" in conjunction with the term "or," the Legislature expressed its intent to make this list of examples nonexhaustive. A court could determine that a person was a proximate cause of a party's injury and at "fault" on the basis of conduct (or lack thereof) not listed in the statute.[18] The term "or" further evidences the Legislature's intent that a defendant seeking to allocate fault to another person need only establish *one* method by which the person was a proximate cause of the injury.[19] The majority opinion makes the proof of a legal duty the exclusive method for proving fault under § 6304(8) through selective quotation: "a breach of a legal duty . . . that is a proximate cause of damage sustained by a party." The majority opinion omits the alternatives specified in the statute, e.g., "an act . . . that is a proximate cause . . . ." It is inconsistent to identify a breach of a legal duty as one method *among many* to establish fault, but then impose the existence of a legal duty as a precondition for finding fault.

The majority opinion's imposition of a prerequisite duty element is also inconsistent with §§ 2957(1) and 6304(1)(b), both of which provide that a person shall be allocated fault regardless of whether he could be named as a party to the action. These statutes are *in pari materia*, having a common purpose, and must be read together to give effect to the statutes in their entirety.[20]

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[18] The use of the term "includes" by itself can limit or expand a list. This Court must consider the context in which the term is used to determine the Legislature's intent. See *Surowitz v Pontiac*, 374 Mich 597, 606; 132 NW2d 628 (1965).

[19] "Or" is a disjunctive term indicating that a person has a choice between options. *People v Thompson*, 477 Mich 146, 161; 730 NW2d 708 (2007) (CORRIGAN, J., concurring in part and dissenting in part).

[20] *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007).

A person who does not owe a duty to the plaintiff obviously cannot be named as a party to the action. Accordingly, a person who does not owe a duty to the plaintiff clearly falls within the ambit of these provisions. To impose a duty requirement for the allocation of fault, this Court would have to violate the rules of statutory construction and rewrite §§ 2957(1) and 6304(1)(b) to include such an exception.[21] This is precisely what the majority opinion does.

Furthermore, the plain language of the statutes does not violate common-law negligence principles by allowing a plaintiff to collect against a person in the absence of a duty. Section 2957(3) provides that the allocation of fault cannot subject a nonparty to liability in the current action or be used as evidence against a nonparty in a separate action. Thus, the allocation of fault to a nonparty is not a determination that the nonparty was negligent and does not subject him to tort liability when the plaintiff cannot otherwise prove all the elements of his claim.

### IV. EFFECT OF *RIDDLE v McLOUTH STEEL*

I further believe that the majority errs by relying on *Riddle v McLouth Steel Products Corp*[22] for the proposition that a named defendant must establish that a nonparty owed a duty to the plaintiff as a precondition for a finding of proximate causation and fault. *Riddle* was decided by this Court before tort reform in 1995 and the enactment of the comparative fault statutes. *Riddle* does not pertain to a defendant allocating fault to a nonparty; rather, it considers whether the tenet that a landowner owes no duty to business invitees to

[21] See *AFSCME*, *supra* at 400.

[22] 440 Mich 85, 99; 485 NW2d 676 (1992).

warn of open and obvious dangers was abrogated by the adoption of the "comparative negligence" scheme in Michigan.[23]

*Riddle* held that the determination of a duty and the consideration of the "comparative negligence" of a plaintiff are separate and distinct because they are considered at different points in the case. When a plaintiff files suit against a defendant, the court must determine as a matter of law whether the defendant owed that plaintiff a duty. A negligence action may proceed against the named defendant only if there is a legal duty. "Comparative negligence," on the other hand, is considered at the end of the trial to reduce the damages a defendant owes to a plaintiff.[24] The statements in *Riddle* upon which the majority opinion relies were meant to describe the relationship of a "plaintiff's *negligence* in relation to the defendant's duty"[25] and are, therefore, completely unrelated to the determination whether the new statutory concept of "fault" may be allocated in the absence of a duty. As discussed, under our statutory scheme, the existence of a duty is irrelevant to the allocation of "fault," which considers only a determination of proximate causation. This is particularly so when allocating fault cannot subject a nonparty to liability under § 2957(3).

The majority opinion's continued mistaken reliance on *Riddle*, and the improper importation of negligence

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[23] Historically, the concept of "contributory negligence" barred a plaintiff whose own negligence contributed to his injury from collecting any compensation from a negligent defendant. From 1979 until the tort reforms of 1995, Michigan courts accepted the common-law concept of "pure comparative negligence." Under this scheme, the plaintiff was entitled to a damages award against a negligent defendant reduced by plaintiff's relative portion of negligence. See *Placek v Sterling Hts*, 405 Mich 638; 275 NW2d 511 (1979).

[24] *Riddle*, *supra* at 95-96.

[25] *Id.* at 98.

principles into §§ 2957 and 6304, is caused, in part, by the continued use of the term "comparative negligence" to describe the allocation of fault under the statutes.[26] The use of this term is a misnomer when used in relation to these statutes. Sections 2957 and 6304 make absolutely no reference to negligence and, by their plain language, relate solely to the allocation of "fault." To remedy any further confusion, I caution the bench and bar to be more precise when referring to statutory "comparative fault."

## V. CONCLUSION

Given the plain language of the comparative fault statutes and the common-law definition of "proximate cause," I dissent from the majority opinion's importation of negligence principles into §§ 2957 and 6304 and the creation of a prerequisite duty element before proximate causation and fault may be considered. Put simply, the comparative fault statutes do not describe the allocation of negligence. The statutes describe the allocation of *fault* between parties and nonparties, including persons who could not otherwise be named as a party to the suit. "Fault" is not defined in terms of negligence, but by a nonexhaustive list of examples that might amount to a proximate cause of the plaintiff's injuries. Accordingly, instead of readopting our previously vacated memorandum opinion, I would remand the case to the trial court to reinstate the notice of nonparty at fault.

CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

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[26] See, e.g., *Barnett v Hidalgo*, 478 Mich 151 (2007); 732 NW2d 472; *Holton A+ Ins Assoc, Inc*, 255 Mich App 318; 661 NW2d 248 (2003).

ZAHN v KROGER COMPANY OF MICHIGAN

Docket No. 136382. Argued January 22, 2009 (Calendar No. 6). Decided April 1, 2009.

Timothy Zahn brought a negligence action in the Genesee Circuit Court against the Kroger Company of Michigan and F.H. Martin Construction Company after falling from a scaffold while working on a Kroger construction project for which Martin was the general contractor. Kroger filed a third-party action against Martin for indemnification, and Martin filed a third-party action seeking contractual indemnification by Cimarron Services, Inc., which was a subcontractractor and Zahn's employer. Martin entered into settlements with Zahn and Kroger. The court, Geoffrey L. Neithercut, J., ruled that both Cimarron and Martin were negligent, and apportioned their fault at 80 and 20 percent, respectively. The court concluded that, under the terms of the contract, Cimarron was not required to indemnify Martin to the extent of Martin's negligence, but was required to reimburse Martin for 80 percent of the settlement amounts. Cimarron appealed, arguing that MCL 600.2956, which requires that parties only pay their own pro rata share of liability, rendered the indemnification clause unenforceable. The Court of Appeals, MURRAY, P.J., and BANDSTRA and FORT HOOD, JJ., affirmed in an unpublished opinion per curiam, issued March 27, 2008 (Docket No. 274994), on the ground that MCL 600.2956 does not apply to contracts. The Supreme Court granted Cimarron's application for leave to appeal. 482 Mich 993 (2008).

In an opinion by Justice HATHAWAY, joined by Chief Justice KELLY and Justices CAVANAGH and WEAVER, the Supreme Court *held*:

MCL 600.2956 does not apply to contract actions, and an employer may voluntarily subject itself to liability for damages to employees from which it would otherwise be insulated.

1. Cimarron and Martin entered into a mutually acceptable agreement to govern liability for construction-site injuries by means of an unambiguous contract. There is no language in MCL 600.2956 and no compelling public policy that would require a court to negate this contract. By its terms, MCL 600.2956 applies

to actions based on tort or another legal theory seeking damages for personal injury; accordingly, it does not apply to this action, which is based on a contract.

2. The trial court properly interpreted the contract, which clearly preserved Martin's right to seek indemnification from Cimarron for any injury arising from Cimarron's negligence.

3. Although Cimarron cannot be held directly liable for the negligence of its own employee under the exclusive-remedy provision of the Worker's Disability Compensation Act, MCL 418.131(1), nothing in that statute or in contract law precludes an employer from voluntarily assuming liability for negligence through a contractual arrangement.

Justice YOUNG, joined by Justices CORRIGAN and MARKMAN, concurring, agreed with Justice MARKMAN's opinion, writing separately to note that stability in the law contributes to stability in our society and that controversies should be decided on the basis of the law rather than the identity of the disputing parties.

Justice MARKMAN, joined by Justices CORRIGAN and YOUNG, concurring, stated that although the majority reached the correct result and applied the correct analysis, it gratuitously included a reference to the "equal bargaining power" of the parties as if to suggest that this circumstance was somehow relevant to the resolution of the instant contract dispute. Such language creates uncertainty in the contract law of this state and invites unnecessary litigation.

Affirmed.

1. INDEMNITY — CONTRACTS — STATUTES — JOINT LIABILITY.

The statutory provision abolishing joint liability in actions seeking damages for personal injury, property damage, or wrongful death does not apply to actions seeking to enforce contracts (MCL 600.2956).

2. INDEMNITY — CONTRACTS — STATUTES — WORKER'S DISABILITY COMPENSATION ACT.

The exclusive-remedy provision of the Worker's Disability Compensation Act does not preclude an employer from voluntarily assuming liability for negligence through a contractual arrangement (MCL 418.131[1]).

*Berry, Johnston, Sztykiel, Hunt & McCandless, P.C.* (by *Eric S. Goldstein*), for Cimarron Services, Inc.

*Secrest Wardle* (by *Janet Callahan Barnes*) for F.H. Martin Construction Company.

HATHAWAY, J. Cimarron Services, Inc.,[1] appeals from a judgment in favor of F.H. Martin Construction Company[2] requiring Cimarron to indemnify Martin for a share of a settlement that Martin had paid as the result of an injury to an employee in a construction accident. Cimarron alleges that the language of the contract does not control. Instead, Cimarron contends that MCL 600.2956 effectively limits the application of express contractual indemnification clauses, because the statute mandates that parties may only be held responsible for their own pro rata share of the negligence.[3] The Court of Appeals rejected this argument and, in an unpublished opinion, held that MCL 600.2956 does not apply to contracts.[4] We granted leave to appeal to review this issue and asked the parties to also address whether the exclusive remedy provision of the Worker's Disability Compensation Act (WCDA), MCL 418.131(1), in any way precludes a third-party defendant employer from voluntarily subjecting itself to liability for negligence to an employee by virtue of an indemnification contract.[5]

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[1] Cimarron was the third-party defendant below.

[2] Martin was a defendant, cross-defendant, and third-party plaintiff below.

[3] MCL 600.2956 provides:

> Except as provided in [MCL 600.6304], in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint. However, this section does not abolish an employer's vicarious liability for an act or omission of the employer's employee.

[4] *Zahn v Kroger Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2008 (Docket No. 274994).

[5] *Zahn v Kroger Co of Michigan,* 482 Mich 993 (2008).

We affirm the judgment of the Court of Appeals in favor of Martin and hold that MCL 600.2956 does not apply to contract actions, and that an employer may voluntarily subject itself to liability for damages to employees from which it would otherwise be insulated. We write briefly to address these issues and to clarify the law regarding indemnification contracts.

The underlying case arose from a construction site accident during the renovation of a Kroger store. Martin was the general contractor and Cimarron was a subcontractor for the project. A Cimarron employee, Timothy Zahn, was injured when he fell from scaffolding while installing drywall. Zahn brought a negligence action against the Kroger Company of Michigan and Martin. Kroger filed a third-party action against Martin for indemnification. Martin, in turn, filed a third-party action against Cimarron seeking indemnification pursuant to their subcontract agreement. Martin entered into a settlement with Zahn for $225,000 and resolved claims for indemnification with Kroger for $12,489.45. Martin then asked the trial court to enforce the terms of the indemnification clause in the subcontract agreement with Cimarron.

This appeal addresses the indemnification clauses in that subcontract. The pertinent contract clauses provide:

> 3. . . . By acceptance of this subcontract, Subcontractor assumes every duty imposed upon Martin, to the extent related to the subject matter of this Subcontract.
>
> * * *
>
> 17. Indemnity — To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold Martin, the Owner and Others (required by the Contract Documents) harmless from all claims for bodily injury and

> property damage that may arise from the performance of the Subcontract work to the extent of the negligence attributed to such acts or omissions by Subcontractor, or anyone employed or contracted by Subcontractor for whose acts any of them may be liable. In no event shall the indemnity contained herein be deemed to cover damages arising exclusively through the negligence of Martin.

The trial court conducted a bench trial on Martin's third-party action for express contractual indemnity. The court ruled that Cimarron's negligence was greater, as it had constructed the scaffolding and ordered Zahn to work on it even after he had protested that it was unsafe. The court ruled that Martin was also negligent, but to a lesser degree, for failing to inspect the scaffolding for safety rails or to take further steps to make the workplace safer for Zahn. The trial court concluded that Martin's percentage share of the negligence was 20 percent and that Cimarron was 80 percent at fault. The trial court held that, pursuant to the terms of the contract, Cimarron was not required to indemnify Martin to the extent of Martin's negligence, but was required to reimburse 80 percent of the settlement amounts back to Martin for its own share of the negligence.

We first address whether MCL 600.2956 renders such indemnification clauses effectively unenforceable. Cimarron contends that the abolition of joint and several liability, as set forth in MCL 600.2956, requires an analysis beyond the language of the contract itself. It proffers that it cannot be held liable for Martin's negligence because MCL 600.2956 requires that parties pay only for their own pro rata share of liability. It further contends that MCL 600.2956 limits indemnification clauses by operation of law and that we are to disregard the actual language of the contract. We find these arguments unpersuasive. Here, Cimarron volun-

tarily entered into an agreement with another business entity. These are business entities with equal bargaining power. The parties came to a mutually acceptable agreement to govern liability for construction site injuries. Such agreements are common in the construction industry. Importantly, neither party claims that the pertinent contractual clauses are ambiguous. To adopt the position that MCL 600.2956 renders express contractual indemnification clauses unenforceable would require that we negate the parties' contract. We find no language in the statute, nor any compelling public policy, that would require us to do so.

The Court of Appeals addressed the identical legal challenge in reviewing a substantially similar express indemnification clause governing a construction site accident. See *Essell v George W Auch Co*.[6] That Court noted, "Although novel, the argument is also contrived because it selectively implicates the underlying negligence complaint and ignores the substance of the cross-complaint, an action based in contract."[7] The Court opined:

> However, defendants ignores [sic] the first sentence of MCL 600.2956, that limits its application to "an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death . . . [.]" While the underlying complaint by Essel [sic] is a tort action seeking damages for personal injury, the action at issue in this cross-complaint is an action based on contract theory. Plaintiff's lawsuit seeks reimbursement for monies paid, not for its own personal injury, property damage, or wrongful death. There is no indication that the Legislature, by amending MCL 600.2956, sought to limit or eliminate the parties' freedom of contract to allocate dam-

[6] *Essell v George W Auch Co,* unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 240940).

[7] *Id*. at 4.

> ages should a breach of contractual duty occur. Indeed, MCL 600.2956 contains the proviso that it applies to tort actions or actions where the legal theory results in damages for personal injury, property damage, or wrongful death. *ISB, supra*. If the Legislature had intended to include all other actions, including contract actions, it expressly would have done so and would not have placed any restricting language within the statute. [*Id*. at 5.]

We find the above analysis persuasive and hold that MCL 600.2956 does not apply to contract actions, and the language chosen by the parties as contained in the contract is controlling.[8]

We must next determine whether the indemnification clause the parties used was properly interpreted. An indemnity contract is to be construed in the same fashion as other contracts. *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2002); *Zurich Ins Co v CCR & Co (On Rehearing),* 226 Mich App 599, 603; 576 NW2d 392 (1997); *Triple E Produce Corp v Mastronardi Produce, Ltd,* 209 Mich App 165, 172; 530 NW2d 772 (1995). The extent of the duty must be determined from the language of the contract itself. *Grand Trunk W R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004). All contracts, including indemnity contracts, should be construed to ascertain and give

[8] Cimarron also urges us to interpret this contract in light of the legislative change in the law concerning joint and several liability. It contends that these clauses were commonly used in contracts drafted before the enactment of the current MCL 600.2956, and that these clauses simply continue to be part of form contracts. However, we note that this agreement was drafted and entered into long after the abolition of joint and several liability, and neither party has alleged that this contract or the pertinent clauses are ambiguous. We cannot assume that the parties in this case, given their equal bargaining power, agreed to a clause that has no meaning or that we should ignore it because the language was part of a form contract.

effect to the intentions of the parties and should be interpreted to give a reasonable meaning to all of its provisions. *Klever v Klever*, 333 Mich 179, 186; 52 NW2d 653 (1952); *MSI Constr Managers, Inc v Corvo Iron Works, Inc*, 208 Mich App 340, 343; 527 NW2d 79 (1995). This Court has generally observed that if the language of the contract is clear and unambiguous, it is to be construed according to its plain sense and meaning. *Grosse Pointe Park v Michigan Muni Liability & Prop Pool*, 473 Mich 188, 198; 702 NW2d 106 (2005). Courts may not make a new contract for parties under the guise of a construction of the contract, if doing so will ignore the plain meaning of words chosen by the parties. *Lintern v Michigan Mut Liability Co*, 328 Mich 1, 4; 43 NW2d 42 (1950).

Here, the contract clearly preserved Martin's right to seek indemnification from Cimarron for any injury arising from Cimarron's negligence. The trial court adhered to the terms of the contract and made a determination of the respective negligence of the two parties. The court ruled that Cimarron was negligent and its pro rata share was 80 percent. The contract terms expressly provide for indemnification under these circumstances. The court ordered Cimarron to indemnify Martin for 80 percent of the settlement of the claim. The Court of Appeals affirmed. We find no error in the lower courts' interpretation of the contract, and the judgment should stand.

Finally, we address whether the exclusive remedy provision of the WDCA[9] precludes enforcement of an

[9] MCL 418.131 provides:

> (1) The right to the recovery of benefits as provided in this act shall be the employee's exclusive remedy against the employer for a personal injury or occupational disease. The only exception to this exclusive remedy is an intentional tort. An intentional tort

indemnification contract when the injured party is the employee of the entity being required to pay the indemnification amount. Cimarron suggests that an employer cannot be required to assume liability for a particular type of damages for negligence from which it is otherwise shielded as a matter of law. Although Cimarron cannot be held directly liable for negligence by its own employee by virtue of the WDCA, nothing in contract law precludes an employer from voluntarily assuming liability for negligence through a contractual arrangement. Similarly, nothing in the WDCA precludes parties from entering into such an agreement. Accordingly, we conclude that the contract language controls, and we affirm the judgment of the Court of Appeals.

KELLY, C.J., and CAVANAGH and WEAVER, JJ., concurred with HATHAWAY, J.

YOUNG, J. (*concurring*). I concur in Justice MARKMAN's opinion. I write separately to note that stability in the law contributes to stability in our society. This is the

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shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. An employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge. The issue of whether an act was an intentional tort shall be a question of law for the court. This subsection shall not enlarge or reduce rights under law.

(2) As used in this section and [MCL 418.827], "employee" includes the person injured, his or her personal representatives, and any other person to whom a claim accrues by reason of the injury to, or death of, the employee, and "employer" includes the employer's insurer and a service agent to a self-insured employer insofar as they furnish, or fail to furnish, safety inspections or safety advisory services incident to providing worker's compensation insurance or incident to a self-insured employer's liability servicing contract.

essence of the rule of law—that controversies are decided on the basis of law, not the identity of the disputing parties. This is why the symbol of justice is blindfolded, because she is uninterested in the identity of the parties but concerned only with the legal merit of their cause. This is also what distinguishes the justice systems of great democracies from those of nations where who one is matters more than the law.

In the grand scheme of things, it might be hard to understand why this great principle matters. But whenever one buys property or enters into a contractual relationship, one does so with the expectation that the rules of law that govern now will not be summarily changed in the future. So, in commercial matters, no less than in other spheres of life, it is important to know in advance what rules will govern in the future and this is especially true of contracts.

When judges desire to assert the power to control the outcomes of controversies—to ensure that favored parties such as the "little guy" win whatever the law—commitment to fixed rules of law becomes an obstacle and thus an inconvenience that must be the first thing cast aside in aid of such power. In the place of announced rules of law are substituted myriad judicial dodges that allow a judge to manipulate outcomes after the fact. Thus, in contractual matters, the willful judge must negate fixed rules of contract in favor of ones that permit after-the-fact "adjustments." These dodges are usually announced as serving a principle of "equity" but are usually no more than a mask that hides the judicial desire to alter outcomes for favored parties.

However well intentioned, I believe that this Court is moving away from defending the rule of law (applying rules known in advance to existing controversies) to a system in which a party's status is what becomes

important to litigation outcomes. For all the reasons stated in Justice MARKMAN's partial concurrence, this case represents a small but significant step in that direction.

CORRIGAN and MARKMAN, JJ., concurred with YOUNG, J.

MARKMAN, J. (*concurring*). In this straightforward contract case, one that ought to be the subject of consensus on this Court, the majority needlessly introduces uncertainty and doubt into the law of our state. By its gratuitous observation that the parties to the contract here are "business entities with equal bargaining power," *ante* at 39, the majority suggests that this circumstance is somehow relevant to its conclusion that the contract ought to be read in accordance with its language. Neither of the parties to this contract has raised any argument concerning their respective "bargaining powers."

After a decade in which this Court has sought to bring a greater consistency and certainty to the law of this state by a disciplined interpretation of statutes, ordinances, deeds, and contracts, and by clear judicial statements concerning the rights and obligations of individuals and businesses, the majority seems bent on restoring a legal regime in which the stability and predictability of the law is perpetually subject to creative legal arguments.

The majority offers no explanation of why it is necessary to remark upon the allegedly "equal bargaining power" of the parties in this case. What, for example, would be different in the majority's analysis if one of the parties to this dispute had *not* been a "business entity"? What would be different in this analysis if the parties had *not* been of "equal bargaining

power"? Indeed, what does it mean to *be* of "equal bargaining power," and how do we *calculate* such "equality"? Where does such a requirement of "equality" *derive* from in the law of this state? Through what means can a party with "unequal" bargaining power ensure that its contract *is* binding on another party?

While the majority provides no guidance in answering these questions, one can hardly doubt that it will become an increasingly common aspect of the appellate landscape in contract cases in Michigan for one party—generally the party that finds the language of the contract to be inhospitable to its claims—to offer its own answers. And as things tend to go, appellate courts will increasingly come to articulate vague rules, fraught with exceptions and exceptions to exceptions, "totality of circumstances" analyses, and multi-part tests for ascertaining what constitutes "equal bargaining power." And eventually in place of a rule of law in which the words of contracts are taken seriously, and in which parties to contract disputes can understand their rights and responsibilities, and in which parties may even find it possible to understand these rights and responsibilities without having to avail themselves of a lawyer, the majority will leave in its wake a legacy of more litigation, more appeals, higher legal costs, and a diminished role for private parties, with a concomitantly enhanced role for judges, in resolving contract disputes. But I suppose this is the very point. When our new Chief Justice promises to "undo . . . the damage" she asserts has been done by this Court over the past decade, Detroit Free Press, December 10, 2008, at 2A, I would venture that the respect this Court has accorded during this time to competent persons to enter into contracts of their own choosing constitutes one aspect of such "damage." See also, e.g., *Genesee Foods Services, Inc v Meadowbrook, Inc*, 483 Mich 907 (2009).

It is well established in Michigan that " 'competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " *Terrien v Zwit*, 467 Mich 56, 71; 648 NW2d 602 (2002), quoting *Twin City Pipe Line Co v Harding Glass Co*, 283 US 353, 357; 51 S Ct 476; 75 L Ed 1112 (1931); see also *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 319; 550 NW2d 228 (1996) (discussing the " 'fundamental policy of freedom of contract' " under which " 'parties are generally free to agree to whatever specific rules they like' "). Rather than merely reiterating this law and resolving the instant controversy, the majority introduces a new murkiness into a realm of law in which clarity and certainty are essential to everyday business relationships. While the present controversy may not seem of great consequence beyond the parties, it is entirely typical of thousands of such contracts freely entered into by individuals and businesses throughout this state each day. And it is essential to the rule of law that these contracts be respected and that this Court provide the leadership and direction to ensure that this takes place. Today's decision moves in exactly the wrong direction in that regard.

The majority reaches the correct result and applies the correct analysis. It is simply not content to end its opinion where it ought, choosing instead to invite new litigation by eroding clear-cut principles of contract law.[1] I would affirm, but without the majority's unsettling language concerning the "equal bargaining power" of the parties.

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[1] By its equally gratuitous references to the absence of "ambiguous" language in this contract, and the absence of "compelling public policy" that "would require that we negate the parties' contract," *ante* at 39, the majority also, I fear, foreshadows future approaches by which traditional rules of freedom of contract can be disregarded where a contract is viewed disapprovingly by a majority of this Court. See generally *Klapp v United*

CORRIGAN and YOUNG, JJ., concurred with MARKMAN, J.

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*Ins Group Agency, Inc*, 468 Mich 459; 663 NW2d 447 (2003); *Federated Publications, Inc v City of Lansing*, 467 Mich 98; 649 NW2d 383 (2002); *Terrien*, *supra*.

*In re* RAYMOND ESTATE

Docket No. 134461. Decided April 2, 2009.

Clair A. Morse petitioned the Lenawee County Probate Court for probate of Alice J. Raymond's will. Raymond and her husband had executed mirror-image wills, and Raymond's husband had died before her. Morse requested the court to construe the residuary clause of Raymond's will. That clause gave 50 percent of the remainder of Raymond's estate "to my brothers and sisters that survive me share and share alike or to the survivor or survivors thereof," and used similar language with respect to the siblings of Raymond's husband. Morse, who was Raymond's brother, asked the court to construe the residuary clause to mean that the siblings of Raymond who survived her should receive 50 percent of the residue and the siblings of Raymond's husband who survived Raymond should receive 50 percent, with no share going to the descendants of any predeceased sibling. The court, Albert J. Neukom, J., entered an order construing the residuary clause in that manner. Some of the respondents, who are the descendants of the predeceased siblings of Raymond and her husband, appealed. In a split decision, the Court of Appeals, WHITBECK, C.J., and COOPER, J. (MURPHY, J., dissenting), affirmed, holding that Raymond's statement that she wished the residue of her estate to go to the siblings who survived her "share and share alike" indicated an intent for a per capita distribution to her surviving siblings and those of her husband, to the exclusion of any descendants of predeceased siblings. 276 Mich App 22 (2007). The Supreme Court ordered and heard oral argument on whether to grant the application for leave to appeal or take other peremptory action. 480 Mich 1194 (2008).

The Supreme Court *held*:

The judgment of the Court of Appeals is affirmed.

In an opinion per curiam signed by Chief Justice KELLY and Justices CORRIGAN and YOUNG, the Supreme Court stated that the trial court correctly ruled that the identified group who may take under the terms of the residuary clause is composed of the brothers and sisters of Alice and Claude Raymond. This group does not include all siblings, but is limited by the phrase "that survive me," which limitation necessarily precludes those siblings who

predeceased Alice Raymond from taking a portion of the testator's estate under the residuary clause. The clause "or to the survivor or survivors thereof" refers to the group described earlier in the disjunctive phrase, the surviving brothers and sisters.

Justice WEAVER, concurring in the result only, would have denied leave to appeal because this is a unique, factually specific case that should have no precedential value.

Affirmed.

Justice MARKMAN, joined by Justice CAVANAGH, dissenting, would conclude that the will indicates the testator's clear intent that the estate should be distributed among her and her husband's surviving siblings and the surviving descendants of the siblings who predeceased the testator. This distribution allows the testator's family and her husband's family to share equally in her estate, further enforcing the testator's intent as evidenced by the will. The plurality's interpretation fails to give the testator's language full effect and essentially construes two distinct and alternative phrases to designate the exact same class of individuals. By ignoring the testator's chosen words, the plurality fails to fully enforce the testator's intended distribution of her estate.

Justice HATHAWAY did not participate in the decision of this case in order to avoid unnecessary delay to the parties in a case considered by the Court before she assumed office by following the practice of previous justices in transition and participating only in those cases for which her vote would be result-determinative.

*Anna Marie Anzalone* for the petitioner.

*Burke and Rennell* (by *Robert J. Rennell*) and *Jeffery T. Hall* for the respondents.

PER CURIAM. In this case, we are called upon to discern the group of individuals who may take under the residuary clause of the testator's will. Petitioner maintains that the residuary clause includes only the surviving siblings of the testator and her late husband, to the exclusion of the surviving heirs of predeceased siblings. In lieu of granting leave to appeal, we would affirm the judgment of the Court of Appeals and hold that the probate court correctly construed the will in petitioner's favor. The class, "brothers and sisters," was

unambiguously qualified and limited by the phrase "that survive me." This qualification clearly indicated the testator's intent to exclude her predeceased siblings and their heirs from the class of devisees.

FACTS AND PROCEDURAL HISTORY

On January 15, 1979, testator Alice Raymond and her husband Claude Raymond executed mirror-image wills, both leaving their estates to one another upon death.[1] Claude Raymond predeceased the testator in February 2000, and Alice Raymond died at the age of 88 in February 2005. Because the testator's spouse was already deceased, the residuary clause of the will came into effect. It provided that the remainder of the estate would be divided as follows:

> A. Fifty (50%) per cent thereof to my brother[s] and sisters that survive me share and share alike or to the survivor or survivors thereof.
>
> B. Fifty (50%) per cent thereof to the brothers and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

The testator had eight siblings, but at the time of her death, only two of her siblings were alive. Likewise, the testator's spouse had eight siblings, but only three of her deceased husband's siblings were alive at the time of the testator's death. The petitioner in this case is one of the testator's surviving brothers. The respondents are some of the children and grandchildren of the deceased siblings of Alice and Claude Raymond.

In June 2005, petitioner filed a petition for probate followed by a petition to construe the will. Petitioner argued that only the surviving siblings of the testator

[1] Each will provided that any debts, taxes, funeral costs, or administrative expenses would be paid out of the estate first.

and her husband could take under the clear terms of the will. Respondent maintained that the will provided for "the survivor or survivors" of the deceased siblings of Alice and Claude Raymond. Following a hearing, the probate judge agreed with petitioner and denied respondents a share of the estate, reasoning:

> I think in reading the clause one has to look at the first phrase, "Fifty per cent thereof to my brothers and sisters that survive me," then there is a coma [sic]. It would appear to this court that the group Ms. Raymond was dealing with were to [sic] her brothers and sisters. Then she qualified that group by "those who survive me." The remaining clause, in this court's eyes, would be descriptive of the earlier group, the earlier group being "my brothers and sisters that survive me." The remaining phrase, "to share and share alike or to the survivors thereof" would mean to my brothers and sisters, those who predecease me, to those that are left, to share and share alike and to the survivors thereof.

The Court of Appeals affirmed. The majority held that, under the plain language of the will, only the testator's surviving siblings and siblings-in-law could receive a share of the estate, and that the will granted nothing to the descendants of predeceased siblings. Because the testator limited the class of "brothers and sisters" to those who survived the testator, this indicated the testator's intent to exclude any predeceased siblings from the class of devisees.

The Court of Appeals majority further held that the phrase "share and share alike" evinced the intent to bestow a per capita distribution among the surviving siblings. The Court of Appeals majority reasoned that the second clause of the bequest—"or to the survivor or survivors thereof"—modified "my brother[s] and sisters that survive me," confining membership to testator's surviving siblings.[2]

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[2] *In re Raymond Estate*, 276 Mich App 22; 739 NW2d 899 (2007).

The dissenting judge believed that the plain language of the provision indicated that the estate should be shared by both the surviving siblings *and* the heirs of the deceased siblings. The dissent believed that the majority's interpretation was illogical and redundant, and that the phrase "survivors thereof" must refer to someone *other than* the surviving siblings. Specifically, the dissenting judge believed that the phrase must refer to the descendants of the predeceased siblings.[3]

The respondents appealed in this Court. We heard oral argument on the application for leave to appeal, and now we would affirm the judgment of the Court of Appeals.

ANALYSIS

"The primary goal of the Court in construing a will is to effectuate, to the extent consistent with the law, the intent of the testator."[4] To accomplish this, a court gives effect to the drafter's intent as indicated in the plain language of the will.[5] The will must be read as a whole and harmonized, if possible, with the intent expressed in the document. If there is no ambiguity, the Court is to enforce the will as written.[6] However, if the intent of the testator cannot be gleaned solely by reference to the will because there is an ambiguity, the Court may discern the intent of the testator through extrinsic sources.[7]

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[3] *Id*. at 35-41 (MURPHY, J., dissenting).

[4] *In re Edgar Estate*, 425 Mich 364, 378; 389 NW2d 696 (1986). See also *Hay v Hay*, 317 Mich 370, 397; 26 NW2d 908 (1947), *Dodge v Detroit Trust Co*, 300 Mich 575, 598; 2 NW2d 509 (1942), and *In re Churchill's Estate*, 230 Mich 148, 155; 203 NW 118 (1925).

[5] *In re Jamieson Estate*, 374 Mich 231; 132 NW2d 1 (1965).

[6] *In re Butterfield Estate*, 405 Mich 702; 275 NW2d 262 (1979); *In re Lowrie's Estate*, 294 Mich 298; 293 NW 656 (1940).

[7] *Id*.

Additionally, while the probate court's factual findings are subject to review for clear error,[8] a probate court's construction of a will is a question of law subject to de novo review.[9]

The substantive portions of the testamentary provisions are identical, providing for "[f]ifty (50%) per cent thereof to the brothers and sisters that survive me, share and share alike or to the survivor or survivors thereof." We agree with the probate court's ruling in this case that the identified group who may take under the terms of the residuary clause is comprised of the brothers and sisters of Alice and Claude Raymond. However, that group does not include all siblings, but is limited by the phrase "that survive me." Thus, the inclusion of this express limitation necessarily precludes those siblings who predeceased Alice Raymond from taking a portion of the testator's estate under the residuary clause.

We further agree with the probate court that the remaining clause "or to the survivor or survivors thereof" necessarily references the group described earlier in the disjunctive phrase—the surviving brothers and sisters. This is consistent with *In re Holtforth's Estate*, 298 Mich 708; 299 NW 776 (1941); and *In re Burruss Estate*, 152 Mich App 660; 394 NW2d 466 (1986). As Justice COOLEY noted in *Eberts v Eberts*, 42 Mich 404, 407; 4 NW 172 (1880), when a will "only makes the gift to persons who survived the testat[or] *there is nothing to go to the issue of others who died before* []*he did*." (Emphasis added.)[10]

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[8] *In re Wojan Estate*, 126 Mich App 50; 337 NW2d 308 (1983); *In re Burruss Estate*, 152 Mich App 660, 663-664; 394 NW2d 466 (1986).

[9] *In re Bem Estate*, 247 Mich App 427, 434; 637 NW2d 506 (2001).

[10] Although "words of survivorship . . . are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application" of the antilapse statute, MCL 700.2603(1)(c), we agree with the Court of Appeals majority that

While the testamentary phrase was imperfectly worded, any other construction, such as that advanced by the Court of Appeals dissent, would permit a gift to the predeceased siblings of the testator, a group that was specifically excluded by the plain language of the will.

We would affirm.

KELLY, C.J., and CORRIGAN and YOUNG, JJ., concurred.

WEAVER, J. (*concurring in the result only*). Leave to appeal was not granted in this case. Rather, oral argument on respondents' application for this Court to grant leave to appeal was heard in this case in order to determine whether this Court should grant leave to appeal, deny leave to appeal, or take other peremptory action. Having heard oral argument, I would deny leave to appeal because I am not persuaded that this Court should take any further action in this unique, fact-specific case that should have no precedential value.

MARKMAN, J. (*dissenting*). Before this Court is the interpretation of a will. Because I believe that the will in dispute commands an interpretation different from that accorded by the plurality, I respectfully dissent.

## I. FACTS AND PROCEDURAL HISTORY

On January 15, 1979, Alice Raymond ("testator") executed the instant will. It first directs that all admin-

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> the language of the residuary clause taken as a whole—specially taking into account the use of the three separate statements: "that survive me," "share and share alike," and "the survivor or survivors thereof"—expresses an intent to make a provision for the death of the beneficiaries in a manner contrary to that provided for in the antilapse statute." [*In re Raymond Estate*, *supra* at 35, citing *In re Burruss Estate*, *supra* at 663, 665; *In re Holtforth's Estate*, *supra* at 710-711).]

istrative and funeral costs and taxes related to testator's death be paid out of her estate, and then gives the "rest, residue and remainder of [testator's] property and estate" ("residuary estate") to her husband, Claude Raymond ("Claude"). The will provides, however, that if Claude predeceases testator (or if Claude and testator die simultaneously), the residuary estate should be divided pursuant to paragraphs A and B.[1] Paragraphs A and B allocate testator's residuary estate as follows:

> A. Fifty (50%) per cent thereof to my brother[s] and sisters that survive me share and share alike or to the survivor or survivors thereof.[2]
>
> B. Fifty (50%) per cent thereof to the brothers and sisters of my husband that survive me, share and share alike or to the survivor or survivors thereof.

When testator died on February 27, 2005, Claude had predeceased her, thereby triggering the will's distribution under paragraphs A and B. At the time of testator's death, two of her brothers were alive, and Claude's two brothers and one of his sisters were alive.[3]

Petitioner, one of testator's brothers, argued before the probate court that paragraphs A and B should be construed to allow only testator's and Claude's brothers and sisters who survived testator to receive under the will with "no share [going] to the surviving descendants

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[1] Claude and testator executed mirror-image wills at the same time. Each spouse's will left his or her estate to the other spouse, and then set forth the distribution to take effect pursuant to paragraphs A and B if the other spouse had already died.

[2] Although paragraph A states "to my brother and sisters," the probate court read the phrase as "to my brother[s] and sisters" without objection by either party. Accordingly, I adopt the probate court's reading of this paragraph.

[3] Testator had five brothers, three of whom predeceased her, and three sisters, all of whom predeceased her. Claude had two brothers, who both survived testator, and six sisters, five of whom predeceased testator.

of predeceased brothers and/or sisters" of either testator or Claude. Petitioner further asked the court to find that the antilapse statute, MCL 700.2603, did not apply on the basis of the alternative devise created by the language "or to the survivor or survivors thereof."

Respondents, children and grandchildren of testator's and Claude's predeceased siblings,[4] objected to the petition and argued that the will should be construed to allow the "descendants of a deceased devisee" to "take their deceased ancestor's share by representation."[5] Respondents alternatively argued that the shares testator's predeceased siblings would have recovered had they survived testator should be distributed to the descendants of those predeceased siblings pursuant to the antilapse statute.

On December 7, 2005, the probate court ordered that testator's two surviving brothers should take 50 percent of the residuary estate and that Claude's two brothers and one sister who all survived testator should take the other 50 percent of the residuary estate. The descendants of testator's and Claude's predeceased siblings were "not entitled to any share in the residue."

Respondents appealed in the Court of Appeals, which affirmed the probate court's order in a split decision. The Court of Appeals concluded that the phrase "brother[s] and sisters that survive me" and the phrase "to the survivor or survivors thereof" both designated the brothers and sisters who outlived testator. *In re Raymond Estate*, 276 Mich App 22, 32-33; 739 NW2d 889 (2007). Accordingly, testator's and Claude's siblings who survived testator were entitled to a distribution under paragraphs

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[4] "Predeceased siblings" refers to either testator's or Claude's siblings who passed away before *testator* died.

[5] Representation is a means by which the closest descendant (or descendants) of a deceased devisee take the share to which the deceased devisee is entitled.

A and B, and descendants of predeceased siblings were entitled to nothing. The dissenting judge noted that interpreting "survivor or survivors thereof" to designate siblings who survived testator was "redundant" and instead interpreted this phrase to designate survivors of testator's and Claude's siblings who predeceased testator. Thus, the "estate would be shared by surviving siblings and the surviving descendants of the siblings who had predeceased the testator." *In re Raymond Estate*, 276 Mich App at 40 (MURPHY, J., dissenting).

Respondents sought leave to appeal in this Court. We granted oral argument on respondents' application for leave to appeal, *In re Raymond Estate*, 480 Mich 1194 (2008), which we heard on October 22, 2008, at Saginaw Valley State University. A plurality now affirms the interpretation of the Court of Appeals majority. In my judgment, however, the interpretation and analysis set forth by the Court of Appeals dissent are correct.

## II. STANDARD OF REVIEW

By interpreting a will, this Court gives legal meaning to the words within the will. Accordingly, we review a probate court's interpretation of a will de novo.[6] *In re Bem Estate*, 247 Mich App 427, 433; 637 NW2d 506 (2001); see also *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998) (holding that questions of law are reviewed de novo).

## III. WILL INTERPRETATION

Our cases are longstanding and uniform in pronouncing that the Court's responsibility in interpreting a will

[6] A probate court's factual findings regarding a will, however, are given deference and reversed only for clear error. *In re Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003).

is to enforce the testator's intent. See, e.g., *Palms v Palms*, 68 Mich 355, 378; 36 NW 419 (1888) ("In construing wills, it is well settled that the intent of the testator must be ascertained and carried into effect so far as it legally can be done."); *In re Scheyer's Estate*, 336 Mich 645, 648; 59 NW2d 33 (1953) ("[T]he primary consideration is to determine, if possible, the intent of the maker."); *In re Churchill's Estate*, 230 Mich 148, 155; 203 NW 118 (1925) ("In the construction of wills the cardinal canon, the guiding polar star, is that the intent of the testator must govern . . . ."). This responsibility is a function of a testator's right to freely dispose of property belonging to the testator as he or she sees fit. *In re Sprenger's Estate*, 337 Mich 514, 521-522; 60 NW2d 436 (1953).[7]

The execution of a will constitutes the point at which the testator is presumed to have formed an intent regarding the distribution of his or her property. *Morrow v Detroit Trust Co*, 330 Mich 635, 642; 48 NW2d 136 (1951). Thus, the language of the will constitutes the best source from which the testator's intent can be determined. *Kinney v Kinney*, 34 Mich 250, 252-253 (1876); *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983). The will should be read as a whole, *In re Chapple's Estate*, 338 Mich 246, 253; 61 NW2d 37 (1953); *In re Brown's Estate*, 324 Mich 264, 267; 36 NW2d 912 (1949), and all words used by the testator should be given effect. *Id.* "The words are to be given their primary and natural significance unless the context makes it clear that they were employed in a different sense." *In re Bruin Estate*, 370 Mich 34, 40;

[7] The will is vital to determining the distribution that the testator intended because the testator, of course, "is not available to provide additional facts or insight." *In re Kremlick Estate*, 417 Mich 237, 240; 331 NW2d 228 (1983).

120 NW2d 752 (1963) (citation and quotation marks omitted). "Having so ascertained [the testator's] intention, it is the duty of the court to give that intention effect if that be legally possible." *In re Schreyer's Estate*, 336 Mich at 649.

## IV. ANALYSIS

### A. DIVISION OF RESIDUARY ESTATE

The second paragraph of the will states in relevant part:

> [I]n the event my said husband should predecease me or should my said husband and I die in a common disaster making it impossible to determine the order of our deaths, then and in such event all of the aforesaid rest, residue and remainder of my estate shall be divided in manner following: [Paragraphs A and B].

Thus, the will directs that if Claude dies before testator, as was the case here, "all" of testator's residuary estate "shall" be divided according to paragraphs A and B. The straightforward language "all" and "shall" expresses the testator's clear direction that the whole residuary estate be distributed as provided in paragraphs A and B.

### B. PARAGRAPH A

Paragraph A states:

> A. Fifty (50%) per cent thereof to my brother[s] and sisters that survive me share and share alike or to the survivor or survivors thereof.

I have separated paragraph A into two clauses for purposes of interpretation, the first reading "Fifty (50%) per cent thereof to my brother[s] and sisters that survive me share and share alike," and the second reading "or to the survivor or survivors thereof." I

disagree with the plurality that testator intended *both* clauses to refer to "the surviving brothers and sisters." *Ante* at 53.

1. FIRST CLAUSE

The will states that the *residuary estate* "shall be divided" in the manner described in paragraphs A and B, and the language directly preceding these paragraphs states that "all of the aforesaid rest, residue and remainder of my estate shall be divided in manner following." Thus, when paragraph A's first clause begins with "Fifty (50%) per cent thereof," the object to which "thereof" refers must be the residuary estate.

"[T]o my brother[s] and sisters that survive me" defines the class of recipients to which the 50 percent portion must be distributed.[8] In order to "survive," one must "remain alive, as after the death of another or the occurrence of some event." *Random House Webster's College Dictionary* (2001). The will provides that the sibling must survive "me," identifying testator as the one her sibling must outlive to qualify for the class. Thus, the class entitled to recover under the first clause is interpreted to consist of testator's two brothers who were living at the time of her death.

The final phrase in the first clause, "share and share alike," identifies the manner by which the 50 percent portion should be divided. "A direction for the division of certain specified property between the members of a group, 'share and share alike,' is construed as a direction to distribute *per capita*." *Van Gallow v Brandt*, 168 Mich 642, 650; 134 NW 1018 (1912) (citation and quotation marks omitted). A distribution "per capita" is

[8] *Random House Webster's College Dictionary* (2001) explains that the use of "that" in this manner usually introduces a restrictive clause that is "essential to the complete meaning of the sentence."

a division of the estate "according to the number of individuals . . . by which an equal share is given to each of a number of persons, all of whom stand in equal degree to the decedent." Black's Law Dictionary (5th ed). In the instant case, "share and share alike" provides that the 50 percent portion under paragraph A should be divided into equal shares among individuals who are equally within the class defined by paragraph A.

2. SECOND CLAUSE

Paragraph A's second clause includes the phrase "to the survivor or survivors thereof," which is analogous to the phrase "to my brother[s] and sisters that survive me" in that both phrases begin with the word "to" and then conclude with language identifying a class of persons. This analogous formulation indicates that the class identified in the second clause, like the class defined in the first clause, should be understood as a class entitled to recover under the will.

"[S]urvivor or survivors thereof" again defines a class of persons who outlive another individual. In this context, unlike with regard to the earlier reference in the paragraph to brothers and sisters who "survive *me*," the death that one must outlive to be a "survivor" is the death of a predeceased sibling. Upon testator's death, two events were possible with respect to each one of testator's siblings. One event was that the sibling was still alive. The sibling would then be entitled to recover as one of the "brother[s] [or] sisters that survived [testator]." The second event is that the sibling had predeceased testator, which would mean that the sibling's descendants still living would be "survivors" of that sibling because they had outlived the sibling.

This interpretation of "survivor or survivors thereof" is supported by testator's use of the word "or"

to separate the two clauses in paragraph A. This term communicates an intent to set forth *alternative* classes of beneficiaries in these clauses. The classes defined in these clauses, therefore, must be distinct, rather than redundant, in order that testator's will be given effect. The instant interpretation of "survivor or survivors thereof" achieves this with the first class comprised of brothers and sisters who survive testator and the second class comprised of descendants of brothers and sisters who did not survive testator.

3. FIRST AND SECOND CLAUSES TOGETHER

When the first and second clauses are read together, paragraph A entitles a sibling who survived testator to recover a share of the estate and creates a substitute devise for any sibling who did not survive testator, to which the survivor or survivors of the predeceased sibling are entitled. The devise created for both a surviving sibling and a predeceased sibling's survivors must be allocated from within the 50 percent portion distributed under paragraph A. This allocation is defined by the phrase "share and share alike," which, as explained earlier, divides the estate among a group of people who stand as part of a similar class. Dividing the 50 percent portion by the total number of testator's siblings (who are in equal relation to testator and in the class preceding) creates eight equal shares. The two brothers who survived testator are each entitled to their own share. The surviving descendants of each predeceased sibling take the share that would have gone to the predeceased sibling had he or she survived testator.

The share for each group of surviving descendants is disbursed according to inheritance, because testator's will provides no guidance for how the "survivor or

survivors" should receive the share. See *In re Horrie Estate*, 365 Mich 448, 453-454; 113 NW2d 793 (1962). Under Michigan's inheritance scheme, the predeceased sibling's descendants take by representation.[9] MCL 700.2103(a). MCL 700.2106(1) provides the framework by which the predeceased sibling's share should be divided among the sibling's descendants by representation:

> [T]he estate or part of the estate is divided into as many equal shares as the total of the surviving descendants in the generation nearest to the decedent that contains 1 or more surviving descendants and the deceased descendants in the same generation who left surviving descendants, if any. Each surviving descendant in the nearest generation is allocated 1 share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

Accordingly, the predeceased sibling's share is further divided into shares based on the sibling's number of children, assuming at least one child is still alive.[10] The children who survived the sibling are each entitled to one share. For the children who predeceased the sibling, their shares are combined and divided in the same manner among the predeceased children's surviving descendants (the predeceased sibling's grandchildren). The descendants of the surviving children are not included in this division, nor are they entitled to any share.

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[9] Typically, a predeceased sibling's spouse would be entitled to take a portion of the sibling's share pursuant to MCL 700.2102. There is no indication here, however, that any predeceased sibling's spouse was still alive at the time that testator died. MCL 700.2103(a) directs that the whole share should go to the sibling's descendants by representation "if there is no surviving spouse."

[10] If none of the sibling's children is alive, then the sibling's share is divided among the sibling's grandchildren.

The potential for survivors to be entitled to distribution by representation explains testator's placement of "share and share alike" *after* the class defined in the first clause, "brother[s] and sisters that survive me." Had testator placed "share and share alike" after the second clause, "survivor or survivors thereof," the specified division would have been more reasonably interpreted as being among testator's siblings *and* testator's predeceased siblings' descendants. Because the predeceased sibling's descendants, who are substitute beneficiaries for the predeceased siblings, could include the living children and grandchildren of any predeceased sibling, to include those descendants in calculating the initial division of the 50 percent portion of the estate would possibly create a division of shares among a large number of people. Such a division would diminish the property to which each living sibling would be entitled, apparently arbitrarily and quite possibly in a manner not intended by testator, and allow persons standing in different degrees of relation to testator to recover an equivalent amount. This result is avoided by testator's placement of "share and share alike" after the first clause, where it is reasonably interpreted to apply to a division among the preceding class.

The interpretation set forth above, contrary to the plurality's assertion, would not "permit a gift to the predeceased siblings of the testator, a group that was specifically excluded by the plain language of the will." *Ante* at 54. Rather, it recognizes that the first clause excludes a predeceased sibling and that such exclusion creates a potential void for the share allocated to that sibling. However, the second clause fills that void by providing an alternative beneficiary. This alternative distribution does not "permit a gift to the predeceased sibling" but allows the descendants of the predeceased

sibling to recover under the will. That is, each of testator's siblings is allocated a share of 50 percent of the estate under paragraph A. If the sibling was alive at the time of testator's death, then that sibling takes his or her respective share. If the sibling has predeceased testator, then the share allocated for that sibling, rather than going to the sibling, goes to the sibling's descendants.

### C. PARAGRAPH B

The identity of language between paragraphs A and B reflects testator's intent that the distribution through one paragraph be similar to the distribution through the other. By expressing her intent to distribute a portion of the estate in a particular way in paragraph A, testator seemingly intended to match that distribution for the other portion of the estate by reciting the same language in paragraph B. Additionally, because of this identity, paragraph B is subject to the same interpretation as A, with the only difference being that paragraph B pertains to Claude's, rather than testator's, siblings. Interpreting paragraph B in the same manner identified above for paragraph A creates the following distribution under paragraph B: a 50 percent portion of the estate should be divided into eight equal shares; Claude's two brothers and one sister who were still living at the time of testator's death should each receive one of the shares; and the remaining five shares should go to the respective descendants of each of the five siblings who predeceased testator. Within each group of descendants, the share should be divided by representation as outlined in MCL 700.2106(1).

### D. PARAGRAPHS A AND B TOGETHER

The will directs that the whole residuary estate be distributed solely through paragraphs A and B. The

whole residuary estate is divided 50-50 between paragraph A and paragraph B. Under paragraph A, 50 percent of the total residuary estate should be divided into equal shares based on testator's number of siblings. Each brother and sister who survived testator should receive his or her respective share. Each share allocated to a brother or sister who predeceased testator should in turn be distributed according to MCL 700.2106(1). Paragraph B distributes the other 50 percent of the whole estate in a similar manner by dividing it into equal shares based on Claude's number of siblings. Each of Claude's siblings who survived testator should receive his or her respective share. Each share allocated to a sibling of Claude's who predeceased testator should go to the surviving descendants of that sibling pursuant to MCL 700.2106(1).

The distribution under paragraphs A and B completely disposes of testator's property and does not leave any remaining portion of the estate undistributed. Every share under both paragraphs goes to either a sibling or the descendants of a predeceased sibling. Even if all of testator's siblings or all of Claude's siblings had predeceased testator, the 50 percent portions would still have been distributed strictly through paragraphs A and B as long as at least one survivor existed.[11]

Under similar reasoning, this interpretation also, importantly, maintains an equal division of the whole estate between testator's family and Claude's family. The importance of this division is reflected in the execution by testator and Claude of mirror-image wills,

[11] If a predeceased sibling had no survivors, then the devise of that share fails and the share is divided among the siblings who survived testator and the siblings who did not survive testator for whom substitute beneficiaries existed.

which evidences an obvious understanding between testator and Claude that, without regard to which of them died first, once both had died, their combined estates would be divided *equally* between their families. By taking measures to implement an equal division under any circumstances, testator demonstrated the importance she placed on having each family receive an equal portion.[12] After the whole estate is divided 50-50 between testator's and Claude's families, each portion remains in the respective family because the existence of the substitute beneficiaries ensures that the 50 percent devise does not lapse.

## V. PLURALITY INTERPRETATION

The plurality's interpretation, in my judgment, fails to give testator's language full effect. In particular, it interprets the class in the first clause to consist of the same individuals who make up the class in the second clause. That is, the siblings who outlive testator are both "brother[s] and sisters that survive [testator]" *and* "the . . . survivors thereof." This interpretation forces the strained reading that testator intended to give her estate to the siblings who survived her "or" to the siblings still alive when she died. I respectfully disagree with this interpretation because rather than giving meaning to testator's use of the word "or" to indicate alternative classes in the first and second clauses of paragraph A, the plurality essentially construes two distinct phrases ("my brother[s] and sisters that survive me" and "the survivor or survivors thereof") to designate the exact same class. The only individuals who qualify to be included in the first class are siblings

[12] Because paragraphs A and B each distribute an equal percentage (50) of the whole estate to the respective families, the property received by testator's family will equal the property received by Claude's family.

who were still living at the time of testator's death. If a sibling was still living at the time of testator's death, the sibling will *always* be a "survivor," because the only way by which a sibling cannot be a survivor is if he or she predeceased testator. The sibling's death would also mean that the sibling did not "survive [testator]." Thus, under this interpretation, a sibling alive after testator's death will *always* be in the first and second groups, and a predeceased sibling will *never* be in either of the groups. This interpretation, therefore, creates the same class with the different language in each clause, even though testator clearly intended for the second clause to provide alternative beneficiaries for the first clause through her use of the word "or."

I further disagree with the method of analysis by which the plurality reaches its conclusion. In particular, it relies on the results from *In re Burruss Estate*, 152 Mich App 660; 394 NW2d 466 (1986), and *In re Holtforth's Estate*, 298 Mich 708; 299 NW 776 (1941), *ante* at 53, even though, as the Court of Appeals acknowledged, the wills in those cases are not "exact match[es]" to the instant will. *In re Raymond Estate*, 276 Mich App at 32. The variances among the wills, however, are highly significant, and because *Burruss* and *Holtforth* can be easily distinguished on these grounds, I believe reliance on those cases is an inappropriate substitute for giving full effect to the instant will's language.[13]

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[13] The testator in *Burruss* devised her estate

> in equal amounts, share and share alike, to [her] daughters, Anna Mary Vollick of Redford Township, Wayne County, Michigan, Jeanne Glaeser of Detroit, Michigan and Audrey Larson of Detroit, Michigan, or to the survivor or survivors of them. [*In re Burruss Estate*, 152 Mich App at 662.]

*Burruss* interpreted "survivor or survivors of them" to refer to any daughter still alive at the testator's death if any of the other daughters

Under the plurality's interpretation, the distribution under paragraph A would be subject to the antilapse statute, which would create a distribution through paragraph A different from the distribution through paragraph B, contrary to testator's manifest intent that the distribution through each paragraph be the same.[14]

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had predeceased the testator. This interpretation created an alternative to the distribution to all three daughters, which appropriately gave effect to the testator's express language (specifically her use of "or"). Yet, this interpretation cannot be reasonably transferred to "to the survivor or survivors thereof," because the group in the first clause of the instant will consists of brothers and sisters *who survived testator*. Testator's use of the word "or" must be given effect, and *Burruss* cannot be read to support ignoring testator's express language.

Similarly, the interpretation by this Court in *In re Holtforth's Estate* cannot trump the language of testator's will here because of the differences between the wills. The testator in *Holtforth* devised his property "*To the seven children of my brother, John Holtforth, and the survivor of them, 20/35 of my said estate aforesaid*." *Id.* at 709 (emphasis in original). The devise to John's seven children was not limited to only those children alive at the time of the testator's death, in contrast to the devise here to "brother[s] and sisters that survive me." Additionally, the testator's use of "and" does not denote an alternative like the word "or" does.

[14] The antilapse statute creates a substitute devise when "a devisee fails to survive the testator and is a grandparent, a grandparent's descendant, or a stepchild of" the testator. MCL 700.2603(1). The substitute devise "is created in the surviving descendants of a deceased devisee." MCL 700.2603(1)(b). When a substitute devise is created, the property is distributed as follows:

> Each surviving devisee takes the share to which he or she would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. [MCL 700.2603(1)(b).]

If the will, however, creates an "alternative devise" for the devise potentially subject to the statutory substitute devise, the substitute devise does not apply and the distribution through the alternative devise takes place. MCL 700.2603(1)(d). Thus, unless testator provided an

On the other hand, the interpretation set forth in this

alternative devise, substitute devises would be created for paragraph A, because testator's predeceased siblings are descendants of testator's grandparents.

Under the statutory definition of "alternative devise," the plurality's interpretation does not create an alternative devise for testator's predeceased siblings. An "alternative devise" is a devise "expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of 1 or more events . . . ." MCL 700.2601(a). The plurality's interpretation does not create an "alternative devise" for siblings "that [did not] survive me" with "the survivor or survivors thereof," because each phrase as interpreted by the plurality, as I have just demonstrated, can *only* include siblings who were still living at testator's death. Thus, the devise to "survivor or survivors thereof" *never takes effect* under the plurality's interpretation. That is, if the gift does not pass to a sibling because he did not "survive [testator]," then the gift also does not go to the sibling under the second clause because he is not a "survivor." Consequently, the devise to "the survivor or survivors thereof" does not create an "alternative devise" under the antilapse statute, because it does not "take effect *instead*" of the devise to "brother[s] and sisters that survive me" in any event. Additionally, the plurality erroneously relies on *Burruss* in concluding that the antilapse statute does not apply, see *ante* at 53-54 n 10, because the version of the statute in *Burruss* did not contain the express statement that "words of survivorship . . . are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of" the provision creating a substitute gift. MCL 700.2603(1)(c).

In the end, the plurality's interpretation, in combination with the application of the antilapse statute, leads to disparate distributions through paragraphs A and B. The antilapse statute only applies when the predeceased devisee is testator's grandparent or a descendant of testator's grandparent, MCL 700.2603(1), which descendants of *Claude's* grandparents are not. Accordingly, under paragraph B, Claude's siblings who survived testator, pursuant to the plurality's interpretation, would receive the total 50 percent portion set aside for his family with the descendants of predeceased siblings receiving nothing. Yet, when the antilapse statute is applied to paragraph A, "[e]ach surviving [sibling] takes the share to which he or she would have been entitled had the deceased [siblings] survived the testator." MCL 700.2603(1)(b). The share that a predeceased sibling would have recovered had the sibling survived testator goes to the predeceased sibling's descendants. *Id.* Thus, the descendants of testator's siblings who predeceased her would be entitled to her predeceased siblings' shares through application of the

dissent results in an identical distribution under paragraphs A and B, which is not altered by the antilapse statute, thereby enforcing testator's use of the same language in each of those paragraphs. [15]

Finally, the plurality's interpretation does not establish alternative beneficiaries who would retain the 50 percent portion of the residuary estate under paragraph B with Claude's family if all of Claude's siblings had predeceased testator.[16] See *In re Raymond Estate*, 276 Mich App at 40-41 (MURPHY, J., dissenting). If no sibling could recover under paragraph B, the 50 percent portion set aside for Claude's family would be distributed under the state's intestacy statutes, which only distribute a testator's estate to the testator's heirs at law, who do not include any of Claude's family.[17] *In re Martz's Estate*, 318 Mich 293, 301; 28 NW2d 108 (1947). In such a situation, Claude's family would receive no distribution, in contravention of testator's intent that each family receive an equal 50 percent portion of the residuary estate under all circumstances, and "all" of

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antilapse statute, whereas the descendants of *Claude's* siblings who predeceased testator would not be entitled to *any* shares.

[15] The interpretation of "the survivor or survivors thereof" set forth here satisfies the definition of an "alternative devise" under the antilapse statute because the devise to a predeceased sibling's descendants arises from the will's express language, takes effect when a sibling has predeceased testator, and takes place "instead" of the devise to the predeceased sibling. See MCL 700.2601(a). Thus, the alternative devise is enforced in lieu of the antilapse statute's substitute devise. MCL 700.2603(1)(d).

[16] Rather than interpreting "survivor or survivors thereof" in a manner that sustains testator's intent to avoid such a situation, the plurality effectively construes the second clause to be inoperative, because if none of Claude's siblings "survived [testator]," then no one is available to recover under paragraph B because only siblings who are alive are "survivors" under the second clause.

[17] Heirs at law include descendants of a testator's parents but do not include descendants of the testator's spouse's parents. MCL 700.2103.

the estate would not be distributed through paragraphs A and B, in direct opposition to testator's intent.[18]

The different distributions provided by the plurality and by this dissent illustrate the importance of giving meaning to *all* of a testator's words. The interpretation of the plurality, in my judgment, will leave uncertainty and doubt in its wake. By contrast, the interpretation of this dissent would leave testators confident that the precise words by which they choose to pass on their estate will be given full effect by the state.

## VI. CONCLUSION

For these reasons, I would remand to the probate court for that court to divide the residuary estate as outlined earlier. The shares going to the "survivor or survivors" of testator's and Claude's siblings who predeceased testator should be distributed in accordance with MCL 700.2106(1).

CAVANAGH, J., concurred with MARKMAN, J.

HATHAWAY, J., did not participate in the decision of this case in order to avoid unnecessary delay to the parties in a case considered by the Court before she assumed office by following the practice of previous justices in transition and participating only in those cases for which her vote would be result-determinative.

[18] Additionally, under the plurality's interpretation, if all of testator's and Claude's siblings had predeceased testator, testator's attempt to distribute "all" of her estate through the will would have been futile, because the will would have no bearing on the distribution under those circumstances.

*In re* ROOD

Docket No. 136849. Argued October 2, 2008 (Calendar No. 1). Decided April 2, 2009.

The Department of Human Services (DHS) filed a petition in the Family Division of the Mason Circuit Court to terminate the parental rights of respondent Darroll D. Rood to a child he had fathered out of wedlock. The respondent had been incarcerated for a domestic violence conviction when the child was removed from her mother's care, but the respondent provided the DHS and the court with his address and telephone number after his release. Despite having the respondent's correct contact information, both the court and the DHS repeatedly used an incorrect address and telephone number when attempting to give respondent notice of the various dispositional hearings and other proceedings taking place in the neglect case against the child's mother, which would affect his parental rights. Ultimately, the court, Mark D. Raven, J., terminated the respondent's parental rights under MCL 712A.19b(3)(g) and (j), ruling that the respondent had failed and would likely continue to fail to provide proper care and custody for his child and that there was a reasonable likelihood, based in part on the respondent's history of domestic violence, that the child would suffer harm if returned to the respondent's home. In an unpublished opinion per curiam, issued June 12, 2008 (Docket No. 280597), the Court of Appeals, ZAHRA and GLEICHER, JJ. (JANSEN, P.J., dissenting), reversed, holding that the trial court had clearly erred by concluding that the criteria set forth in MCL 712A.19b(3)(g) and (j) had been established by clear and convincing evidence. The Court remanded the case to give the respondent an opportunity to demonstrate his willingness and ability to parent his child. The Supreme Court granted the DHS's application for leave to appeal, directing the parties to address various issues related to the adequacy of the DHS's efforts to contact the respondent during the proceedings. 482 Mich 900 (2008).

In an opinion by Justice CORRIGAN, joined by Chief Justice KELLY and Justice MARKMAN, and opinions by Justice CAVANAGH, Justice WEAVER, and Justice YOUNG, the Supreme Court *held*:

The DHS and the trial court failed to comply with the Michigan statutes and court rules requiring that the respondent be given adequate notice of the proceedings. The DHS failed to comply with the Michigan statutes requiring that reasonable efforts be made to reunite a child and family, which includes reunification with noncustodial parents when appropriate. The trial court clearly erred by using the respondent's failure to participate as an excuse for the DHS's failure to comply with its duties and as a basis for terminating his parental rights. The Court of Appeals properly reversed and remanded for the trial court to afford the respondent a fair opportunity to participate.

Justice CORRIGAN, joined by Chief Justice KELLY and Justice MARKMAN, would further hold that the respondent was deprived of even minimal due process by the state's failure (1) to comply with its statutory, regulatory, and constitutional obligations to provide him with actual notice of the proceedings, despite knowledge of his correct address, (2) to attempt to locate, assess, and engage him in the termination process, and (3) to place the child with a parent if possible. Although the trial court correctly concluded that the respondent never formally paid child support, he was also never ordered to do so. While the respondent's absence from his child's life and failure to voluntarily offer monetary support may be evidence of neglect, they are not automatic grounds for termination and only trigger his right to participate in services available for parents in child protective proceedings. Because the respondent was neither informed about nor properly offered the evaluation and services available to aid the court in determining whether the respondent would become able to provide proper care and custody within a reasonable time, the trial court erred by terminating his parental rights on the mere presumption that the respondent would neglect or harm his child in the future. The trial court also erred by ruling, on the basis of the respondent's prior convictions, that there was a reasonable likelihood that he would harm the child if she were returned to his home.

Justice CAVANAGH, concurring in part, agreed with the result reached by the lead opinion. The DHS and the trial court failed to make the reasonable efforts required by the statutes and the court rules to reunite the respondent with his child and, in light of this failure, the trial court clearly erred by determining that the DHS had established statutory grounds for termination. Justice CAVANAGH would hold that, when the state is required to provide notice of proceedings to parents, a reasonable effort to do so should comply with due process requirements. Given that the statutes and the court rules so clearly compel the Supreme Court's holding in this case,

which is consistent with due process principles, he disagreed that it was necessary to address whether the respondent's due process rights were violated.

Justice WEAVER, concurring in part, agreed only with the result of the lead opinion, specifically, that the Court of Appeals correctly remanded the case to give the respondent a fair opportunity to participate. Justice WEAVER also agreed with Justice YOUNG that because the case is resolved substantively and procedurally on the basis of Michigan law, the lead opinion unnecessarily attempts to resolve federal questions concerning Title IV-E of the Social Security Act, 42 USC 670 *et seq*.

Justice YOUNG, concurring in part, agreed with the result reached by the lead opinion, but only on the narrow ground that, given the failed and inadequate attempts at providing the respondent notice, the trial court clearly erred by using the respondent's failure to participate in the child protective proceedings against the child's mother and his failure to provide child support as grounds for terminating his parental rights. The lack of notice deprived the respondent of numerous statutorily required services to ensure that he could properly parent his child. Justice YOUNG disagreed with the lead opinion's attempt to create substantive rights in parents from federal statutes that only impose duties on the state, its reliance on the current version of the DHS's foster care manual, and its unnecessary consideration of constitutional issues.

Affirmed.

Justice HATHAWAY did not participate in the decision of this case in order to avoid unnecessary delay to the parties in a case considered by the Court before she assumed office by following the practice of previous justices in transition and participating only in those cases for which her vote would be result-determinative.

PARENT AND CHILD — CHILD PROTECTIVE PROCEEDINGS — TERMINATION OF PARENTAL RIGHTS — NOTICE OF CHILD PROTECTIVE PROCEEDINGS.

The state may not terminate a person's parental rights without having made adequate attempts to provide the person notice of the pretermination proceedings and, when appropriate, the opportunity to participate in services available for parents in those proceedings (MCL 712A.1 *et seq*.; MCR 3.900 *et seq*.).

*Michael A. Cox*, Attorney General, *Thomas L. Casey*, Solicitor General, and *Susan Kasley Sniegowski*, Prosecuting Attorney, for the petitioner.

*Jeffrey C. Nellis* for the respondent.

Amicus Curiae:

*Vivek S. Sankaran* for the Children's Law section of the Michigan State Bar.

CORRIGAN, J. The Department of Human Services (DHS) challenges reversal by the Court of Appeals of a circuit court order terminating the respondent father's parental rights to his daughter. *In re Rood,* unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 280597). We affirm the judgment of the Court of Appeals. As that court opined, respondent behaved as a "less-than-ideal parent" and "shares responsibility" for his lack of communication with the DHS and the court. *Id.* at 3. But the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Santosky v Kramer,* 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). Accordingly, "[w]hen the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." *Id.* at 753-754. Here, the attempts at communication with and notice to respondent about the proceedings, in part as a result of errors by the DHS and the court, failed to comply with state and federal requirements and, under the circumstances of this case, denied respondent minimal procedural due process. Because his substantial rights were affected, the Court of Appeals correctly remanded this case in order to give respondent "a fair opportunity to participate." *In re Rood*, *supra* at 5.

## FACTS AND PROCEEDINGS

This case concerns respondent's daughter, A., who was born out of wedlock to respondent and Laurie Kops

on April 16, 2004.[1] Their relationship ended when A. was about one year old. After that, respondent only had sporadic contact with A. Respondent last saw A. in December 2005, when he went to Kops's home to celebrate Christmas with A. At that time, he and Kops had an argument that culminated in a domestic violence charge against him.[2] He testified that he no longer saw A. because, after that event, he was ordered to have no contact with Kops.[3]

On March 21, 2006, the Mason County DHS placed A. in foster care after confirming reports that Kops had not been caring for A. but had left all three of her children with friends without making provisions for their care. Kops's whereabouts were unknown. The Child Protective Services worker for the DHS knew that respondent was A.'s father and understood that respondent was in the Mason County jail on the day the DHS took protective custody of A. The record reflects —and the parties do not dispute—that A.'s placement with the state following removal was designated for federal funding under subchapter IV, part E, of the

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[1] Respondent executed an affidavit acknowledging paternity. The affidavit of paternity does not appear in the record, but presumably respondent acknowledged parentage under MCL 722.1003(1), which provides: "If a child is born out of wedlock, a man is considered to be the natural father of that child if the man joins with the mother of the child and acknowledges that child as his child by completing a form that is an acknowledgment of parentage." Such an acknowledgment "establishes paternity, and . . . may be the basis for court ordered child support, custody, or parenting time . . . ." MCL 722.1004. Accordingly, respondent's status is that of a legal, not a putative, father.

[2] A police report dated December 27, 2005, reflects Kops's claims that respondent verbally and physically abused her, causing injury, on December 25, 2005. Respondent denied Kops's version of events, but pleaded guilty of domestic violence, second offense, MCL 750.81(3), and was sentenced to time served.

[3] He later admitted that a prior no contact order was already in place at this time; he had violated this prior order on Christmas in order to see A.

United States Social Security Act, 42 USC 670 *et seq.* (Title IV-E). Accordingly, as we will explain in detail, federal law governing child protective proceedings is directly implicated as the case is subject to federal audit and review.

Respondent confirmed that he had been jailed for the domestic violence conviction that stemmed from the Christmas 2005 incident. He pleaded guilty on March 14, 2006, and, after being sentenced to time served, he was released from jail around the same time that A. was removed to foster care. The day after his release, Kops called to inform him that A. was in DHS custody. On March 23, 2006, he telephoned the DHS and informed Child Protective Services worker Susan Straley that he had been released from jail. Straley had not previously attempted to contact him. He testified that he told her he wished to have A. placed with him but Straley told him "they looked to place the child back with the mother not the father[]."[4] Straley told respondent that he could call the DHS to set up visits with A. Respondent testified that, in light of Kops's history of denying him access to A., he did not wish to set up visits and risk seeing her over a brief period and then never seeing her again if she was placed back in Kops's care. He did not "think any kid should be put through a push and pull with their parents." He further testified that Straley did not tell him that the DHS would create a parent/agency treatment plan and service agreement (service plan) to provide services to A.'s parents in an attempt to reunify her with her family.

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[4] Straley denied telling respondent that the DHS would place A. only with her mother. She testified that, although the DHS does generally try to reunify a child with the custodial parent, she did not recall telling respondent that the DHS only worked toward reunification with *mothers,* as opposed to fathers.

Respondent testified that he gave Straley his cell phone number, the cell phone number of his girlfriend, Corinna Marshall,[5] and their address on Manistee Street in Manistee, Michigan. Straley then gave him the name and phone number of the DHS foster care worker who would take over the case on March 30, 2006, Leasa Patterson. Straley also furnished respondent's phone number and Manistee Street address to Patterson.

On March 29, 2006, the Family Division of the Mason Circuit Court mailed a preliminary hearing notice to respondent at an incorrect address on 10th Street in Manistee. The notice was returned to the court as undeliverable on April 6, 2006. The record does not reveal why the court used the inaccurate 10th Street address.[6]

Patterson drafted an initial service plan (ISP) dated April 19, 2006, that outlined services designed to help Kops regain custody of A. The ISP erroneously stated that respondent's whereabouts were "unknown." Patterson did not try to contact respondent, despite having contact information for him. Lacking proper notice, respondent did not participate in the April 20 preliminary hearing. After the hearing, the court ordered that A. remain in the care of the DHS, that Kops receive parenting time, and that "[r]easonable efforts shall be made to preserve and reunify the family to make it possible for the child(ren) to safely return home."

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[5] Straley attested that respondent gave her only one cell phone number.

[6] The court record contains documents from unrelated matters, including certificates of conviction, apparently linking respondent to the 10th Street address. Respondent claims that he never lived at that address. It is not clear why this address was included on the certificates of conviction. Although various addresses are listed for respondent on the exhibits and police reports attached to the certificates, the 10th Street address is not among them.

The first notice respondent actually received that was mailed to his correct address advised him that a dispositional hearing involving Kops would take place on June 8, 2006. Respondent attended this hearing, during which Kops entered a no contest plea to the neglect allegations. Accordingly, the court retained jurisdiction over A. under MCL 712A.2(b).[7] The court did not address respondent's rights and conduct; rather, the court stated that he was not yet a respondent because no allegations had been made against him.

Respondent later testified that, until this hearing, he had not been aware that a neglect case against Kops was pending; from his conversation with Straley, he understood only that Kops had left A. with someone else and that Kops's whereabouts were unknown on the day that the DHS took protective custody. At the hearing, respondent gave the court his Manistee Street address and a cell phone number. The court told him he could obtain copies of the petition and other paperwork. According to Patterson, respondent knew he could speak with her after the hearing, but he "he got upset and stormed out of the courtroom and left."

A second dispositional hearing was held on June 29, 2006. For unknown reasons, instead of using the Manistee Street address that the court had used successfully and that respondent had again provided on June 8, the court sent notice of this hearing to respondent at the

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[7] MCL 712A.2(b)(1) confers court jurisdiction over a juvenile

> [w]hose parent or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, education, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is without proper custody or guardianship.

10th Street address. Thus, respondent did not appear. After the hearing, the court ordered that A. stay in the care of the DHS but that efforts would continue toward reunification with Kops. With regard to respondent, the order simply stated: "Notice is to be given to the legal/putative father(s) as required by law."

A week later, on July 6, 2006, Patterson contacted Kops to ask if Kops knew how to contact respondent. Kops told her—apparently falsely—that he was in Irons, Michigan.[8] Patterson testified that she contacted Kops because the phone number she had for respondent did not work. Patterson did not record her attempt to call respondent or the phone number she used. The updated service plan (USP) completed by Patterson for the period April 19, 2006, to July 17, 2006, however, lists the same phone number for respondent found in the April 19, 2006, ISP; the USP does not include the new phone number provided by respondent during the June 8 hearing at which Patterson was present.

Two additional dispositional/review hearings took place on September 14 and December 7, 2006. The court mailed notice of the September hearing to respondent at the incorrect 10th Street address. The court did not send any notice at all of the December hearing. On December 12, 2006, the court notified the parties that a permanency planning hearing would take place on March 1, 2007. The notice advised that the hearing "may result in further proceedings to terminate parental rights." The notice was again sent to respondent at the incorrect 10th Street address and was returned to the court as undeliverable.

Patterson attempted to contact respondent on December 20, 2006, when she sent a copy of the most

[8] Respondent testified that he did not live in Irons while this case was pending.

recent service plan and her business card to the Manistee Street address; on December 28, 2006, that mail was returned to her as undeliverable.[9] In January 2007, Patterson again asked Kops if she knew how to locate respondent; Kops replied that she did not know his whereabouts.

On January 24, 2007, Patterson filed a petition seeking to terminate the parental rights of both Kops and respondent. The petition alleged that Kops could not provide a stable home for her children and had failed to make progress under the service plan. It further alleged that respondent had contributed to A.'s unsafe and neglectful environment—and therefore that his rights should be terminated under MCL 712A.19b(3)(g)—by physically assaulting Kops in December 2005 in A.'s presence, failing to pay child support since A. was placed in foster care, failing to contact Patterson to participate in services in order to gain custody, and failing to have contact with A. after she was placed in foster care. Finally, the petition alleged that respondent's rights should be terminated under MCL 712A.19b(3)(j) because A. was likely to be harmed if placed in his home since respondent had a "criminal history and pattern of instability . . . ." The petition recounted several convictions: breaking and entering a building with intent to steal, MCL 750.110, in 1999; misdemeanor attempt to resist and obstruct an officer, MCL 750.479, in 2005; misdemeanor domestic

[9] Both respondent and Marshall testified that they lived at the Manistee Street address in a home owned by Marshall's parents but moved to an apartment on Ramsdell Street from July 2006 to June 2007 while they fixed up the home. Marshall stated that she forwarded the mail for herself and "all occupants" during that time. Marshall and respondent stated that they each continued to receive mail at the Manistee Street address as well. The parties could not explain why Patterson's December 20, 2006, mail was returned to her.

violence, MCL 750.81(2), in 2005; and the domestic violence conviction stemming from his dispute with Kops in December 2005.

Proceedings to terminate respondent's parental rights were originally scheduled for March 22 and 23, 2007. On January 25, 2007, the court sent notice of the proceedings to respondent at the correct Manistee Street address. At the March 1, 2007, permanency planning hearing, the termination proceedings were adjourned. On May 23, 2007, respondent called Patterson and left a message for her. He testified that he had spoken to the prosecuting attorney, who advised him to contact Patterson. She returned his call on May 25. At that time he told her that he wanted custody of A. and was capable of raising her. Patterson instructed respondent to obtain counsel to represent him at the termination proceedings. The next review hearing took place on June 12, 2007. Respondent received notice of this hearing, which the court mailed to the Manistee Street address, and he appeared at the hearing. On June 14, 2007, the court appointed attorney Jeffrey Nellis to represent respondent.

The termination hearing took place on August 30 and 31, 2007. A. was just under $3\frac{1}{2}$ years old at the time. At the hearing, respondent described his past relationship with A. and his desire to raise her. He testified that, before December 2005, he spent time with A. and, when he lived with Kops, he was often the one who fed A. at night or got up with her when she cried. After his relationship with Kops ended, he requested overnight or weekend visits, but Kops generally refused. He saw A. when Kops "wanted [him] to buy something" or "needed something or wanted [him] to watch [A.] overnight" because Kops was having a party. He was concerned about A.'s

living conditions and had called the police but did not know if they took any action in response to his concerns. He stated that he currently lived with Marshall, stayed out of trouble, and was the primary caregiver for Marshall's daughter, M., who was just under three years old at the time of the hearing. He testified that he stayed home, cared for M., and remodeled the house while Marshall worked.

Respondent also testified that, until he began receiving notices about the termination proceedings at his Manistee Street address, he did not know that the DHS or the court was attempting to contact him; he therefore assumed that A. had been returned to Kops and, as usual, that he would not hear from Kops until she needed something from him. He assumed that, if the children had remained in foster care and were not being reunified with Kops, the DHS or the court would have contacted him about placement with him. He admitted, however, that he had not made further efforts to contact the DHS or the court for information about the outcome of the proceedings or to set up visits with A.

The record confirms respondent's testimony that he was never ordered to pay child support, either while A. was with Kops or when she was in foster care. The prosecutor did not know why local prosecutors or the DHS had not sought support, particularly when Kops received public assistance.[10] Respondent stated that he gave Kops money after A. was first born and later bought items that Kops requested, like diapers, because otherwise Kops would spend the money on alcohol. He

[10] When a child receives federally supported public assistance, including Title IV-E funds, the state is required to seek child support from a noncustodial parent. 42 USC 654(4)(A)(i) and (20); 42 USC 666; 45 CFR 302.31(a)(2). To this end, Michigan law permits the DHS to seek child support from a noncustodial parent and requires the prosecuting attorney to represent the DHS in such matters. MCL 552.451b; MCL 552.454(1); MCL 722.3(2).

stated, "[I]f they wanted me to pay child support I would pay child support." He also stated, "I'll do whatever they want me to do" to get A. back. He testified that he did not have a full-time job but could pay support because Marshall was working and because he did odd jobs for Marshall's father and occasionally worked as a self-employed mechanic.

Marshall confirmed that she had lived with respondent for about 18 months, stating that while they both cared for M., respondent cared for her "mostly because he's home more" while Marshall worked. Marshall testified, "He takes care of her, he feeds her, he takes her outside, he makes sure she's bathed an[d] goes to bed on time." When asked how he had done, Marshall responded, "Excellent, my daughter loves him to death." Marshall also testified that respondent had never assaulted or abused Marshall.

Respondent's counsel argued that, at a minimum, termination was premature. He requested that respondent "at least be given an opportunity to participate in services." He added that if the DHS had concerns about respondent's mental stability, it could conduct a psychological evaluation or a home study.

The prosecutor introduced testimony from DHS staff and evidence of respondent's convictions. Patterson testified that she sought termination because respondent "has a criminal record and . . . didn't make diligent enough attempts to contact [her]." She was not aware that respondent claimed to have given money and items to Kops in order to care for A. or that he was caring for another child. She admitted that, if she had been in contact with him earlier in the process, she would have ordered a home study to assess the appropriateness of placement with him.

Kops did not participate in the termination proceedings. Rather, she voluntarily relinquished her rights to A. on August 29, 2007.[11]

The court ruled that termination of respondent's rights was appropriate under MCL 712A.19b(3)(g) and (j). Termination under subsection 3(g) is appropriate if the "parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." MCL 712A.19b(3)(g). The court ruled that termination was warranted under that subsection because of respondent's two convictions for domestic violence involving Kops and "the allegation [by the DHS] . . . that the child was present during the domestic violence." The court also observed that respondent had not paid child support since his daughter was placed in foster care, nor had he made payments under a court order requiring him to reimburse the state for services provided in A.'s case.[12] Finally, al-

[11] The record reflects that Kops released her rights "contingent upon" the termination of respondent's rights. We have no other information concerning whether or how her "contingent" release affected the proceedings. Placing such a condition on her voluntary release creates a specter of misconduct by the state, particularly in light of the unexplained failures of the DHS and the court to follow up on their lack of contact with respondent beyond asking Kops—*who clearly did not want respondent to gain custody of A.*—if she knew where respondent was living. Indeed, because she released her rights to A. on the day before respondent's termination hearing, the record creates the impression that termination of respondent's rights was a foregone conclusion. Because a noncustodial parent has a constitutionally protected interest in his child, the state may not enter into agreements with an unfit custodial parent that may compromise the state's efforts to reunite the child with the noncustodial parent. Doing so creates a barrier to the noncustodial parent's participation in the proceedings and thus sets him up to fail at the termination hearing.

[12] The court referred to a June 14, 2007, order directing respondent to reimburse the court for attorney fees by paying $100 a month beginning

though respondent had Patterson's contact information, he had little contact with the DHS or the court. Thus, the court found "a failure to demonstrate proper motivation on behalf of [respondent] in making attempts to see his [child]." The court added: "[T]here has to be a responsibility and a burden of a parent to step forward. And, it's not the department's responsibility to . . . search him out in the way that's been suggested by counsel." Thus, the court concluded that termination was appropriate because the record showed by clear and convincing evidence that respondent's absence "during a very important developmental period makes it likely that this child would suffer emotionally if returned to the respondent's care." The court found that there was "no reasonable expectation that he would be able to provide proper care and custody within a reasonable time considering this child's age."

The court also concluded that termination was appropriate under MCL 712A.19b(3)(j), which applies when clear and convincing evidence establishes that "[t]here is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." The court cited respondent's criminal convictions and stated that "no one knows" if respondent had "learned his lesson" or no longer had a "propensity . . . to be involved in criminal behavior." The two domestic violence convictions, in particular, were "of a [sic] concern to the Court."

After finding grounds to terminate respondent's rights, the court declined to conclude that termination

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July 15, 2007. It is unclear whether respondent was aware of this order. A stamp on the order reflects that a copy was mailed to him on June 15, 2007. It does not indicate what mailing address was used.

would clearly not be in A.'s best interests.[13] It observed that A. had been in foster care for more than 18 months and that she had developed an attachment to her surrogate parents, experienced stability and continuity in care, and was "thriving." It characterized respondent as "virtually a stranger" to her and held that continuing "an uncertain and risky and long" reunification process was "to[o] risky" and not in her best interests.

On respondent's appeal, the Court of Appeals majority reversed. *In re Rood*, *supra* at 5. The panel characterized respondent as "having been a less-than-ideal parent during his child's brief lifetime," but concluded that "the breakdown of communication in this case was predominantly attributable to petitioner." *Id.* at 3.[14] Although respondent "shares responsibility for this lack of communication," he made the initial effort to contact the DHS, attended the hearings for which he received notice, and provided his contact information to the DHS and the court. Therefore, "it was reasonable to expect that respondent would become involved in the child's life, provided that he received proper notice of the protective proceedings." *Id.*

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[13] At the time of the hearing, MCL 712A.19b(5) provided:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, *unless the court finds that termination of parental rights to the child is clearly not in the child's best interests*. [Emphasis added.]

[14] In particular, the panel observed that, "during the first several months of the dispositional phase of this case," Patterson's efforts "consisted of one phone call to respondent, which failed to connect . . . ." *In re Rood*, *supra* at 2. Further, Patterson did not try to contact respondent through the mail, although she had his address, until more than five months after she had asked Kops about respondent's whereabouts in July 2006. *Id.* at 3.

Further, because the record showed that respondent was the primary caregiver for another child and appeared willing and able to provide for A., the trial court impermissibly concluded that " 'there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time . . . .' " *Id*. at 3-4, quoting MCL 712A.19b(3)(g). Similarly, although respondent has a criminal record, none of his offenses related to child abuse or neglect, and his record did not serve as clear and convincing evidence that he would continue to engage in domestic violence. Accordingly, the court's determination that there was a reasonable likelihood of harm to A. "amounted to 'essentially conjecture.' " *Id.* at 4 (citation omitted).

The panel also observed that, under MCL 712A.18f(1), (2), and (4), before a court may enter a dispositional order in a child protective proceeding, the petitioner must make reasonable efforts to rectify the problems that caused the child's removal by adopting a service plan. *Id*. at 2. The adequacy of the petitioner's efforts to provide services may bear on whether there is sufficient evidence to terminate a parent's rights. *Id.*, citing *In re Fried,* 266 Mich App 535, 542; 702 NW2d 192 (2005). Because the efforts of the DHS were inadequate, and in light of the lack of notice to respondent of many of the court proceedings, the panel vacated the order terminating respondent's parental rights and remanded for "reconsideration after respondent has received an opportunity to demonstrate his ability and willingness to parent" A. *In re Rood*, *supra* at 4.[15]

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[15] In dissent, Judge KATHLEEN JANSEN stated that respondent "took little initiative to contact petitioner, thereby demonstrating his general indifference for the life of the child." *In re Rood*, *supra* at 1 (JANSEN, J., dissenting). She opined that there was a "real possibility that respondent's failure to fully participate in these proceedings was not so much

The DHS sought leave to appeal in this Court, and we granted leave.[16] We affirm the judgment of the Court of Appeals and remand this case to the trial court for proceedings consistent with this opinion.

STANDARD OF REVIEW

Appellate courts are obliged to defer to a trial court's factual findings at termination proceedings if those findings do not constitute clear error. MCR 3.977(J); *In re Trejo Minors,* 462 Mich 341, 356; 612 NW2d 407 (2000). "We review for clear error both the court's decision that a ground for termination has been proven

attributable to a lack of adequate notice as it was to his desire to avoid contact with the child's mother." *Id*. She concluded that placing A. with respondent "would be tantamount to placing the child with an utterly disinterested stranger" and that "there was a genuine likelihood that the child would suffer from future emotional harm if placed in respondent's custody." *Id*. at 1-2.

[16] We directed the parties to address

> (1) whether the Department of Human Services made adequate efforts to contact the respondent-appellee father, who had given contact information to the court at the June 8, 2006, hearing concerning the rights of the child's natural mother; (2) whether the Department of Human Services was under a legal duty, imposed by statute or court rule, to conduct a home study or to make other efforts to place the minor child with the respondent father, given the unique circumstances of this case; (3) whether the existence of any legal duty was mitigated by the respondent father's failure to contact the agency for over one year, failure to pursue visitation with his child who had been placed in foster care, or his domestic-violence convictions involving the child's mother; and (4) whether the failure of the family court to send notices of the proceedings to the correct address, or the failure of the Department of Human Services to make diligent efforts to contact the respondent father at the address and telephone number provided by him at the June 8, 2006, adjudication hearing for the respondent mother, precluded the court from terminating respondent father's parental rights. [*In re Rood*, 482 Mich 900 (2008).]

by clear and convincing evidence and, where appropriate, the court's decision regarding the child's best interest." *In re Trejo*, 462 Mich at 356-357. "A finding is 'clearly erroneous' [if] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (quotation marks omitted). Whether proceedings complied with a party's right to due process presents a question of constitutional law that we review de novo. *Sidun v Wayne Co Treasurer,* 481 Mich 503, 508; 751 NW2d 453 (2008).

## DISCUSSION

### I. CONSTITUTIONAL PARENTAL RIGHTS

A natural parent has a fundamental liberty interest "in the care, custody, and management" of his child that is protected by the Fourteenth Amendment of the United States Constitution, *Santosky*, 455 US at 753, and by article 1, § 17, of the Michigan Constitution, see *Reist v Bay Co Circuit Judge,* 396 Mich 326, 341-342; 241 NW2d 55 (1976) (LEVIN, J.) (stating that parents and children have fundamental rights "in their mutual support and society"). As the United States Supreme Court stated in *Santosky*, 455 US at 753-754:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. . . . When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.

II. PROCEDURAL DUE PROCESS

Here, the primary question presented is whether the state's actions satisfied respondent's right to procedural due process. We reviewed the most basic requirements of procedural due process in *Dow v Michigan*, 396 Mich 192, 205-206; 240 NW2d 450 (1976):

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v Ordean*, 234 US 385, 394 [34 S Ct 779; 58 L Ed 1363] (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v Manzo,* 380 US 545, 552 [85 S Ct 1187, 14 L Ed 2d 62] (1965)." *Goldberg v Kelly*, 397 US 254, 267; 90 S Ct 1011; 25 L Ed 2d 287 (1970).
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> The "opportunity to be heard" includes the right to notice of that opportunity. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v Central Hanover Bank & Trust Co*, [339 US 306, 314; 70 S Ct 652; 94 L Ed 865 (1950)].

"Due process requires fundamental fairness, which is determined in a particular situation first by 'considering any relevant precedents and then by assessing the several interests that are at stake.' " *In re Brock*, 442 Mich 101, 111; 499 NW2d 752 (1993), quoting *Lassiter v Durham Co Dep't of Social Services,* 452 US 18, 25; 101 S Ct 2153; 68 L Ed 2d 640 (1981). Under *Mathews v Eldridge,* 424 US 319, 335; 96 S Ct 893; 47 L Ed 2d 18 (1976), three factors are generally considered to determine what due process requires in a particular case:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute proce-

> dural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

See also *In re Brock*, 442 Mich at 111, quoting *Mathews*.

### III. CHILD PROTECTIVE PROCEEDINGS IN MICHIGAN

In Michigan, procedures to ensure due process to a parent facing removal of his child from the home or termination of his parental rights are set forth by statute, court rule, DHS policies and procedures, and various federal laws discussed below.

#### A. REMOVING A CHILD FROM HIS HOME

##### 1. MICHIGAN STATUTES AND COURT RULES

The sections of Michigan's Probate Code of 1939 governing juveniles (the Juvenile Code), MCL 712A.1 *et seq.,* are guided by the following overarching goals:

> This chapter shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, *preferably in his or her own home*, conducive to the juvenile's welfare and the best interest of the state. If a juvenile is removed from the control of his or her parents, the juvenile shall be placed in *care as nearly as possible equivalent to the care that should have been given to the juvenile by his or her parents*. [MCL 712A.1(3) (emphasis added).]

Subchapter 3.900 of the Michigan Court Rules, which covers proceedings involving juveniles, espouses the same statutorily derived goals.[17]

Here, the court removed A. from her home, as authorized by the Juvenile Code, MCL 712A.2(b)(1), as

[17] MCR 3.902(B).

a result of Kops's neglect. When a child is removed under § 2(b), her parents[18] are entitled to notice of the proceedings and, if they are named as respondents, to representation by an attorney. A parent whose parental rights have not been terminated, including one who is not a named respondent, must be notified of and permitted to participate in each hearing, including dispositional review hearings, permanency planning hearings, and termination proceedings.[19] Our court rules require the trial court to determine at the preliminary hearing whether the parent has been notified, and the court may adjourn the hearing to secure the presence of a parent.[20] The court must also advise a respondent parent at the respondent's first court appearance that he has a right to an attorney at each stage of the proceedings and a right to a court-appointed attorney if he is financially unable to employ an attorney on his own behalf.[21]

When the DHS petitions for removal of a child under MCL 712A.2(b), the court must hold a preliminary hearing or hearings and may authorize the petition

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[18] The Juvenile Code and court rules provide rights similar to those of parents for guardians and legal custodians. We omit references to guardians and legal custodians here for the sake of brevity and because only parental rights are at issue.

[19] MCL 712A.19(5)(c); MCL 712A.19a(4)(c); MCL 712A.19b(2)(c); MCR 3.921(B)(1)(a) and (d), (2)(c), and (3).

[20] MCR 3.965(B)(1).

[21] MCL 712A.17c(4) and (5); MCR 3.915(B)(1). In a child protective proceeding, the petitioner, child, respondent, and parent are parties. MCR 3.903(A)(18). " 'Parent' means the mother, the father . . . , or both, of the minor." MCR 3.903(A)(17); cf. 42 USC 675(2) ("The term 'parents' means biological or adoptive parents or legal guardians, as determined by applicable State law."). "Respondent" is not specifically defined for the purposes of child protective proceedings until the termination stage, when it generally "includes (1) the natural or adoptive mother of the child [and] (2) the father of the child . . . ." MCR 3.977(B).

"upon a showing of probable cause that 1 or more of the allegations in the petition are true and fall within the provisions of section 2(b) . . . ." MCL 712A.13a(2). The preliminary hearing is governed by MCL 712A.13a and corresponding provisions of MCR 3.965. At the hearing, if the court does not dismiss the petition for removal, it may release the child to a parent and may impose any terms and conditions necessary to protect the child's physical and mental well-being.[22] If the child is not returned to his home, "the court shall order the juvenile placed in the most family-like setting available consistent with the juvenile's needs."[23] MCL 712A.13a(10). To this end, the "court must inquire of the parent . . . regarding the identity of relatives of the child who might be available to provide care. If the father of the child has not been identified, the court must inquire of the mother regarding the identity and whereabouts of the father." MCR 3.965(B)(13). The court must permit "the juvenile's parent to have frequent parenting time" unless visits, "even if supervised, may be harmful to the juvenile." MCL 712A.13a(11).[24] If visits may be harmful, the court must order a psychological evaluation of, or counseling for, the child and may suspend parenting time until the evaluation or counseling takes place.[25]

Within 30 days of the child's placement, and before the court may enter an order of disposition in a proceeding under § 2(b), the petitioning agency—here the

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[22] MCL 712A.13a(3); MCR 3.965(B)(12)(a).

[23] See also MCR 3.965(C)(2).

[24] See also MCR 3.965(C)(6)(a) ("Unless the court suspends parenting time pursuant to MCL 712A.19b(4) [because a petition to terminate parental rights has been filed], . . . the court must permit *each parent* frequent parenting time . . . unless parenting time, even if supervised, may be harmful to the child.") (emphasis added).

[25] MCL 712A.13a(11).

DHS[26]—must provide an initial service plan.[27] The agency must report what efforts were made and what services were provided, if any, to prevent removal or to rectify the conditions that caused removal.[28] The child's continued placement must be "in the most family-like setting available and in as close proximity to the child's parents' home as is consistent with the child's best interests and special needs." MCL 712A.18f(3). As part of the ISP, the agency is statutorily required to "identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs as an alternative to foster care." MCL 722.954a(2).[29] The ISP also must detail the efforts to be made and services to be offered to facilitate the child's return to his home or other permanent placement and a schedule for "regular and frequent parenting time between the child and his or her parent" unless parenting time would be harmful to the child. MCL 712A.18f(3) and (4).

2. THE CHILDRENS FOSTER CARE MANUAL

State and federal law require the DHS to promulgate rules, policies, and instructions to carry out the statutory mandates.[30] The DHS Childrens Foster Care

[26] As applied to this case, the "agency" is the "public or private organization, institution, or facility . . . that is responsible under court order or contractual arrangement for a juvenile's care and supervision." MCL 712A.13a(1)(a); see also MCR 3.903(C)(1).

[27] MCL 712A.13a(8)(a); MCL 712A.18f(2) and (4); MCR 3.965(E)(1).

[28] MCL 712A.18f(1); MCR 3.965(D)(1).

[29] Indeed, the court rules explicitly require that, at the preliminary hearing, the court "shall direct" the agency to identify and consult with relatives pursuant to MCL 722.954a(2). MCR 3.965(E).

[30] 45 CFR 1356.21(g); MCL 722.111 to 711.128; cf. MCL 712A.13a(8).

Manual (which the agency refers to as the "CFF")[31] guides the creation and implementation of a service plan, as required by 42 USC 671(a)(16) and 42 USC 675(1). Consistently with the statutory directives, the DHS "**requires** the engagement of the family in development of the service plan," including "all parents/guardians . . . ." CFF 722-6, p 1 (emphasis in original). "Parents **must be encouraged to actively participate**," and the foster care worker must make "an attempt or efforts to identify and locate absent parent(s)/legal guardian or putative father." *Id*. at 2 (emphasis in original). "The participation of parents and members of the extended family/relative network is viewed as essential to achieving permanency and is to be actively sought." *Id*. at 3. The service plan must address "[w]hat the parent(s) . . . must do to achieve reunification" and "[w]hat the supervising agency must do to support parental objectives." *Id*. The foster care worker must meet with "each parent" face-to-face in the parent's home and by phone at specified intervals during the pendency of the child's placement in foster care. *Id*. at 5-6. The agency also "**must** use parenting

[31] The CFF is available online at <http://www.mfia.state.mi.us/olmweb/ /ex/html/> (accessed March 18, 2009). Only the current version is available and, although the CFF is quoted in briefs in this case, the parties have not provided the Court with the version of the CFF in effect during the proceedings in this case. Although the CFF has not been subjected to the requisite notice and comment period, which is required before such manuals are afforded deference by Michigan courts, it is nonetheless consistent with the statutes in effect during the proceedings and provides helpful insight into the procedures that the DHS requires employees to complete in practice to fulfill the statutory requirements. Further, the up-to-date version may be helpful for courts and parties faced in the future with challenges like the ones presented by this case. But, contrary to Justice YOUNG's contention, *post* at 130, we do not fault DHS staff for failing to comply with explicit provisions of the CFF that were not in effect or not central to fulfilling the statutory mandates during the pendency of this case.

time to maintain and strengthen the relationship between parent and child." *Id*. at 7 (emphasis in original). "Parenting time must be provided for every parent with a legal right to the child, regardless of prior custody." *Id*.

With regard to the services offered to parents, the CFF explicitly advises: "It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children." CFF 722-6, p 11. The CFF explains that services in part underlie the "reasonable efforts" in which the DHS must engage both to avoid removal and to reunify the child with his family. *Id*. at 14, 16. "If reunification is the permanency planning goal, the court must consider whether efforts by the supervising agency to reunify a family are reasonable . . . ." *Id*. at 16. "In all cases, the supervising agency's service planning must include the parent(s) (except when parental rights have been terminated) . . . ." *Id*. If a parent is "absent," the DHS must consult the Absent Parent Protocol (APP) "to ensure DHS workers . . . and the courts address the absent parent issue as early as possible in child protection proceedings." *Id*. at 17.[32]

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[32] The current version of the APP is available at <http://courts.michigan.gov/scao/resources/standards/APP.pdf> (accessed March 18, 2009). The APP defines an absent parent as including a legal parent whose whereabouts are unknown. APP, § B(3)(b), p 5. The APP is a component of state program improvement plans (PIPs) developed in response to reviews of the state's federally funded child welfare programs. The PIPs aim to correct deficiencies cited in the United States Department of Health and Human Services Child and Family Services review (CFSR) and Title IV-E review. Noncompliant programs cause a significant loss of federal funding. See the discussion of Title IV-E funding in part IV of this opinion; *Michigan Improvement Plan (PIP) for Title IV-E Review*, Family Independence Agency, Children's Services, November 1, 2004, p 3 <http://www.michigan.gov/documents/Michiga4_123388_7.pdf> (accessed March 18, 2009); United States Depart-

B. PERMANENCY PLANNING

1. MICHIGAN STATUTES AND COURT RULES

The service plan must be updated every 90 days.[33] The court generally must review the case within 182 days of the child's removal and every 91 days thereafter during the first year of placement.[34] At each review hearing, the court must evaluate compliance with the service plan by the child's parent and the "extent of progress made toward alleviating or mitigating the conditions that caused the child to be placed in foster care . . . ." MCL 712A.19(6) and (7). The court may prescribe additional services or actions to be taken that are "necessary to rectify the conditions that caused the child to be placed in foster care or to remain in foster care." MCL 712A.19(7)(a).[35]

If a child remains in foster care and parental rights have not been terminated, the court must conduct a permanency planning hearing within one year of the child's removal.[36] Permanency planning hearings are governed by MCL 712A.19a and MCR 3.976. Under MCL 712A.19a(2), "[r]easonable efforts to reunify the

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ment of Health and Human Services, Administration for Children & Families, *Children's Bureau Child and Family Services Reviews Fact Sheet* <http://www.acf.hhs.gov/programs/cb/cwmonitoring/recruit/cfsrfactsheet.htm> (accessed March 18, 2009); *PIP General Information* [Michigan CFSR], pp 24, 28, 32 <http://www.michigan.gov/documents/FIA-CFS-PIP-Narrative_106409_7.pdf> (accessed March 18, 2009) (noncompliance with federal CFSR requirements resulted, and APP is necessary, in part because "[f]athers were not engaged in the case planning process even when their whereabouts were known" and because "[d]iligent efforts were not made to find an absent father").

[33] MCL 712A.18f(5).

[34] MCL 712A.19(3); MCR 3.966(A)(2); MCR 3.975(C).

[35] See, generally, MCR 3.973(F); MCR 3.975(A), (F), and (G).

[36] MCL 712A.19a(1); MCR 3.976(B)(2).

child and family must be made in all cases" except those involving aggravated circumstances not present here.[37]

At the permanency planning hearing, the court shall review "the progress being made toward the child's return home or to show why the child should not be placed in the permanent custody of the court." MCL 712A.19a(3). If the court determines that the "return of the child to his or her parent would not cause a substantial risk of harm to the child's life, physical health, or mental well-being, the court shall order the child returned to his or her parent." MCL 712A.19a(5). When making this determination, the court "shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm . . . ." MCL 712A.19a(5).[38] Under the version of MCL 712A.19a in effect during the proceedings in this case, if the court determined that the child should not be returned to his parent, the court was required to order the agency to initiate proceedings to terminate parental rights unless termination was clearly not in the child's best interests. If termination was not in the child's best interests, the court could consider alternative permanent placement, including ongoing foster care.[39]

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[37] Reasonable efforts toward reunification are unnecessary if a parent caused or created an unreasonable risk of the abandonment, serious physical or sexual abuse, or death of a child. MCL 712A.19a(2)(a); MCL 722.638(1) and (2). Such efforts are also unnecessary if the parent's rights to the child's sibling were involuntarily terminated, MCL 712A.19a(2)(c), or if the parent was convicted of felony assault resulting in injury or of committing or aiding in the murder, attempted murder, or voluntary manslaughter of the child or the child's sibling, MCL 712A.19a(2)(b). See also MCR 3.976(B)(1).

[38] See also MCR 3.976(E)(1).

[39] MCL 712A.19a(6) and (7); MCR 3.976(E)(2) and (3). Significantly, effective July 11, 2008, termination proceedings are no longer required if

2. THE CHILDRENS FOSTER CARE MANUAL

The CFF notes that reunification is normally "directed toward the home from which the child was removed" but, "where indicated, the focus may shift to the non-custodial parent's home." CFF 722-7, p 2. The current CFF requires the foster care worker to complete family assessment/reassessment of needs and strengths forms "to evaluate the presenting needs and strengths *of each household with a legal right to the child(ren)*." CFF 722-8a, p 1 (emphasis added). But if a parent is "unable to be located, is incarcerated for more than two (2) years or refuses to participate, an assessment does not have to be completed." *Id*. To this end, the worker is required to document that he

> completed a diligent search for parent(s) with a legal right to the child(ren) through such things as statewide [Client Information Management System] inquiry, Secretary of State inquiry, search of telephone books, US Post Office address search, follow up on leads provided by friends and relatives, legal publication, etc. and has been unable to locate. The parent(s) has not respond [sic] to mailings from the worker. [CFF 722-8, p 6.]

C. TERMINATION OF PARENTAL RIGHTS

If the case proceeds to a termination hearing, MCL 712A.19b and MCR 3.977 provide that the court may terminate a parent's rights to his child if the court finds by clear and convincing evidence that one or more of the statutory criteria are met.[40] If, as here, termination is

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the "state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required." MCL 712A.19a(6)(c), as amended by 2008 PA 200.

[40] MCL 712A.19b(3); MCR 3.977(F); see also *Santosky,* 455 US at 769.

sought under a supplemental petition,[41] the court considers legally admissible evidence and must state its findings of fact and conclusions of law.[42] At the time of the hearing in this case, MCL 712A.19b(5) provided that if the court found grounds for termination, "the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, *unless the court finds that termination of parental rights to the child is clearly not in the child's best interests*." (Emphasis added.)[43]

## IV. FEDERAL LAW

The processes for removing a child from his home and terminating a parent's rights are also governed by federal statutes and regulations. Title IV-E establishes federal funding to support state foster care systems and conditions funding on compliance with federal requirements.[44] The record reflects—and the parties do not

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[41] A supplemental petition "seeks to terminate the parental rights of a respondent over a child already within the jurisdiction of the court on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction." MCR 3.977(F).

[42] MCL 712A.19b(1); MCR 3.977(F)(1).

[43] Effective July 11, 2008, MCL 712A.19b(5), as amended by 2008 PA 199, now provides: "If the court finds that there are grounds for termination of parental rights *and that termination of parental rights is in the child's best interests*, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made." (Emphasis added.)

[44] 45 CFR 1356.21; 45 CFR 1356.50; see, generally, 42 USC 670; 42 USC 671. Title IV-E was substantially enacted and revised by the Adoption and Safe Families Act of 1997 (ASFA), PL 105-89, 111 Stat 2115. The Fostering Connections to Success and Increasing Adoptions Act of 2008, which was enacted after the relevant proceedings in this case, provides additional financial support for adoptions and kinship guardianships and requires additional efforts by states to notify and work with the extended families of children who have been removed from their homes as a result of abuse or neglect. PL 110-351, §§ 101, 103, 122 Stat 3950-3953, 3956.

dispute—that A.'s placement was designated for Title IV-E funding. Title IV-E requirements are significant in states, including Michigan, that rely on federal funding to support child welfare programs. Because we choose to accept federal funding, noncompliance with the federal scheme results in substantial funding losses and financial penalties.[45] Accordingly, in order to comply with federal requirements, our Legislature enacts and amends state statutes to mirror the federal scheme[46]

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[45] The federal statutes referred to in this opinion, with some exceptions, e.g., 42 USC 674(d)(3)(A), were enacted pursuant to Congress's spending power, US Const, art I, § 8, cl 1. As a result, because the rules set forth in these statutes are not "unrelated 'to the federal interest' " in these statutes, *South Dakota v Dole*, 483 US 203, 207; 107 S Ct 2793; 97 L Ed 2d 171 (1987), the state must comply with these rules in order to accept funding under these statutes. As indicated in note 32 of this opinion, states are reviewed for compliance with federal requirements. See also 45 CFR 1356.71. When a state is found not to be in substantial compliance, a portion of its federal funding is "disallowed" and must be repaid to the federal government with interest, 45 CFR 1356.71(h) and (j), and the state may be assessed financial penalties, 45 CFR 1356.86. The executive branch, acting through the DHS, is empowered by the Michigan Constitution to accept federal aid in order to help finance or execute its statutorily defined functions. Article 3, § 5, of the 1963 Michigan Constitution provides:

> Subject to provisions of general law, this state or any political subdivision thereof, any governmental authority or any combination thereof may enter into agreements for the performance, financing or execution of their respective functions, with any one or more of the other states, the United States, the Dominion of Canada, or any political subdivision thereof unless otherwise provided in this constitution.

Because one of the DHS's undisputed "functions" is the protection of children, the DHS has properly entered into an agreement with the federal government to accept the funding at issue here.

[46] As just one example of the many parallel provisions, which are generally evident from our discussion, the Legislature amended MCL 712A.19a in 2004 and 2008 to more closely resemble the comparable federal provisions. 2008 PA 200; 2004 PA 473. Most recently, for instance, as is relevant to cases like this one, 2008 PA 200 added subsection 6(c) to

and now provides that Title IV-E prevails to any extent that it conflicts with state law. 2008 PA 248, § 559.[47] Federal requirements are also clearly reflected by the DHS policies discussed earlier.

The federal provisions most applicable here include the requirement that, under most circumstances, states must make "reasonable efforts . . . to preserve and unify families" in order both to prevent a child's removal from his home and to make it possible for the child to safely return to his home. 42 USC 671(a)(15)(B). Further, states must "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards[.]" 42 USC 671(a)(19). For each child in foster care, the state's case service plan must include, among other things, "services . . . to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own safe home or the permanent placement of the child . . . ." 42 USC 675(1)(B); see

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that statute to provide, consistently with 42 USC 675(5)(E)(iii) and 45 CFR 1356.21(i)(2)(iii), that a court is not required to terminate parental rights if the "state has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home, if reasonable efforts are required."

[47] 2008 PA 248 is the current DHS appropriations act and provides: "If a conflict arises between the provisions of state law, department rules, or department policy, and the provisions of title IV-E, the provisions of title IV-E prevail." Accordingly, the Legislature has consistently required the DHS to report any conflicts with federal regulations, the results of CFSR and Title IV-E foster care eligibility reviews (which measure compliance with the ASFA), and changes in DHS policy, court forms, and court rules to meet the relevant statutory requirements. See 2008 PA 248, §§ 215, 271, and 272 and the appropriations act in effect during these proceedings, 2005 PA 147. We note that we have not discovered any conflicts between the state and federal requirements applicable to this case.

also 42 USC 671(a)(16). The state must also maintain a "case review system," in part to ensure that each child's service plan is "designed to achieve placement in a safe setting that is the least restrictive (most family like) and most appropriate setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child . . . ." 42 USC 675(5)(A); see also 42 USC 671(a)(16). The case review system also must ensure that procedural safeguards are in place "with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents[.]" 42 USC 675(5)(C)(ii). The state must ensure that appropriate services are provided. As is now reflected by the recent amendment of MCL 712A.19a(6)(c) by 2008 PA 200, a court is not required to terminate parental rights if "the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home." 42 USC 675(5)(E)(iii); see also 45 CFR 1356.21(i)(2)(iii).

The Code of Federal Regulations fleshes out these requirements. Perhaps most significantly, 45 CFR 1356.21(b) provides, in part:

> The State must make reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from his/her home, as long as the child's safety is assured [and] to effect the safe reunification of the child and family (if temporary out-of-home placement is necessary to ensure the immediate safety of the child) . . . .

Further, 45 CFR 1356.21(g), mirrored by MCL 712A.18f(3), prescribes in subsection 1 that a case service plan must be "developed jointly with the parent(s) or guardian of the child in foster care," in

subsection 3 that it must "[i]nclude a discussion of how the case plan is designed to achieve a safe placement for the child in the least restrictive (most family-like) setting available and in close proximity to the home of the parent(s) when the case plan goal is reunification," and in subsection 4 that it must "[i]nclude a description of the services offered and provided to prevent removal of the child from the home and to reunify the family . . . ."[48]

Finally, we respond to Justice YOUNG's contention that we "advance a novel interpretation of federal law" by concluding that the federal scheme conveys substantive rights. *Post* at 128-130. First, as a partial aside, we disagree with his implication that this Court may not address an unresolved question of federal law when that question bears on the outcome of a case under our jurisdiction. We are not precluded from deciding an issue merely because federal circuits disagree and the

[48] We note that the DHS and Governor Jennifer Granholm entered into a settlement agreement stemming from a class action lawsuit in federal district court alleging deficiencies in Michigan child welfare practices. *Dwayne B v Granholm,* Case No 2:06-CV-13548 (ED Mich), filed August 8, 2006. The text of the settlement is available at <http://www.michigan.gov/documents/dhs/DHS-LegalPolicy-ChildWelfareReform-Settlement_243876_7.pdf> (accessed March 18, 2009). Notably, the settlement is guided in part by the following principle: "The ideal place for children is in their own home with their own family. When DHS cannot ensure their safety in the family home, it must place children in the most family-like and least restrictive setting required to meet their unique needs . . . ." Settlement, § II.D, p 3. The section of the settlement pertaining to service plans requires that "[i]f the parent(s) and/or child(ren) are not available or decline to sign the plan, the service plan shall include an explanation of the steps taken to involve them and shall identify any follow-up actions to be taken to secure their participation in services." Settlement, § VII.A, p 20. The agreement is not directly relevant to the case before us, however; it resulted from the alleged failure of the DHS to comply with applicable laws and was entered by the federal district court on October 24, 2008, after the relevant events in this case.

United States Supreme Court has yet to resolve a conflict among the circuits. See *post* at 128-129. Most significantly, however, Justice YOUNG's discussion of substantive rights creating private rights of action under 42 USC 1983 does not bear on this case, in which respondent does not seek to enforce a federal statutory provision by way of a private civil rights action. Rather, respondent claims procedural error rooted in the state's failure to comply with the state and federal processes *mandated* for termination cases. Thus, we do not conclude that the federal statutes create substantive rights; we need not weigh in on this question. The underlying substantive right at stake is not in question; it is respondent's constitutionally protected right to the care and custody of his child. Rather, we hold that respondent may certainly claim procedural error in an action brought by the state to terminate this right if the state fails to comply with the required procedures and its failure may be said to have affected the outcome of the case.

## V. APPLICATION TO THIS CASE

### A. FACTS

Here, compliance with the relevant laws and regulations was sorely lacking with regard to respondent. Beginning with the preliminary hearing, the court is required to "direct" the DHS to identify and consult with relatives, MCR 3.965(E), consistent with the statutory mandate in MCL 722.954a(2). It must also determine whether "the parent . . . has been notified"; the hearing may proceed in the absence of the parent if the parent was notified or if a "reasonable attempt to give notice was made." MCR 3.965(B)(1). In this case, the order following the preliminary hearing reflected only the court's opaque determination that notice "was

given as required by law." The record does not reflect that the court directed the DHS to identify relatives or made any findings with regard to whether reasonable attempts were made to notify respondent.

Next, before the August 2007 termination hearing, the court held six hearings, beginning with the preliminary hearing on April 20, 2006, and ending with the permanency planning hearing on March 1, 2007. Notice was sent to respondent's current address for only *one* of these six hearings: the June 8, 2006, dispositional hearing. Yet respondent submitted his Manistee Street address to the DHS before any of the hearings took place. Further, he again provided this address to the court on June 8, but the court continued to use the inaccurate 10th Street address. Although at least two of the court's notices by mail to the 10th Street address were returned as undeliverable, there is no evidence of follow-up measures to locate a correct address. To the extent that the DHS was responsible for updating respondent's information, the DHS had respondent's correct address on file and the court used this address *successfully* in June 2006. Yet the court reverted without explanation to the 10th Street address and, at least until December 2006, Patterson concluded that respondent's whereabouts were unknown on the basis of a single phone call to Kops, from whom respondent was estranged and who apparently hoped to prevent contact between A. and respondent.

With regard to the efforts of the DHS to involve respondent, the ISP Patterson prepared for the April 20, 2006, hearing reflected respondent's correct address and his status as A.'s father, but stated that he was "unwilling" to participate in the service plan. Yet the ISP also confirms Patterson's testimony that she did not contact respondent before the preliminary hearing

and had no information about his household. Each subsequent updated service plan and report to the court similarly stated that respondent was "unwilling" or "refused" to participate. The USPs also reflected that Patterson did not complete a family assessment form to evaluate the needs and strengths of respondent's household, presumably because she characterized him as refusing to participate.[49] The USPs consistently reflected that Patterson had no contact with respondent. They did not detail efforts to contact him beyond Patterson's unfruitful calls to Kops in July 2006 and January 2007.[50] The USP sections on "Kinship Resources and Placement" simply stated that efforts were not made to obtain a placement with relatives because "[t]here are no appropriate relatives . . . ."

### B. THE STATE DID NOT PROVIDE ADEQUATE PROCEDURAL DUE PROCESS

In light of these facts, we find this Court's opinion in *Sidun* and the United States Supreme Court's decision in *Jones v Flowers,* 547 US 220; 126 S Ct 1708; 164 L Ed 2d 415 (2006), instructive. Each case involved the due

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[49] The USPs reflected that Patterson assessed Kops's household; the assessment sections pertaining to respondent's household were left blank. At trial, Patterson testified that, if she had been in contact with respondent earlier in the process, she would have ordered a home study to assess the appropriateness of placement with him. Thus, the forms and practices of the DHS while this case was pending appear consistent with the current CFF, which states that a family assessment form "to evaluate the presenting needs and strength of each household with a legal right to the child(ren)" must be completed unless a parent "refuses to participate . . . ." CFF 722-8a, p 1.

[50] Somewhat disturbingly, the USP for the period January 16, 2007, to April 16, 2007, appears to reflect a fictional in-person contact between Patterson and respondent on January 16, 2007. Following this entry in the contact log, Patterson wrote, "Mr. Rood is not participating in services so this worker has not had contact with him but I am required to enter something to complete my report."

process rights of real property owners whose property was foreclosed by the state. In both cases, as here, the state's attempts at notice by mail were returned unclaimed. When notice is returned unclaimed,

> the adequacy of the government's efforts will be evaluated in light of the actions it takes after it learns that its attempt at notice has failed. . . . "[W]hen mailed notice of a tax sale is returned unclaimed, the State must take additional reasonable steps to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." [*Sidun,* 481 Mich at 511, quoting *Jones,* 547 US at 225.]

In *Sidun,* the county treasurer's follow-up measures were insufficient when notice mailed to one address was returned unclaimed and the treasurer failed to attempt to contact the owner at a second address recorded on the deed in the treasurer's possession. *Sidun*, 481 Mich at 513-515. Because the treasurer had the owner's "address at hand but failed to mail notice to her at that address," the treasurer failed to afford her "minimal due process." *Id.* at 515.

Similarly here, the court and the DHS had respondent's Manistee Street address on hand from the time proceedings began in March 2006. There is no excuse for their failure to use this address, particularly before December 2006, when Patterson's mail addressed to Manistee Street was returned for unknown reasons. Indeed, to some extent this failure is even more egregious than the one in *Sidun*, in which it was less obvious that the second address on the deed belonged to the owner in question. *Id*. at 513-514. Here, the court and the DHS were aware that the address was both that of respondent *and* up-to-date, since he provided it in March and June 2006 and the court used it successfully to notify respondent of the June 8, 2006, hearing.

Although this case does not involve a proceeding against property, the holdings of *Jones* and *Sidun* are instructive in a proceeding involving parental rights. As the United States Supreme Court has held, a parent's interest in his child "is an interest far more precious than any property right." *Santosky*, 455 US at 758.

### C. THE TRIAL COURT CLEARLY ERRED

The trial court excused the failures of notice and communication by noting respondent's failure to contact the DHS or the court after his initial call to Patterson on March 23, 2006, or after he attended the June 8, 2006, hearing. The court refused to credit respondent's testimony that, when he did not hear from the court or the DHS after March 23, he assumed that A. had been returned to Kops; rather, the court "assum[ed] he was under the impression that [A. was] still in foster care." The court also did not credit respondent's claim that he declined to seek visits with A. because he feared bouncing in and out of A.'s life. Rather, the court concluded that respondent simply wished to avoid liability for child support payments.

We conclude that the trial court clearly erred by ruling that respondent was sufficiently responsible for his own lack of participation to excuse the state's failures to inform him of the ongoing proceedings. First, although respondent was generally aware of A.'s initial placement in foster care and Kops's admission of neglect, his stated assumption that A. had been or would be returned to Kops was reasonable—and, indeed, was correct—until he was successfully notified in January 2007 of the termination proceedings; until that time, the express goal of the proceedings was reunification *with Kops*. Second, although the court correctly concluded that respondent never formally paid child sup-

port, he was also never ordered to pay child support. Significantly, the state was obligated to pursue support from him without regard to whether he visited A.[51] Therefore, he could not avoid his support obligation by simply deciding to forgo visitation. Similarly, no evidence was presented to contradict his claim that he provided Kops with items such as diapers when she asked for them. Rather, the record confirms respondent's alleged reason for refusing to give Kops money, which was that she had an ongoing history of drug and alcohol abuse. We acknowledge that, under the clear error standard, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C).[52] But under these circumstances, we are "left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich at 337 (quotation marks omitted). The court's finding that respondent continued to avoid contact with his child merely to avoid paying child support was based on respondent's admission that, at some time in the past, Kops had insisted that she control his visitation schedule with A. and that, if he did not comply, she would pursue support. Thus, there is some evidence in the record to support the court's finding. But this isolated statement is a thin reed on which to base the overarching conclusion that respondent chose not to visit A. while in foster care merely to avoid paying support. As noted, respondent

[51] As previously noted, neither the DHS nor the prosecutor fulfilled the state's duty to pursue respondent for support, either when Kops received public support for A. or when A. was placed in foster care and became eligible for Title IV-E funds. Thus the court may have overstated respondent's culpability in failing to pay support, given that he was never ordered to do so and otherwise testified that he had provided Kops with support and purchased items from time to time.

[52] MCR 3.902(A) specifically provides that MCR 2.613 applies in child protective proceedings.

could, and should, have been ordered to pay support at any time during A.'s stay in foster care; he could not have avoided support by choosing not to visit her. Moreover, his willingness to care for A. *if* Kops were out of the picture is evident from his requests of the DHS and the court to place A. with him.

Significantly, respondent's willful absence from A.'s life and failure to voluntarily offer monetary support—even while A. was in foster care and even if to avoid Kops—is not automatic grounds for termination. Rather, his lack of contact and support is evidence of neglect. As A.'s natural and legal parent, although this neglect suggests that respondent was not a "model parent[]," *Santosky*, 455 US at 753, he is still entitled to notice and meaningful participation in a process affecting his parental rights.

Accordingly, it is crucial that, although respondent had actual notice of A.'s removal after the fact and received notice of one dispositional proceeding, respondent received no notice of the ongoing proceedings, the services and evaluations available from the DHS, or the fact that his parental rights could be at stake in a neglect case *against Kops*. In other words, although he had actual notice of A.'s removal and the allegations against Kops, by no means did he receive actual notice of the full nature and import of the proceedings with regard to his own rights. Subsequent notice of the termination petition and the appointment of counsel are insufficient to afford due process when *respondent's rights were terminated in part because he had not participated in the earlier proceedings* and when the trial court refused to adjourn in order for respondent to meaningfully participate in services and be evaluated as an appropriate caregiver for A. The state cannot fail to

make reasonable attempts to provide adequate notice of earlier proceedings and their consequences and then terminate a parent's rights on the basis of circumstances that could have been significantly affected by those proceedings.

Further, it is for this reason that the trial court erred when it excused the court's failures of notice on the basis of respondent's lack of contact with the court and the DHS. Even if respondent willfully failed to follow up with the DHS or the court *in the neglect proceeding against Kops*, he did not effectively forfeit his constitutional parental rights at a later termination proceeding *against him* by doing so. As explained earlier, his failure to seek visits with A. or to voluntarily provide monetary support during the proceedings was certainly additional evidence of his own neglect of his daughter. But a showing of neglect, alone, merely triggers a parent's right to participate in services. It does not automatically justify termination. As expressed in MCL 712A.19b(3)(g), when a parent fails "to provide proper care or custody for the child," termination is not appropriate unless "there is [also] no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." Because respondent was neither informed about nor properly offered the evaluation and services available to aid the court in making the latter determination, his rights could not be terminated merely because of his failure to provide care and custody.

D. THE ERRORS AFFECTED RESPONDENT'S SUBSTANTIAL RIGHTS

Thus, the state's failures of notice directly affected respondent's substantial rights because his lack of participation in the earlier proceedings and service

plans prevented the court from meaningfully considering whether respondent could become capable of caring for his child within a reasonable time. Although he was certainly neglectful, in light of his lack of notice, his failure to participate did not constitute a waiver of his constitutional parental rights, as the trial court essentially concluded. Full notice not only would have created the opportunity for respondent to *meaningfully* participate or decline participation in services, but would have allowed the DHS and the court to gather other facts necessary to the court's termination decision. For instance, with regard to support, not only was respondent never pursued for a monetary contribution, but Patterson admitted that, because she had no contact with him, she had no opportunity to learn or verify that he provided A. with items such as diapers. Perhaps most significantly, the court found termination appropriate under MCL 712A.19b(3)(g) in part because it concluded that, in light of respondent's prior absence in A.'s life, A. "would suffer emotionally if returned to the respondent's care." Yet respondent had not been entirely absent from A.'s life; in actuality, he lived with her after her birth and she had last seen him only three months before she was removed to foster care. Assessments of respondent and services aimed at reunifying him with his daughter would have provided direct information concerning their relationship and its potential emotional harm to A. But because respondent was not evaluated, the court was left to merely assume that a relationship with respondent would be emotionally harmful to A.[53] In doing so, the court effectively

[53] On this point we note that, in evaluating whether termination was contrary to A.'s best interests, the court contrasted her bond to respondent with her bond to her foster parents, opining that respondent was "virtually a stranger," whereas A. had developed an attachment to her surrogate parents and experienced stability and continuity in care. Yet on

punished respondent for his past neglect by presuming, in the state's favor, that respondent would neglect or harm his child in the future. Thus, the court essentially relieved the state of its burden to prove the grounds for termination by clear and convincing evidence and deprived the second clause of MCL 712A.19b(3)(g)—which requires the state to show that, despite past neglect, a parent could not appropriately care for his child in a reasonable amount of time—of any meaning.[54]

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June 7, 2007—less than three months before the termination hearing—A. had been transferred from her original foster family to a second foster family. The new family appears to be the same family with which Kops left A. in 2006, so A. was somewhat familiar with them. It is worth noting that the new foster family also wishes to adopt A. and her half-sister. But the court overstated the stability of A.'s relationships while in foster care. Moreover, the court could only have reached the question whether A.'s best interests were better served by her foster family *if* it had first properly found grounds to terminate respondent's rights. MCL 712A.19b(5). See also *Fritts v Krugh,* 354 Mich 97, 115; 92 NW2d 604 (1958):

> It is totally inappropriate to weigh the advantages of a foster home against the home of the natural and legal parents. Their fitness as parents and question of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered [to the child].

To whatever extent respondent should be considered a "stranger" to the child, his paramount rights as a natural and legal father require meaningful, independent findings concerning whether their prior lack of relationship would cause her harm, MCL 712A.19b(3)(j), or prevent him from providing "proper care and custody within a reasonable time considering the child's age," MCL 712A.19b(3)(g).

[54] We presume that a court could conceivably conclude that a parent's extended absence from his child's life would preclude reunification within a time frame appropriate to the child's age. But the court may not assume this fact under these circumstances, in which respondent's lack of prior participation was significantly attributable to the state and participation would have generated direct information on this point; the state would have conducted a professional evaluation of the child-parent relationship and its potential harm to A.

Employing such a presumption in the state's favor is inappropriate when respondent was not notified of his opportunity to be evaluated for placement and, therefore, he may not be faulted for his failure to participate or the resulting factual gaps in the record. Indeed, in part because respondent claimed to care for another child of similar age, assessments and services had some potential to reveal that respondent could provide a safe home for A. in a reasonable amount of time.

The court also found termination appropriate under both MCL 712A.19b(3)(g) and (j) (the latter subdivision requiring a finding of a "reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent") because respondent had been convicted of felonies, including domestic abuse against Kops. Significantly, the court opined that "*no one knows*" whether respondent no longer had a "propensity . . . to be involved in criminal behavior." (Emphasis added.) Yet the only direct evidence presented on this point weighed in respondent's favor. It was undisputed that respondent had never been accused of harming a child. Further, respondent and Marshall testified that he was staying out of trouble and had never abused Marshall. He and Marshall also both testified that he successfully cared for a young child, M., on a daily basis. In light of this evidence, Patterson's failure to assess respondent's needs and strengths, including the appropriateness and safety of his household, *as she did for Kops*, deprived the court of objective information on a disputed issue crucial to the outcome.[55] *No one knew* whether respon-

[55] As is helpfully stated by the current version of the CFF: "It is only when timely and intensive services are provided to families that agencies and courts can make informed decisions about parents' ability to protect and care for their children." CFF 722-6, p 11.

dent was likely to persist in criminal behavior because no one had evaluated him and his lifestyle. Moreover, it is significant that the statutory scheme does not relieve the state of its responsibility to make reasonable efforts toward reunification with a parent merely because, as here, that parent has a history of criminal activity or violence toward adults. Reasonable efforts are unnecessary as a result of the parent's past violence or criminal behavior only if the parent caused or created an unreasonable risk of serious physical abuse, sexual abuse, or death of a child, if the parent was convicted of felony assault resulting in the injury of one of his own children, or if the parent committed murder, attempted murder, or voluntary manslaughter of one of his own children. MCL 712A.19a(2); MCL 722.638(1) and (2). Thus, the trial court again thwarted the statutory scheme by presuming that respondent was a danger to A. on the basis of his criminal history when that history did not include any of the enumerated offenses.

E. DECISION

In sum, the state deprived respondent of even minimal procedural due process by failing to adequately notify him of proceedings affecting his parental rights and then terminating his rights on the basis of his lack of participation without attempting to remedy the failure of notice. The state was aware of respondent's status as A.'s father, his correct address, his release from jail, and his interest in obtaining custody of A. The state failed to make reasonable efforts to apprise him of the ongoing proceedings after becoming aware that most of its attempts at notice and contact had failed. Although respondent had bare notice of the proceedings involving A. and that the DHS was pursuing reunifica-

tion *with Kops*, he did not receive sufficient information to meaningfully participate—or to decline to participate—in the pretermination proceedings. The failures of notice deprived respondent of his right to procedural due process when the state then terminated his parental rights in part as a result of circumstances and missing information directly attributable to respondent's lack of meaningful prior participation. Under these circumstances, respondent's subsequent notice of the termination proceedings was not sufficient or "reasonably calculated, *under all the circumstances*, to . . . afford [him] an opportunity to present [his] objections," *Mullane*, 339 US at 314 (emphasis added), in any meaningful way, given that the court refused to delay termination in order to rectify the earlier deficiencies in notice. Respondent, therefore, was denied due process because the proceedings lacked "fundamental fairness," which is required before parental rights may be terminated. *In re Brock*, 442 Mich at 111. Accordingly, the Court of Appeals properly reversed and directed the trial court to afford respondent a fair opportunity to participate.

### F. ADDITIONAL CONCERNS

Finally, we note that we do not prohibit the courts or the DHS from *initially* focusing reunification efforts on the custodial parent, consistent with the statutory mandates that a child be placed "preferably in his or her *own* home . . . ."[56] But when unsuccessful efforts at reunification with the custodial parent cause the state to reconsider the permanency plan, there is no excuse for its failure to adequately notify the noncustodial parent of his right to involvement. Because failure to participate in the service plan is an explicit factor that

[56] MCL 712A.1(3) (emphasis added).

may justify termination,[57] a parent has a due process right to notice of his opportunity to be assessed as a potential placement for his child before the state pursues termination on grounds that might have been remedied through assessment. To this end, we note that the statutory preferences given to a child's placement in his "own home,"[58] or in "close proximity to the child's *parents' home*,"[59] may be difficult to apply in some cases because the text appears to presume that both parents reside in the same home.[60] A noncustodial parent's rights appear to be recognized by references to a "parent" or "parents" and by the requirements that a child be placed in "the most family-like setting available"[61] and permanently reunified with his "family" if pos-

[57] The court "shall view the failure of the parent to substantially comply with the terms and conditions of the case service plan . . . as evidence that return of the child to his or her parent would cause a substantial risk of harm . . . ." MCL 712A.19a(5). Further, consistently with 42 USC 675(5)(E)(iii), MCL 712A.19a(6)(c) now provides that even if the court determines at a permanency planning hearing that a child should not be returned to his parent and the child has been in foster care for 15 of the preceding 22 months, the court is not required to order the agency to initiate termination proceedings if the state "has not provided the child's family, consistent with the time period in the case service plan, with the services the state considers necessary for the child's safe return to his or her home . . . ."

[58] MCL 712A.1(3).

[59] MCL 712A.18f(3) (emphasis added); see also 42 USC 675(5)(A) ("close proximity to the *parents' home*") (emphasis added).

[60] Most notably, MCL 712A.1(3) states a preference that a child remain in his "own home" when possible, but then offers guidelines for placement when the child has been "removed from the control of his or her *parents* . . . ." (Emphasis added.) 42 USC 675(1)(B) similarly displays an assumption that parents share a home by requiring that the state offer services "in order to improve the conditions in the *parents' home* [and] facilitate return of the child to his own safe home . . . ." (Emphasis added.) 42 USC 675(5)(C)(ii) likewise refers to "removal of the child from the home *of his parents* . . . ." (Emphasis added.)

[61] MCL 712A.13a(10); MCL 712A.18f(3); 42 USC 675(5)(A).

sible.[62] Yet references to a child's "own home" appear to favor the custodial parent's home. There is no reason to conclude that a parent has a diminished constitutional right to his child merely because he does not have physical custody of that child. To the contrary, *Santosky*, 455 US at 753, specifies that "*natural parents,*" not just custodial parents, have a fundamental liberty interest "in the care, custody and management of their child" and that this interest persists although they are not "model parents" and even if they "have *lost temporary custody of their child* to the State." (Emphasis added.) Therefore, our reading of the statutes must account for a noncustodial parent's rights. "Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharmaceuticals*, 468 Mich 1, 6; 658 NW2d 127 (2003). Accordingly, the statutory references to placement or reunification with "a parent," "parents," or "family" must be read to include noncustodial parents when appropriate. Perhaps most significantly, the mandate that "[r]easonable efforts to reunify the child and family must be made in all cases," MCL 712A.19a(2), is not fulfilled merely through efforts to reunify the child and the custodial parent. Reunification efforts may be initially directed at a custodial parent when appropriate, consistent with the statutory preferences for a child's "own home." But if these efforts are unfruitful, the state must also make reasonable efforts to reunify the child with the noncustodial parent.[63] Accordingly,

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[62] MCL 712A.19a(2).

[63] We note that the current CFF facilitates precisely this approach. It requires efforts to locate an absent parent and "**requires** the engagement" of "all parents/guardians" in developing the service plan. CFF 722-6, pp 1-2 (emphasis in original). A caseworker must meet with "each parent" and must pursue parenting time "for every parent with

unless the noncustodial parent is statutorily disqualified from becoming his child's custodian, the state must notify the noncustodial parent of his right to be evaluated as a potential placement and of his statutory right to receive services if appropriate.

## CONCLUSION

In conclusion, a parent is entitled to procedural due process if the state seeks to terminate his parental rights. The state must make reasonable efforts to notify him of the proceedings and allow him a meaningful opportunity to participate. We evaluate whether a particular parent was afforded minimal due process on a case-by-case basis. Statutory requirements, court rules, and agency policies provide an important point of departure for this inquiry. Here, the state failed to fulfill statutory mandates, which facilitate a parent's fundamental right of access to his child, to place a child with his parent if possible. The state also failed to comply with statutory notice requirements, as well as requirements that the state attempt to locate, assess, and engage a nonparticipating parent. Because respondent's rights were then terminated directly and indirectly because of his uninformed lack of participation, he was deprived of minimal due process. Although the state may again seek to terminate his parental rights, it may not do so until he has been afforded a meaningful opportunity to participate.

Affirmed.

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a legal right to the child, regardless of prior custody." *Id*. at 5-7. A family assessment/reassessment of needs and strengths must be conducted for "each household with a legal right to the child(ren)," CFF 722-8a, p 1, and, "where indicated," reunification efforts "may shift to the non-custodial parent's home." CFF 722-7, p 2.

KELLY, C.J., and MARKMAN, J., concurred with CORRIGAN, J.

CAVANAGH, J. (*concurring in part*). I concur in the result reached by the lead opinion. The trial court's decision to terminate respondent's parental rights should be reversed because the Department of Human Services (DHS) and the trial court failed to make reasonable efforts to reunite respondent with his child and, in light of this failure, the trial court clearly erred by determining that the DHS had shown that the statutory grounds for termination were established. Contrary to the lead opinion, however, I do not think that it is necessary for this Court to determine whether the state's actions in this case also violated respondent's due process rights.

I concur with the lead opinion's holding that the DHS failed to comply with its statutory duties. The state has a duty, under MCL 712A.19a(2), to make reasonable efforts to reunite a child and family.[1] Reasonable efforts require that the DHS and the trial court, at a minimum, make the active efforts towards reunification provided for in statutes and court rules, such as those outlined in parts III(A)(1) and (B)(1) of the lead opinion.[2] I agree

[1] The statute provides some exceptions, but none applies here.

[2] I agree with the lead opinion's summary of the applicable state law requirements, including the requirement that the court must "advise a respondent parent at the respondent's first court appearance that he has a right to an attorney at each stage of the proceedings and a right to a court-appointed attorney if he is financially unable to employ an attorney on his own behalf." *Ante* at 94.

In addition, as observed by the lead opinion, Michigan must comply with Title IV-E of the Social Security Act, 42 USC 670 *et seq*., because it receives federal funding through Title IV-E. I agree with the lead opinion's statement that the procedure for termination cases is mandated by both federal and state law, including the "reasonable efforts" requirement. See 45 CFR 1356.21(a) and (b). As a result, courts should

with the lead opinion's conclusion that "compliance with the relevant laws and regulations was sorely lacking with regard to respondent" for the reasons explained in part V(A).[3] *Ante* at 107. Further, I agree that respondent's culpability did not excuse or mitigate the state's failure to comply with its statutory duties, as discussed in part V(C). I would also hold that, when the state is required to provide notice of proceedings to parents, a reasonable effort to do so should comply with due process requirements, such as those set out in *Sidun v Wayne Co Treasurer*, 481 Mich 503; 751 NW2d 453 (2008). In this case, the failure of the trial court and the DHS to fulfill their statutory duties and make reasonable efforts to reunite respondent and his child warrants reversal of the trial court's termination of respondent's parental rights.

I also concur that the trial court clearly erred by terminating respondent's parental rights under MCL 712A.19b(3)(g) and (j), in part for the reasons explained in part V(D) of the lead opinion. The state failed to meet its burden to show that either basis for termination was present, especially taking into consideration the earlier failures of the DHS and the trial court to comply with their statutory duties.

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generally read the state and federal requirements in conjunction, and a parent may "claim procedural error in an action brought by the state to terminate [his parental rights] if the state fails to comply with the required procedures" in federal law. *Ante* at 107. It is not necessary, however, to determine whether the federal requirements were met in this case because the state's actions so clearly failed to meet the state requirements and "we have not discovered any conflicts between the state and federal requirements applicable to this case." *Ante* at 104 n 47.

[3] For the reasons stated in the lead opinion, I concur with its conclusion that "statutory references to placement or reunification with 'a parent,' 'parents,' or 'family' must be read to include noncustodial parents when appropriate." *Ante* at 121.

In light of the two clear statutory bases for reversing the trial court's termination of respondent's parental rights, I do not think that it is necessary for this Court to address whether respondent's due process rights were violated. I agree that due process issues could be implicated because of the uncontested fundamental liberty interest of any parent " 'in the care, custody, and management' " of his child. *Ante* at 91, quoting *Santosky v Kramer*, 455 US 745, 753; 102 S Ct 1388; 71 L Ed 2d 599 (1982). I also agree that, in Michigan, the statutes, the court rules, DHS policy, and federal laws all set forth procedures that help ensure adequate due process protection for parents. *Ante* at 93. Nonetheless, I disagree that "the primary question presented [in this case] is whether the state's actions satisfied respondent's right to procedural due process." *Ante* at 92. This case may be fully resolved on statutory grounds, and the alleged due process violations arise out of the same state actions that resulted in statutory violations. Because this Court's holding is so clearly compelled by the statutes and court rules and is, at a minimum, consistent with due process principles, I do not find it necessary to address the extent to which it is required by due process principles.

WEAVER, J. (*concurring in part*). I agree only with the result of the lead opinion, specifically, that the Court of Appeals correctly remanded the case to give the respondent "a fair opportunity to participate." *In re Rood*, unpublished opinion per curiam of the Court of Appeals, issued June 12, 2008 (Docket No. 280597), at 5.

Further, I agree with Justice YOUNG, *post* at 130 n 13, that because this case is resolved both substantively and procedurally on the basis of Michigan law, the lead opinion, expressing no restraint, unnecessarily attempts to resolve federal questions concerning Title IV-E of the Social Security Act, 42 USC 670 *et seq*.

YOUNG, J. (*concurring in part*). I concur in the result reached by the lead opinion, but do so on a narrow ground: given the failed and inadequate attempts at providing respondent notice in this case, the trial court clearly erred[1] by using respondent's failure to participate in the child protective proceedings against Laurie Kops as grounds for terminating his parental rights. I concur with the following rationale from the lead opinion that supports my conclusion:

> [A]lthough respondent had actual notice of A.'s removal after the fact and received notice of one dispositional proceeding, respondent received no notice of the ongoing proceedings, the services and evaluations available from [the Department of Human Services (DHS)], or the fact that his parental rights could be at stake in a neglect case *against Kops*. In other words, although he had actual notice of A.'s removal and the allegations against Kops, by no means did he receive actual notice of the full nature and import of the proceedings with regard to his own rights.[2]

As a result of the lack of adequate notice, respondent was clearly deprived of numerous statutorily required services to ensure that he could properly parent his child. Yet in terminating his parental rights, the trial court held respondent to the standard that would have applied had he actually received such services. Accordingly, I concur in the result reached in the lead opinion.

## I. CLEAR ERROR

The failure of the trial court and the DHS to provide adequate notice to respondent was the root of the trial court's erroneous ruling that petitioner had presented

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[1] I also concur with the lead opinion's reliance on *In re Trejo*, 462 Mich 341; 612 NW2d 407 (2000), for the proper standards of review employed in termination cases.

[2] *Ante* at 113.

clear and convincing evidence in support of the grounds cited in the termination petition—respondent's criminal history and inability to provide proper care and custody within a reasonable time. Respondent was not on notice that he was statutorily entitled to services and evaluation by the DHS and, therefore, was never the subject of a DHS investigation regarding his suitability to parent A.[3] As a result, there is a "hole" in the evidence on which the trial court based its termination decision. Although there is record evidence that respondent has been convicted of various criminal offenses, the DHS was statutorily obligated to investigate further to determine whether respondent could provide a safe custodial environment for A.[4] Moreover, if the trial court and the DHS had provided timely notice, there is a possibility that respondent's inability to provide proper care and custody within a reasonable time could have been rectified through services.[5]

It is equally true that the trial court clearly erred by basing the termination on respondent's failure to provide child support. Although the DHS was empowered under the statute to seek child support from respondent while A. was in foster care,[6] it failed to do so. Respondent was never asked, let alone ordered, to pay child support for A. and, therefore, was not on notice that his failure to do so could result in the termination of his parental rights.

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[3] See MCL 712A.18f(1), (3), and (4); MCR 3.965(D)(1).

[4] See MCL 712A.18f.

[5] There are situations in which the DHS is not required to provide services to the parent and may seek termination at the initial dispositional hearing, including "[a]bandonment of a young child." MCL 722.638(1)(a)(*i*) and (2). A parent abandons, or "deserts," his child if he is absent for more than 91 days and has not sought custody of his child. MCL 712A.19b(3)(a)(*ii*). The petition in this case did not allege abandonment.

[6] MCL 552.451b; MCL 722.3(2).

Although I agree with the result reached by my colleagues, I must disassociate myself from the alternative rationales employed in the lead opinion that sweep well beyond the limited legal issue presented in this case. To resolve this matter, this Court need only consider whether the trial court committed clear error by terminating respondent's parental rights on the basis of his nonparticipation, prior criminal record, and failure to pay child support.

## II. POINTS OF DEPARTURE FROM THE LEAD OPINION

One alternative rationale that I find insupportable is the lead opinion's attempt to create substantive rights in a parent from federal statutes that do nothing more than impose a duty on the state. Title IV-E of the Social Security Act, 42 USC 670 *et seq*., was enacted under Congress's spending power[7] and provides federal funding for states that adopt a foster care plan that complies with various requirements.[8] If a state violates those requirements, it will be required to return a portion of its federal funding.[9] As noted in the lead opinion, our Legislature has enacted several statutes mirroring the federal act.[10]

The lengthy analysis of the Title IV-E requirements provided in the lead opinion would be useful background information for intracourt training purposes in an effort to bring our system into conformance with the federal law to avoid having to return federal dollars. However, the United States Supreme Court has not addressed the question of which provisions of Title IV-E

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[7] US Const, art I, § 8, cl 1.

[8] 42 USC 670; 42 USC 671; 45 CFR 1356.21; 45 CFR 1356.50.

[9] 45 CFR 1356.71(h) and (j).

[10] *Ante* at 103-104.

might create substantive rights that might be enforced by a parent,[11] and that question has been the topic of much debate among lower federal courts.[12] Given that the provenance for using Title IV-E to convey substantive rights is uncertain, *this* Court should not advance a

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[11] In *Suter v Artist M*, 503 US 347, 350; 112 S Ct 1360; 118 L Ed 2d 1 (1992), the United States Supreme Court determined that 42 USC 671(a)(15) did not create a private cause of action for children affected by the state's actions. Congress reacted by enacting 42 USC 1320a-2, which provides:

> In an action brought to enforce a provision of the Social Security Act [42 USC 301 *et seq*.], such provision is not to be deemed unenforceable because of its inclusion in a section of the Act requiring a State plan or specifying the required contents of a State plan. This section is not intended to limit or expand the grounds for determining the availability of private actions to enforce State plan requirements other than by overturning any such grounds applied in Suter v. Artist M . . . but not applied in prior Supreme Court decisions respecting such enforceability; provided, however, that *this section is not intended to alter the holding in Suter v. Artist M that* [*42 USC 671(a)(15)*] *is not enforceable in a private right of action*. [Emphasis added.]

In the wake of Congress's enactment of § 1320a-2, the United States Supreme Court has not considered whether any provision of Title IV-E creates a private cause of action. The Court has only held that courts must examine Title IV-*D* of the Social Security Act provision by provision to determine whether the challenged provision gives rise to an enforceable, individual right. *Blessing v Freestone*, 520 US 329, 342; 117 S Ct 1353; 137 L Ed 2d 569 (1997).

[12] See *Arrington v Helms*, 438 F3d 1336, 1342-1347 (CA 11, 2006) (42 USC 675 does not create a private cause of action); *31 Foster Children v Bush*, 329 F3d 1255, 1268-1274 (CA 11, 2003) (42 USC 675[5][D] and [E] do not create private cause of action); *Johnson v Holmes*, 377 F Supp 2d 1084, 1092-1101 (D NM, 2004) (42 USC 671[a][9] does not create a private cause of action), rev'd in part on other grounds 455 F3d 1133 (CA 10, 2006); *Carson v Heineman*, 240 FRD 456, 532-544 (D Neb, 2007) (42 USC 671[a][1], [10], [11], [15], [16], and [22], 42 USC 672, and 42 USC 675[1], [4], and [5][B], [D], and [E] do not create private causes of action); *ASW v Oregon*, 424 F3d 970, 975-979 (CA 9, 2005) (42 USC 671[a][12] and 42 USC 673[a][3] create private causes of action); *California Alliance of Child & Family Services v Allenby*, 459 F Supp 2d 919, 922-925 (ND Cal, 2006) (42 USC 675[4][A] creates a private cause of action); *Kenny A v Perdue*, 218

novel interpretation of federal law, especially when this case can easily and entirely be resolved on narrow state law grounds.[13] Accordingly, I disagree with part IV of the lead opinion.

I also disagree with the lead opinion's extensive reliance on the *current* version of the DHS Childrens Foster Care Manual. This internal operating manual does not have the force of law, or even of an administrative rule. Moreover, this Court should not judge the conduct of the trial court and DHS workers on the basis of standards that were not imposed until after the events relevant to this case.

Finally, I disagree with the lead opinion's consideration of the potential constitutional implications of the trial court's and the DHS's statutory and court rule violations. This Court has repeatedly held that it should not decide a case on constitutional grounds if the issues can be fully and adequately resolved on statutory grounds.[14] The numerous statutory and court rule vio-

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FRD 277, 290-294 (ND Ga, 2003) (42 USC 622[b][10], 42 USC 671[a][10], [16], and [22], and 42 USC 675[1] and [5][D]and [E] create private causes of action).

[13] It is the duty of the Legislature to enact statutes providing *procedural* rights consistent with Title IV-E. A parent may challenge the trial court's failure to comply with state statutes that have been enacted as part of a Title IV-E compliance plan. However, the "remedy" for the state's failure to enact statutes consistent with Title IV-E is given to the federal government in the form of "disallowing funding," not to the parent.

Contrary to the statement in the lead opinion, *ante* at 106-107, I do not imply that this Court lacks authority to consider questions of federal law that have yet to be decisively resolved by the federal courts when this is necessary for the resolution of a case properly before this Court. However, I do challenge the lead opinion's unnecessary and lengthy analysis of Title IV-E when this case can be entirely resolved—both substantively and procedurally—on state law grounds.

[14] See *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1,* 468 Mich 722, 734; 664 NW2d 728 (2003), citing *People v Riley*, 465 Mich 442,

lations, and the trial court's subsequent use of its own violations as grounds for terminating respondent's parental rights, are sufficiently egregious to require appellate relief. We should delve no further than the clear error analysis, which completely resolves this matter.

HATHAWAY, J., did not participate in the decision of this case in order to avoid unnecessary delay to the parties in a case considered by the Court before she assumed office by following the practice of previous justices in transition and participating only in those cases for which her vote would be result-determinative.

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447; 636 NW2d 514 (2001), and *MacLean v Michigan State Bd of Control for Vocational Ed*, 294 Mich 45, 50; 292 NW 662 (1940); *Delta Charter Twp v Dinolfo*, 419 Mich 253, 264 n 4; 351 NW2d 831 (1984).

PEOPLE v BRYANT

Docket No. 133725. Argued March 3, 2009 (Calendar No. 1). Decided June 10, 2009.

A Wayne Circuit Court jury convicted Richard P. Bryant of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony for the death of Anthony Covington. When police officers found Covington a half-hour after he had been shot and asked him what had happened, he responded that he had been shot by "Rick," then described "Rick" and the location about six blocks away where the shooting had occurred. Covington died a few hours later from his injuries. At trial, Thomas W. Brookover, J., allowed Covington's statements to the police regarding the shooting to be admitted under the excited utterance exception to the rule against hearsay. The defendant appealed. The Court of Appeals, CAVANAGH, P.J., and JANSEN and SAAD, JJ., in an unpublished opinion per curiam, issued August 24, 2004 (Docket No. 247039), affirmed, holding that the statements were properly admitted because they were not the product of a police interrogation and, therefore, not testimonial. The Supreme Court initially held the defendant's application for leave to appeal in abeyance pending the decisions in two related cases, but, after the United States Supreme Court decided *Davis v Washington*, 547 US 813 (2006), it remanded this case to the Court of Appeals for reconsideration in light of *Davis* in lieu of granting leave to appeal. 477 Mich 902 (2006). On remand, the same Court of Appeals panel again affirmed, concluding that the victim's statements constituted admissible non-testimonial hearsay because the police were responding to an ongoing emergency. Unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 247039). The Supreme Court granted the defendant's application for leave to appeal. 482 Mich 981 (2008).

In an opinion by Justice MARKMAN, joined by Chief Justice KELLY and Justices CAVANAGH and HATHAWAY, the Supreme Court *held*:

The statements at issue constituted inadmissible testimonial hearsay under the United States Supreme Court's decisions in *Crawford v Washington*, 541 US 36 (2004), and *Davis v Washing-*

*ton*, 547 US 813 (2006), because their primary purpose was to establish or prove past events potentially relevant to later criminal prosecution, not to enable the police to meet an "ongoing emergency" as that term is defined by the United States Supreme Court, i.e., the emergency presented by the pendency of the criminal event itself. Admission of the statements constituted plain error requiring reversal.

1. In *Crawford*, the United States Supreme Court held that, under the Sixth Amendment of the United States Constitution, testimonial statements of witnesses who are absent from trial are admissible only when the declarant is unavailable and the defendant had a prior opportunity to cross-examine. *Davis* clarified that statements are "testimonial" when the circumstances objectively indicate that there is no ongoing emergency, i.e., the emergency presented by the pendency of the criminal event itself, and the primary purpose of the interrogation is to establish or prove past events that may be relevant to later criminal prosecution. Under the Court of Appeals' analysis, all statements made while the police are questioning a seriously injured complainant would be rendered non-testimonial, and this is clearly inconsistent with the commands of the United States Supreme Court because it confuses a medical emergency with the emergency circumstances of an ongoing criminal event. *Davis* further held that statements are non-testimonial if they describe an event as it is actually happening and testimonial if they describe an event that has already happened. The declarant's statements in this case related solely to events that had occurred in the past and at a different location, and none of them referred to events occurring at the time the statements were made, none alleged any ongoing threat, and none asserted the possible presence of the alleged perpetrator. Further, none of the officers testified to having secured the area, searched the area for the perpetrator, provided cover for the other officers, taken up defensive positions, or called for backup assistance. These circumstances clearly indicate that the primary purpose of the victim's statements was to establish the facts of an event that had already occurred rather than to enable police assistance in an ongoing emergency, as defined by the United States Supreme Court.

2. The admission of the victim's statements constituted plain error requiring reversal. Defendant was clearly prejudiced by the error because the evidence against him was not overwhelming and the statements were highly damaging, as the prosecutor himself conceded. Whether the statements could have been admitted under the hearsay exception for dying declarations is not properly

before this Court because the prosecutor did not appeal the district court's ruling that there was not a sufficient foundational basis for concluding that the statements were dying declarations, and, in fact, conceded that there was not such a sufficient foundational basis.

Reversed and remanded for a new trial.

Justice WEAVER, dissenting, would affirm the judgment of the Court of Appeals for the reasons stated in its unpublished opinion on remand, specifically, that the declarant's statements were made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency.

Justice CORRIGAN, joined by Justice YOUNG, dissenting, stated that, because the circumstances in this case were midway on the spectrum between the ongoing emergency in *Davis* and the police-station interrogation in *Crawford*, the Court of Appeals did not clearly err by concluding that the victim's statements were non-testimonial. The statements in question were also probably dying declarations, which likely would be excepted from the rule in *Crawford*.

CONSTITUTIONAL LAW — EVIDENCE — RIGHT OF CONFRONTATION — HEARSAY — TESTIMONIAL STATEMENTS.

An unavailable declarant's statement to the police is inadmissible testimonial hearsay if circumstances objectively indicate that the primary purpose of the questioning that elicited the statement was to establish the facts of a past event that may be relevant to later criminal prosecution rather than to enable police assistance in an ongoing emergency (US Const, Am VI).

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training and Appeals, and *Jeffrey Caminsky*, Principal Appeals Attorney, for the people.

State Appellate Defender (by *Peter Jon Van Hoek*) for the defendant.

MARKMAN, J. We granted leave to appeal to consider whether the victim's statements to the police in this case constituted inadmissible testimonial hearsay

within the meaning of the United States Supreme Court's decisions in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006). The Court of Appeals held that the statements were non-testimonial under the test set forth in *Davis*, 547 US at 822, because they were made "in the course of a police interrogation under circumstances objectively indicating that its primary purpose was to enable police assistance to meet an ongoing emergency." *People v Bryant (On Remand)*, unpublished opinion per curiam of the Court of Appeals, issued March 6, 2007 (Docket No. 247039), at 3. Because we conclude on the basis of *Crawford* and *Davis* that the "primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution," *Davis*, 547 US at 822, we respectfully disagree and hold that the statements constituted inadmissible testimonial hearsay. Moreover, we conclude that the admission of these statements constituted plain error requiring reversal. Therefore, we reverse the Court of Appeals and remand for a new trial.

## I. FACTS AND HISTORY

The victim lived with his brother within a few houses of defendant, from whom he had been purchasing cocaine for three years. The victim's brother testified that defendant sold drugs to the victim at defendant's back door. On April 28, 2001, the victim told his brother that he planned to redeem an expensive coat that he had pawned with defendant in exchange for some cocaine. On April 29, 2001, between 3:00 and 3:30 a.m., the brother heard gunfire, and at about 3:25 a.m., five police officers responded to a radio dispatch indicating that a man had been shot. They found the victim lying on the ground next

to his car at a gas station about six blocks from defendant's house. The victim had a gunshot wound in his abdomen and appeared to be in considerable pain. In response to the officers' questioning, the victim indicated that he had been shot at approximately 3:00 a.m. while standing outside defendant's back door. The victim stated that before being shot he had a short conversation through a closed door with defendant. He identified defendant as the shooter because, although he did not see defendant shoot him, he knew that it was defendant who had shot him because he recognized defendant's voice. While the victim described defendant as being 40 years old, 5' 7" tall, and about 140 pounds, according to defendant's driver's license, defendant was actually 30 years old, 5' 10" tall, and 180 pounds. Although the brother testified that the victim knew defendant's last name, the victim himself told the police that he did not know defendant's last name.[1] The victim told the police that, after he was shot, he drove himself to the gas station. The victim died within a few hours after he was transported to the hospital. When the police left the gas station, they immediately proceeded to defendant's house. The police found what appeared to be blood and a bullet on defendant's back porch and what the police believed to be a bullet hole in the back door. The victim's wallet and identification were also discovered outside defendant's house. However, the police did not discover any drugs, guns, bullets, or the victim's coat when they searched defendant's house at approximately 5:30 a.m. on the morning of the shooting. Defendant's girlfriend testified that defendant was not home at the time of the shooting and that she had not heard any gunfire that morning. The medical examiner

[1] Defendant, whose name is Richard, goes by the name "Rick," and the victim told the police that "Rick" shot him.

testified that the bullet that killed the victim had passed through an intermediary target, such as a door. Toxicology tests showed that the victim had consumed cocaine within four hours of his death. Defendant was arrested one year later in California and was extradited to Michigan.

Defendant's first trial resulted in a hung jury. Following a second jury trial, and after two days of deliberations, defendant was convicted of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony.[2] The Court of Appeals affirmed. *People v Bryant*, unpublished opinion per curiam of the Court of Appeals, issued August 24, 2004 (Docket No. 247039).

Defendant appealed, arguing that the trial court erred by admitting the victim's statements to the police identifying him as the shooter.[3] This Court held defendant's application for leave to appeal in abeyance pending our consideration of *People v Mileski*, 472 Mich 927 (2005), and *People v Walker*, 472 Mich 928 (2005). After we subsequently vacated our orders granting leave to appeal in *Mileski* and *Walker* and remanded those cases to the Court of Appeals for reconsideration in light of the United States Supreme Court's decision in *Davis*, we similarly remanded this case. On remand, the Court of Appeals again affirmed, concluding that the victim's statements constituted admissible non-testimonial hearsay. *Bryant (On Remand)*, *supra* at 3. When defendant again appealed, we granted leave. *People v Bryant*, 482 Mich 981 (2008).

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[2] The jury acquitted defendant of first-degree murder.

[3] The trial court's decision predated the United States Supreme Court's decisions in *Crawford* and *Davis*. The trial court denied defendant's motion to suppress the victim's statements to the police, holding that these statements were admissible under the excited utterance exception to the hearsay rule, MRE 803(2).

II. STANDARD OF REVIEW

Whether the admission of the victim's statements to the police violated defendant's Sixth Amendment right of confrontation is a question of constitutional law that this Court reviews de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

III. ANALYSIS

Defendant argues that the admission of the victim's statements to the police identifying defendant as the shooter violated his Sixth Amendment right of confrontation. The Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him . . . ." US Const, Am VI.[4] In *Crawford*, 541 US at 59, the United States Supreme Court held that "[t]estimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." Although the Court left "for another day any effort to spell out a comprehensive definition of 'testimonial,' " it did say that "[w]hatever else the term covers, it applies at a minimum to prior testimony . . . and to police interrogations." *Id.* at 68. The Court defined "[t]estimony" as " '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.* at 51, quoting *American Dictionary of the English Language* (1828). The Court explained that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person

[4] The Michigan Constitution also guarantees criminal defendants the right "to be confronted with the witnesses against him or her . . . ." Const 1963, art 1, § 20.

who makes a casual remark to an acquaintance does not." *Id.* The Court recognized that "[v]arious formulations of this core class of 'testimonial' statements exist," such as " 'pretrial statements that declarants would reasonably expect to be used prosecutorially' " and " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " *Id.* at 51-52 (citations omitted). However, the Court indicated that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." *Id.* at 52. The Court stated that "even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class." *Id.* at 53. The Court further stated that it was "us[ing] the term 'interrogation' in its colloquial, rather than any technical legal, sense." *Id.* at 53 n 4. Finally, *Crawford* concluded that the statement that the defendant's wife had given in that case in response to police questioning at the police station constituted an inadmissible testimonial hearsay statement. *Id.* at 53 n 4, 68.

In *Davis*, the Supreme Court further expounded on the meaning of the term "testimonial hearsay statements." The Court held that "[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 US at 822. On the other hand, "[t]hey are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Id. Davis* further explained that "in the final

analysis [it is] the declarant's statements, not the interrogation's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n 1.[5]

The statements in dispute in *Davis* were made to a 911 emergency operator. The victim told the operator, "[The defendant's] here jumpin' on me again"; "He's usin' his fists." *Id.* at 817. The Court held that these statements were non-testimonial. *Id.* at 829. The Court asserted that *Davis* was distinguishable from *Crawford* because in *Davis*: (1) the victim was "speaking about events *as they were actually happening*, rather than [as in *Crawford*] 'describ[ing] past events . . . hours after the events . . . had occurred"; (2) thus, in contrast to the victim in *Crawford*, the victim "was facing an ongoing emergency"; (3) "the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past"; and (4) the victim's "frantic answers were provided over the phone, in an environment that was not tranquil, or even . . . safe," while, in *Crawford*, the victim was "responding calmly, at the station house, to a series of questions . . . ." *Id.* at 827 (emphasis in the original; citation omitted). The Court held that the "primary purpose" of the interrogation in *Davis* "was to enable police assistance to meet an ongoing emergency," and, thus, the elicited statements were non-testimonial. *Id.* at 828-829.

In *Hammon*, a companion case decided with *Davis*, the police responded to a reported domestic disturbance. When the police arrived, the victim was sitting

[5] Although the focus here is on the statements made by the declarant to the interrogators, the interrogators' questions would nevertheless seem to provide necessary context in understanding the "primary purpose" of these statements.

alone on the porch and the defendant was inside. The victim told the police that the defendant had hit her and thrown her. The Court held that because "the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime," the victim's statements to the police were testimonial. *Id.* at 830. The Court explained that *Hammon* was distinguishable from *Davis* because in *Hammon*: (1) "the interrogation was part of an investigation into possibly criminal past conduct"; (2) "[t]here was no emergency in progress"; and (3) "[w]hen the officer questioned [the victim], . . . he was not seeking to determine (as in *Davis*) 'what is happening,' but rather 'what happened.' " *Id.* at 829-830. As the Court further explained:

> The statements in *Davis* were taken when [the victim] was alone, not only unprotected by police (as [the victim in *Hammon*] was protected), but apparently in immediate danger from [the defendant]. [The victim in *Davis*] was seeking aid, not telling a story about the past. [The *Davis* victim's] present-tense statements showed immediacy; [the *Hammon* victim's] narrative of past events was delivered at some remove in time from the danger she described. [*Id.* at 831-832.]

By contrast, the Court reasoned that *Hammon* was similar to *Crawford* because: (1) "[b]oth declarants were actively separated from the defendant"; "[b]oth statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (3) "both took place some time after the events described were over." *Id.* at 830. Accordingly, the statements in *Hammon*, like those in *Crawford*, were testimonial. *Id.*

In the instant case, there is no question that the victim is unavailable, and defendant did not have a prior opportunity to cross-examine the victim. Therefore, if the victim's statements to the police were

testimonial in nature, they are inadmissible. *Crawford*, 541 US at 68.[6] Accordingly, the only issue here is whether the victim's statements were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an "ongoing emergency," as defined by the United States Supreme Court, or whether the primary purpose of this interrogation was to establish or prove past events potentially relevant to a later criminal prosecution. *Davis*, 547 US at 822.

On remand, the Court of Appeals held that the statements in this case were non-testimonial, and thus affirmed defendant's convictions.[7] We, however, agree

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[6] The prosecutor argues that the victim's statements to the police are admissible because they fall within the excited utterance exception of MRE 803(2). However, this argument is clearly incompatible with the United States Supreme Court's decision in *Crawford.* As that Court indicated, "Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence . . . ." *Crawford*, 541 US at 61. Instead, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Id.* at 68-69. See, also, McCormick, Evidence (6th ed), § 252, p 163, citing *Crawford*, 541 US at 59 n 8 ("While . . . [the *Crawford* Court] suggested that dying declarations might be excepted for historical reasons, the Court took a different view of excited utterances (also known as spontaneous declarations).").

[7] In its first opinion, the Court of Appeals stated, "The one question asked by the police—'what happened?'—does not constitute an interrogation and there is no evidence of interrogation." *Bryant*, *supra* at 2. In its second opinion, however, the Court of Appeals recognized that the police had, in fact, asked the victim multiple questions and that the victim's statements were "made in the course of a police interrogation." *Bryant (On Remand)*, *supra* at 3. Indeed, the police admittedly asked defendant a "series of questions." In its second opinion, the Court of Appeals stated, "The questioning was used to establish . . . whether the shooter . . . followed [the victim] to the gas station . . . ." *Id*. However, none of the officers testified that they ever asked the victim whether the shooter followed the victim to the gas station or any similar questions.

with defendant that the statements were testimonial pursuant to *Crawford* and *Davis*. The police found the victim lying on the ground outside a gas station. The police asked him what had happened, who had shot him, and where the shooting had occurred. The victim told the police that defendant shot him about 30 minutes earlier at defendant's house, which was about six blocks away, and that he drove himself to the gas station. These statements related solely to events that had occurred in the past and at a different location. None of these statements referred to events occurring at the time the statements were made, none alleged any ongoing threat, and none asserted the possible presence of the alleged perpetrator. The circumstances, in our judgment, clearly indicate that the "primary purpose" of the questioning was to establish the facts of an event that had *already* occurred; the "primary purpose" was not to enable police assistance to meet an ongoing emergency.[8] The crime had been completed about 30 minutes earlier and six blocks from where the police questioned the victim. The police asked the victim what had happened in the past, not what was currently happening. That is, the "primary purpose" of the questions asked, and the answers given, was to enable the police to identify, locate, and apprehend the perpetrator.

*Davis* stated that "in the final analysis [it is] the declarant's statements, not the interrogation's ques-

[8] The dissent contends that the "time lapse" between the shooting and the questioning does not necessarily mean that the emergency was not ongoing when the questioning occurred. *Post* at 160. However, the dissent overlooks that part of *Davis*, 547 US at 828-829, in which the Supreme Court concluded that once the defendant had stopped assaulting the victim and left the scene of the crime, the "ongoing emergency" was over. Applying that same reasoning to the instant case, the "ongoing emergency," at least in the *Davis* sense, was over once the victim was able to escape from defendant and drive six blocks to the gas station.

tions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n 1. The declarant here (i.e., the victim) made these statements while he was surrounded by five police officers and knowing that emergency medical service (EMS) was on the way. Obviously, his primary purpose in making these statements to the police was not to enable the police to meet an ongoing emergency of the type identified by the United States Supreme Court, but was instead to tell the police who had committed the crime against him, where the crime had been committed, and where the police could find the criminal. That is, the primary purpose of the victim's statements to the police was to "establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 US at 822.[9]

Further, the officers' actions do not suggest that the officers themselves considered the circumstances at the gas station to constitute an "ongoing emergency,"[10] at least not as the Supreme Court defines that term. None of the officers testified to taking any actions to secure the area, to search the station for the possible presence of any armed individuals, or to provide cover for other officers. None of the officers indicated that he drew his weapon at the gas station, took up a defensive position

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[9] The fact that *Davis* held that the pertinent question is the statement's "primary purpose," rather than its "sole purpose," suggests that statements may be considered testimonial even though the statements may to some extent "enable police assistance to meet an ongoing emergency." However, this matter need not be amplified upon in the present case.

[10] *Davis* explained that "police conduct [cannot] govern the Confrontation Clause; testimonial statements are what they are." *Davis*, 547 US at 832 n 6. "Their saying that an emergency exists cannot make it be so." *Id.* In the instant case, the police conduct (although not dispositive) does not even remotely suggest that the police believed that an ongoing emergency existed while they were interrogating the victim at the gas station.

out of concern that the shooter might be nearby, or called for any backup assistance to ensure the safety of the officer himself or others in the area. And none of the police officers questioned people who were in or around the gas station (other than the victim and the gas station attendant) or searched in any way at the station for the shooter.[11] Rather, they acted in a manner entirely consonant with officers who knew that the crime had already been committed, that it had been commit-

[11] Contrary to the dissent's contention, *post* at 160 n 1, the police were specifically asked these types of questions. For example, one officer was asked, "When your partner parked the car, what did you do?" to which he responded, "I got out of the vehicle and I went towards [the victim]." This officer was then asked if he went "immediately" to the victim and the officer responded, "Yes, I did." This officer was then asked, "You didn't go into the [gas] station and ask what had happened or anything like that," to which he responded, "Negative, no." Then, the officer was asked, "What did [your partner] do upon parking the car?" to which he said, "He got out of the vehicle too [and walked] towards [the victim]." The officer was then asked, "While you're talking to [the victim], where is [your partner]?" to which he responded, "He was right there with me." The officer was also asked whether he was standing or kneeling, and he indicated that he was standing. Another officer was asked, "Where did [the officers] go" when they got out of their vehicles, and he indicated that they "all went to [the victim]." Yet another officer was asked, "Where were [the other officers] when you arrived?" and he responded, "They were by [the victim]." This officer was then asked whether he "went straight to [the victim] or did . . . something else," to which he responded, "I went straight to [the victim]." Then, this officer was asked, "You mean the entire time you were there you spent that entire time talking with [the victim], is that what you're saying," and he said, "The majority of the time there I did, yes." Another officer was asked, "So you get there and there's already two [sic] officers over near [the victim] on the ground and so you go over there also, correct," to which he responded, "Correct." This officer was then asked, "You didn't look around and say, gee, there might be a shooter around here, I better keep an eye open," to which he said, "I did not, no." Finally, another officer was asked, "And when you got there at the gas station what did you, what's the first thing you did?" to which he responded, "I approached the subject, the victim . . . on the ground and asked him something like what happened." This officer was then asked, "Did your partner go with you?" and he responded, "Yes. Yes. He followed right behind me."

ted at a different location, and that there was no present or imminent criminal threat. Indeed, once the EMS unit arrived for the victim, the police left the gas station and immediately proceeded to defendant's house, where they *then* called for backup assistance because they feared that defendant might still be inside.[12]

The primary purpose of the police questioning of the victim at the gas station was to determine who shot the victim and where the shooter could be found so that they could arrest him. The police were at the gas station to investigate a past crime, not to prevent an ongoing one, and the victim was not "speaking about events *as they were actually happening*," as in *Davis*, but was " 'describ[ing] past events,' " as in *Crawford* and *Hammon*. *Davis*, 547 US at 827 (emphasis in the original; citation omitted).[13] The primary purpose of the victim's

[12] Some of the officers actually left the gas station to proceed to defendant's house even before EMS arrived. The dissent contends that the fact that the police called for backup assistance when they reached defendant's house indicates that there was an "ongoing emergency." *Post* at 160 n 1. Even if there was an "ongoing emergency" at defendant's house (which we do not concede since defendant was not even at his house when the police arrived), this "ongoing emergency" existed at defendant's *house*, not at the gas station at which the statements were made. Further, referring to the police investigation at defendant's house as an "ongoing emergency" for purposes of evaluating an alleged *Crawford* violation is inconsistent with *Davis*, 547 US at 828-829, as the Court concluded in that case that once the defendant had stopped beating the victim and left the premises, the "ongoing emergency" had ended, *despite the fact that a dangerous criminal remained on the run*. Under the dissent's approach, if there is an "ongoing emergency" *anywhere* (or even what the police *perceive* to be such an "ongoing emergency"), a victim's statements to the police are to be considered non-testimonial even if those statements are made away from the actual venue of this "ongoing emergency."

[13] In *Davis*, 547 US at 828, the Court discussed *King v Brasier*, 1 Leach 199, 168 Eng Rep 202 (1779), in which "a young rape victim, 'immediately on her coming home, told all the circumstances of the injury' to her

statements was not "to describe *current* circumstances requiring police assistance," as in *Davis*, but to "establish[] the facts of a *past* crime, in order to identify (or provide evidence to convict) the perpetrator," as in *Crawford* and *Hammon*. *Davis*, 547 US at 826-827 (emphasis added).

When the police questioned the victim at the gas station, there simply was no "ongoing emergency," as that term is defined by the United States Supreme Court. The prosecutor argues that the primary purpose of the interrogation was to enable police assistance to meet an "ongoing emergency"—to find and apprehend a criminal before he injured somebody else. This argument is unpersuasive because an "ongoing emergency" in this sense would almost *always* exist while the police are investigating alleged crimes. That is, to adopt the prosecutor's argument would effectively render nontestimonial *all* statements made before the offender was placed behind bars.[14] This is clearly inconsistent

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mother." *Davis* stated that "if the relevant statement had been the girl's screams for aid as she was being chased by her assailant," the statement would have been non-testimonial. *Davis*, 547 US at 828. "But by the time the victim got home, her story was an account of past events," and, thus, the victim's statement to her mother was testimonial. *Id.*

[14] The dissent contends that we must consider the "length of time between [the] initial event and [the] police questioning." *Post* at 161 n 2. Presumably, the shorter the time between the event and the questioning, the more likely that the statement should be considered non-testimonial. However, the United States Supreme Court has not directed us to consider the "length of time between [the] initial event and [the] questioning." Instead, it has directed us to consider whether the statements describe an event as it is "actually happening," or whether they describe an event that has already "happened." *Davis*, 547 US at 827. If the statements fall in the former category they are to be considered non-testimonial and if they fall in the latter category they are to be considered testimonial, says the Supreme Court. *Id.* Although the dissent may refer to this as an "artificial threshold," *post* at 161, it is, for better or worse, the "threshold" set by the Supreme Court, and is thus the threshold that we must follow here.

with the commands of the Supreme Court. See, for example, *State v Kirby*, 280 Conn 361, 385 n 19; 908 A2d 506 (2006) (explaining that "accepting the state's arguments on this point would render meaningless the distinction drawn by the United States Supreme Court, as they would render virtually any telephone report of a past violent crime in which a suspect was still at large, no matter the timing of the call, into the report of a 'public safety emergency' "); *State v Mechling*, 219 W Va 366, 377; 633 SE2d 311 (2006) ("[T]he investigation of a past crime—while necessary to prevent future harms and lead to necessary arrests—is likely to elicit testimonial statements from witnesses that will be subject to the constraints of the Confrontation Clause.") See also Fisher, *What happened—and what is happening—to the confrontation clause*, 15 J L & Policy 587, 614 (2007), which explained:

> The presence of an ongoing emergency is important only insofar as it indicates that a declarant's statement describing criminal activity can fairly be described as part of the event itself, rather than a report or a narrative of it. If the law were otherwise, statements reporting criminal activity or accusing others of crimes would always be nontestimonial until a suspect was in custody and unable to cause further harm. Even more to the point, if the law were otherwise, *Hammon* would have had to come out the other way and the Court could never have indicated that the latter part of the 911 call in *Davis* was nontestimonial [sic]. Yet the emergencies in those cases were limited to the criminal events themselves, and when those events ceased occurring, statements describing how they had transpired were testimonial.

Equally unpersuasive is the Court of Appeals argument that the police were "responding to an emergency" because "someone at the gas station was shot and laying on the ground." *Bryant (On Remand)*, *supra* at 3. Once again, this type of "emergency" almost *always* exists

when the police respond to a victim who has been seriously injured. That is, if we were to adopt the Court of Appeals analysis, all statements made while the police are questioning a seriously injured complainant would be rendered non-testimonial, and this is also clearly inconsistent with the commands of the Supreme Court by confusing a medical emergency with the emergency circumstances of an ongoing criminal episode. See, for example, *Kirby*, 280 Conn at 384-385 ("[A]lthough the complainant might have needed emergency medical assistance at the time she made the call, the bulk of her conversation with [the police dispatcher] nevertheless consisted of her account of a crime that had happened to her in the recent past, rather than one that was happening to her at the time of the call," which "renders the telephone call recording testimonial and, therefore, inadmissible under *Crawford*"); *State v Lewis*, 235 SW3d 136, 147 (Tenn, 2007) ("Even though the victim was in a state of distress from his wounds, his comments did not describe an 'ongoing emergency,' as defined in *Crawford*, and were instead descriptions of recent, but past, criminal activity as in *Hammon*."). Most importantly, see *Davis*, 547 US at 828-829, in which the United States Supreme Court indicated that once the defendant stopped attacking the victim and "drove away from the premises," "the emergency appears to have ended." The Court said nothing at all that would remotely suggest that whether the victim was in need of medical attention was in any way relevant to whether there was an "ongoing emergency." Instead, the Court said that once the criminal event was over, i.e., the defendant had stopped assaulting the victim and left the premises, the "ongoing emergency" was over at least for purposes of evaluating an alleged *Crawford* violation.[15]

[15] Just as *Davis* was not referring to *any* "ongoing emergency" occurring *anywhere*, see note 12 of this opinion, it was also obviously not

The hearsay statements at issue in the instant case are significantly different from the admissible hearsay statements in *Davis*, i.e., the statements made to the 911 operator while the defendant was still attacking the victim, because, unlike in *Davis*, this victim was describing past events, rather than describing a criminal episode as it was unfolding, and, unlike in *Davis*, this victim was away from defendant and the crime scene, and was in the protection of five police officers. On the other hand, this case is significantly similar to *Hammon* because in both cases the police were seeking through their questioning to determine what had *previously* occurred, rather than what was occurring at the time of the questioning, and the victims were separated from the defendants and in the protection of the police. That is, in both *Hammon* and this case, (1) "[the] declarants were actively separated from the defendant[s]"; (2) "[the] statements deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed"; and (3) "[they] took place some time after the events described were over." *Id.* at 830.[16]

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referring to every imaginable *type* of "ongoing emergency." Instead, given that *Davis* concluded that the statements made while the victim was being assaulted *did* occur during an "ongoing emergency," but the statements made after the defendant stopped assaulting the victim and left the premises did *not* occur during an "ongoing emergency," it is clear that *Davis* used the term "ongoing emergency" in reference to the emergency presented by the pendency of the criminal event itself, not by its aftermath, including the purely medical aftermath. *Davis*, 547 US at 828-829.

[16] Both the prosecutor and the dissent argue that the instant case is distinguishable from *Crawford* because the *Crawford* interrogation was more formal, i.e., the interrogation was tape-recorded and it took place at a police station. However, *Davis* expressly stated that the protections of the Confrontation Clause are not limited to statements made during formal interrogations. *Davis*, 547 US at 830. Further, we find it particularly telling that the three similarities between the instant case and *Hammon* that are listed directly above are the exact same three similari-

Here, the officers were obviously attempting to find out "what had happened in the past," as evidenced by the fact that the first question asked was "what happened." The officers were not "seeking to determine (as in *Davis*) 'what is [now] happening,' but rather 'what happened.' " *Davis*, 547 US at 829-830. Most importantly, the victim's actual statements pertained to what had happened previously, rather than to what was actually happening at the time of the interrogation. For these reasons, the victim's statements to the police were testimonial and, thus, inadmissible.

Even assuming that the error here is unpreserved because, although defendant objected to the admission of the evidence, he did not do so on the basis of the Confrontation Clause as the trial in this case took place before *Crawford*,[17] a reversal is required under the plain error standard. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Given that this case was pending when *Crawford* was decided, *Craw-*

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ties that the United States Supreme Court relied on to conclude that *Hammon* is significantly similar to *Crawford*. *Id.*

[17] Before *Crawford*, as long as the hearsay statement was admissible under a "firmly rooted" hearsay exception, its admission did not violate the Confrontation Clause, *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and the excited utterance exception is a "firmly rooted" hearsay exception, *White v Illinois*, 502 US 346, 355-356 n 8; 112 S Ct 736; 116 L Ed 2d 848 (1992). Because this was the state of the law when the trial occurred in this case, defendant's objection on the basis that the statements were not excited utterances, but not on the basis of a Confrontation Clause violation, was completely reasonable. Therefore, defendant cannot be faulted for failing to raise the Confrontation Clause issue at the trial. The prosecutor himself seems to agree:

> Given the importance of resolving this point of law to the jurisprudence of this state, the People see no reason to quibble about the adequacy of Defendant's presentation of the issue to the trial court. The trial in this matter preceded *Crawford* by more than a year, and trial counsel's motion in limine was adequate to place the admissibility of the testimony at issue.

*ford* is applicable, *Teague v Lane*, 489 US 288, 304; 109 S Ct 1060; 103 L Ed 2d 334 (1989), and, for the reasons discussed earlier, *Crawford* was clearly violated here. That is, there was error and the error was plain.

In addition, in our judgment, the error clearly prejudiced defendant. The evidence against him was far from overwhelming and the victim's statement indicating that defendant was the one who shot him was obviously extraordinarily damaging. In fact, the prosecutor essentially conceded that the error was prejudicial when, at the suppression hearing before trial, he conceded that the admission of the victim's statements to the police is a "crucial issue to the prosecutor's case; . . . if this court rules that the excited utterance is not going to be admissible, then we won't have a trial here . . . ." In addition, during his opening statement to the jury, the prosecutor repeatedly referred to the victim's statements to the police and explained:

> The *most important piece of evidence* you will hear during this trial is [the victim] in many respects speaking to you. [The victim] will tell you that it was the defendant who shot him. Obviously he won't be here to tell you that. But before he died, the last—one of the last—probably the last thing he was able to say was that Rick shot, Rick shot me . . . . And . . . the police, all of them, heard [the victim] say Rick shot me . . . . The *most important piece of evidence* you'll hear during this trial, in other words, will be [the victim] in a certain respect speaking to you from the grave and telling you what happened in this case and telling you who's responsible. . . . All of the evidence here but *mainly* [the victim's] own words before he died point to [defendant] having pulled the trigger and having killed [the victim]. [Emphasis added.]

The prosecutor also relied heavily on the victim's statements in his closing statement to the jury, stating:

> The *main* reason we know enough about what happened to be able to decide beyond a reasonable doubt whether the charges that have been made out here, the *main* reason we know is because of [the victim's] words himself, his own words to you through those police officers in the early morning of April 29th, 2001. [Emphasis added.]

Further evidence that the error was prejudicial is the fact that defendant's first trial resulted in a hung jury. Finally, the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Carines*, 460 Mich at 763 (citation and quotation marks omitted). For these reasons, we believe that defendant is entitled to a new trial.

We also agree with defendant that the issue whether the victim's statements are admissible under the hearsay exception for dying declarations is not properly before this Court.[18] At the preliminary examination, the prosecutor argued that the statements were admissible as either excited utterances or as dying declarations. The district court originally ruled that the statements were inadmissible because there had been no showing of the requisite factual foundation. The prosecutor then sought to establish a foundation for admission of the statements directed solely at the question whether the

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[18] In *Crawford*, 541 US at 56 n 6, the Supreme Court recognized that "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are." However, the Court concluded that "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations," but "[i]f this exception must be accepted on historical grounds, it is *sui generis*." *Id.* In *Giles v California*, 554 US ___; 128 S Ct 2678, 2682; 171 L Ed 2d 488 (2008), the Supreme Court quoted *Crawford*, 541 US at 54, for the proposition that "the Confrontation Clause is 'most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding.' " It then noted in dictum that one of the "forms of testimonial statements [that] were admitted at common law even though they were unconfronted" were dying declarations. *Id*.

statements were excited utterances. At no point in the ensuing examination was the officer asked any questions concerning whether the victim expressed a belief that his death was imminent or was told that he was likely to die from his wound.[19] That is, the prosecutor clearly abandoned any effort to establish even a minimally sufficient foundation for the dying declaration exception, and limited his further questions exclusively to the excited utterance exception. The district court then ruled that the statements were admissible excited utterances, but did not address whether they were also dying declarations. The district court's original ruling that there was not a sufficient foundational basis to conclude that the statements were dying declarations was *never appealed* or reversed.

Indeed, the prosecutor essentially conceded during the following exchange at the pretrial conference that the victim's statements to the police were not dying declarations:

> *The Court*: I guess we have two issues ultimately, whether it comes in as a dying declaration or whether it comes in as an excited utterance. Is that where we are?
>
> *The Prosecutor*: The issue is not whether it comes in as one or the other. It came in at the [preliminary] exam clearly as an excited utterance. I think that's the way it's

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[19] MRE 804(b) provides, in pertinent part:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> * * *
>
> (2) In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death.

> going to be at trial because I think there's going to be a *lack of proof on whether the deceased knew he was dying at the time*. [Emphasis added.]

In addition, at the suppression hearing, the prosecutor stated:

> [The victim], as we know, unlike what the officers knew that night, but what we know now is that [the victim] ended up dying of his injuries. He himself, [the victim], may not have known that at the time.

During the prosecutor's closing statement to the jury, the prosecutor again said:

> [The victim] ended up dying several hours later. We don't know whether he knew that at the time he said this . . . .

Because a dying declaration must be made while the declarant believes his death to be imminent, and the prosecutor stated that there is a "lack of proof on whether the deceased knew he was dying at the time," the prosecutor seems to have conceded that the victim's statements were not dying declarations.[20]

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[20] The dissent contends, "The statements in this case seem admissible as dying declarations, thus potentially obviating much of the majority's analysis." *Post* at 158. We must point out initially that the United States Supreme Court has not yet held that dying declarations are admissible under *Crawford*. More significantly, however, and contrary to the dissent's contention, the prosecutor did more than merely fail to "establish[] the requisite foundation for a dying declaration," *post* at 164 n 5; rather, he failed to appeal the district court's decision that the statement was not a dying declaration, and he explicitly conceded that there is a "lack of proof on whether the deceased knew he was dying at the time." In addition, even after *Crawford* and *Davis* were decided, the prosecutor still did not raise the dying declarations issue either with the Court of Appeals or with this Court until after this Court granted leave to appeal. On the other hand, defendant consistently argued that the victim's statements were inadmissible and that they were not dying declarations. In fact, when the district court ruled that the victim's statements were admissible, defendant asked the district court to clarify whether they

The circuit court also believed that the prosecutor had abandoned the dying declarations issue when, in response to defendant's request that the prosecutor refrain from referring to the victim's statements as the *dying* victim's statements during closing arguments, the circuit court stated:

> I think maybe based upon an attorney's knowledge of the difference between dying declaration[s] and excited utterance[s], dying declarations have a[] [greater] aura [of] reliability than excited utterances. This was not a dying declaration. It did not come in as a dying declaration, and I'm going to agree with Defense counsel on this one. That should not be characterized as, he lay there dying. . . . That's pure supposition.

The prosecutor did not contest the circuit court's ruling that the victim's statement was not a dying declaration. In fact, during his closing argument, the prosecutor told the jury that the victim's statements to the police were admissible under the excited utterance exception to the hearsay rule; the prosecutor did not refer to the dying declaration exception. Finally, the prosecutor did not raise this issue in the Court of Appeals or this Court until after this Court granted leave to appeal limited to the issue whether the victim's statements constituted testimonial hearsay under *Crawford* and *Davis*. Accordingly, the prosecutor has either effectively conceded that the victim's statements did not constitute a dying

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were admissible as dying declarations or as excited utterances. In addition, during the trial, defendant asked the circuit court to ensure that the prosecutor refrain from referring to the victim's statements as the "dying victim's statements." While defendant did everything he could to ensure that the victim's statements were not admitted as dying declarations, the prosecutor did nothing equivalent to seek admission of the statements as dying declarations, and essentially conceded that the statements were *not* dying declarations. Therefore, to answer the dissent's question, *post* at 166, this is why we do "not [now] give the parties the same consideration" with regard to this issue.

declaration or, at the very least, has abandoned this issue. See *Gross v Gen Motors Corp*, 448 Mich 147, 162 n 8; 528 NW2d 707 (1995) (stating that "[w]hen a cause of action is presented for appellate review, a party is bound to the theory on which the cause was prosecuted or defended in the court below" and "[f]ailure to properly brief an issue on appeal constitutes abandonment of the question").

## IV. CONCLUSION

Because the victim's statements to the police were inadmissible testimonial hearsay statements pursuant to *Crawford* and *Davis*, and the admission of the statements constituted plain error requiring reversal, we reverse the Court of Appeals and remand this case for a new trial.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ., concurred with MARKMAN, J.

WEAVER, J. (*dissenting*). I dissent from this Court's decision to reverse the Court of Appeals and remand for a new trial. I would affirm the judgment of the Court of Appeals for the reasons stated in its unpublished opinion on remand, specifically, that the declarant's statements were made in the course of a police interrogation under circumstances objectively indicating that the interrogation's primary purpose was to enable police assistance in an ongoing emergency.

CORRIGAN, J. (*dissenting*). I respectfully dissent. The Court of Appeals reasonably concluded that the victim's statements—made within a half-hour of being shot while he lay bleeding in a parking lot—were nontestimonial for Confrontation Clause purposes because

they were elicited by police officers addressing an ongoing emergency. Further, I question the majority's treatment of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), and *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 224 (2006), as conclusive regarding the admissibility of the victim's statements under these facts, where, although the victim's statements were likely also dying declarations, the prosecution abandoned this argument in the lower courts. The statements likely would have qualified for admission *both* as excited utterances and as dying declarations but, under then-existing law, the prosecution needed only to advocate for admission under one theory. It chose the former. After the trial, however, the United States Supreme Court established new Confrontation Clause standards in *Crawford* and further suggested that dying declarations might prove a rare exception to the new rule. The statements in this case seem admissible as dying declarations, thus potentially obviating much of the majority's analysis. Accordingly, the majority's opinion—which reverses a number of close calls made by the Court of Appeals in this highly fact-specific case—exemplifies the adage that "bad facts make bad law." For these reasons, I would affirm defendant's convictions.

As recounted in the majority opinion, police officers arrived at a Detroit gas station at 3:25 a.m. within minutes after receiving a report of a shooting. It appears that they did not know how long ago the shooting had occurred, where it took place, or whether the shooter was at the gas station. They found the gunshot victim lying on the ground, bleeding, visibly in pain, and having trouble talking. They asked him what happened. He reported that defendant shot him about 3:00 a.m. at a residence six blocks away. The majority concludes that

the primary purpose of the officers' questions "was to establish the facts of an event that had *already* occurred," not to "enable police assistance to meet an ongoing emergency." *Ante* at 143. But the majority considers the facts in hindsight, rather than with an objective view of the circumstances at the time the statements were made. The United States Supreme Court's opinion in *Davis* clearly establishes that the statements must be viewed through an objective assessment of the circumstances surrounding them: "Statements are nontestimonial when made in the course of police interrogation under circumstances *objectively indicating* that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822 (emphasis added); and see *Crawford*, *supra* at 52 (emphasis added; citations omitted) (statements have been characterized as testimonial if they " 'were made under circumstances which would lead an *objective witness* reasonably to believe that the statement would be available for use at a later trial' ").

First, the majority assumes too much when it concludes that there was no ongoing emergency because the shooting necessarily occurred 30 minutes earlier. Rather, it is more likely that experienced officers would not take the victim's time estimate so literally as to summarily conclude that they, the victim, and the public were out of danger. The officers themselves reported that the victim was visibly in pain and having trouble talking; I cannot imagine that they trusted him to have looked at his watch the moment after he was shot. Further, even at trial a precise time was never established; indeed, the victim's brother testified that he heard shots between 3:00 and 3:30 a.m.

In any event, even if we assume that the reported shooting occurred a full 25 minutes earlier at 3:00 a.m.,

this time lapse certainly does not prohibit as a matter of law the conclusion of the Court of Appeals that an emergency was ongoing. Rather, the officers knew that an armed assailant had been within six blocks of their location. They could not be sure that the assailant would not harm others or pursue the victim.[1] One could reasonably conclude that the assailant posed an immediate, continuing danger. Therefore, even if we assume that about 30 minutes had passed, this case does not become automatically comparable to cases such as *Crawford*, where police questioned the declarant at the police station "hours after" the relevant events occurred. See *Davis*, *supra* at 827.

Contrary to the majority's assertions, *ante* at 149-150 n 15, *Davis* does not establish an artificial threshold after which all questions are assumed to be for purposes of retrospective investigation and all statements in response are presumed testimonial. The semantic difference between what is "actually happening" and what has already "happened" is not so simple when applied to the real world, where context controls which legal labels most aptly apply. The amount of time that has elapsed

[1] The majority concludes that the officers did not subjectively perceive an ongoing emergency because they did not testify, for example, about "taking any actions to secure the area, to search the station for the possible presence of any armed individuals, or to provide cover for other officers." See *ante* at 144-146. I am wary of the majority's speculation concerning police procedures, particularly because these officers testified before the United States Supreme Court decided *Crawford* or *Davis*. Therefore, the officers were not questioned to elicit their goals in questioning the victim or whether and how they had already determined that the shooter was not in the immediate area. In any event, the majority's reference to the officers' *later* call for backup assistance, *ante* at 146, cuts against the majority's conclusion; the officers' fear that defendant remained armed and dangerous confirms that their attempts to identify him and his location by questioning the victim were related to potential ongoing danger.

between the onset of an emergency and statements about that emergency clearly must be considered in context.[2]

For similar reasons, I disagree with the majority's presumption that the victim's statements were not made during an ongoing emergency as a matter of law because the victim had escaped to the gas station. A mere distance in space between an initial event and the ensuing statements by a victim is not dispositive. Neither *Davis* nor *Crawford* states a bright-line rule establishing that an emergency ends the moment the assailant and victim are physically separated to any extent. Instead, clearly the nature of the initial assault, including the type of weapon used, affects whether an objective victim or police officer would conclude that the threat has ended, as I discuss further *infra* when I address the facts of *Hammon*, the companion case of *Davis*.[3] Indeed, as the majority acknowledges, *ante* at 146 n 12, there may have been an ongoing emergency originating from defendant's house. There is no prin-

[2] Further, the Court of Appeals conclusion that the emergency was ongoing here does not require us to conclude that an emergency is ongoing any time police seek to "apprehend a criminal before he might injure somebody else," thereby "effectively render[ing] non-testimonial *all* statements made before the offender was placed behind bars." *Ante* at 147. Rather, clearly the overall circumstances of the statements must control the court's determination whether the emergency was truly ongoing. The majority inappropriately takes the Court of Appeals analysis to its logical extreme instead of accepting the simple proposition that a length of time between an initial event and police questioning is a factor relevant to whether the emergency is ongoing; some lapse of time does not require the automatic conclusion that an objective observer would perceive the emergency as having ended.

[3] I do not assert that "if there is an 'ongoing emergency' *anywhere* (or even what the police *perceived* to be such an "ongoing emergency"), a victim's statements to the police are to be considered nontestimonial . . . ." *Ante* at 146 n 12. Rather, I simply conclude that any apparent distance must be viewed in context.

cipled reason to conclude *as a matter of law* that the officers' questions and the victim's statements were unrelated to, or did not constitute a part of, that emergency merely on the basis of a distance of six blocks.[4]

For these reasons, I cannot join the majority's conclusion that the victim's statements "related solely to events that had occurred in the past . . . ." *Ante* at 143. Rather, as in *Davis*, *supra* at 827, "the nature of what was asked and answered . . . was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past." Accordingly, I also disagree with the majority's comparison of this case to *Hammon*. There, the police spoke to the domestic violence victim while she sat on her front porch. She stated that the defendant had "hit" and "thrown" her. The defendant was inside the house. *Davis*, *supra* at 830. The Court reasonably determined that the victim was no longer in danger because she was protected by the police. *Id.* at 831. Further, because she suffered physical abuse but did not report that her assailant used a gun or that others were in danger inside the home, the prospect of continuing immediate danger to the victim, the officers, or the public was negligible. In contrast, the evidence here much more strongly suggests that an emergency was in progress and that the

[4] Indeed, my disagreement with the majority centers on my conclusion that we should not reverse this case as a matter of law simply because the victim and the assailant were separated in some way where the Court of Appeals reached a supportable conclusion based on all the underlying facts. Whether the victim and the assailant are separated by a door (as in *Hammon*), by one block, by six blocks, or by ten blocks, the nature and persistence of the relevant emergency depend on the circumstances, including the type of danger or assault involved and the continued vulnerability of the victim (or others, when relevant) to further danger.

officers sought to determine " 'what is happening,' " not simply " 'what happened.' " *Id.* at 830. Indeed, a gunman was on the loose. The officers did not know his location or whether he remained a threat. Thus, I cannot agree that the officers primarily questioned the victim "to investigate a past crime," *ante* at 146, or to "establish or prove past events potentially relevant to later criminal prosecution," *Davis*, *supra* at 822, as in *Crawford* and *Hammon*. *Ante* at 135, 147.

This case seems to fall midway on a spectrum between the facts of *Crawford* and those of *Davis*. As the *Davis* Court explained, in *Davis* the 911 caller "was speaking about events *as they were actually happening*, rather than 'describ[ing] past events.' " *Davis*, *supra* at 827 (emphasis and punctuation in original), quoting *Lilly v Virginia*, 527 US 116, 137; 119 S Ct 1887; 144 L Ed 2d 117 (1999) (plurality opinion). The call was "plainly a call for help against [a] bona fide physical threat," and

> the nature of what was asked and answered in *Davis*, again viewed objectively, was such that the elicited statements were necessary to be able to *resolve* the present emergency, rather than simply to learn (as in *Crawford*) what had happened in the past. That is true even of the operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon. [*Davis*, *supra* at 827.]

In *Crawford*, in contrast, the declarant's statements were made during questioning at the police station that took place "hours after the events she described had occurred." *Davis*, *supra* at 827. The *Davis* Court also described the "striking" difference in the "level of formality between the two interviews." *Id.* The declarant in *Crawford* was "responding calmly, at the station house, to a series of questions, with the officer-

interrogator taping and making notes of her answers." *Id.* The declarant in *Davis*, on the other hand, provided "frantic answers . . . over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id.*

I agree with the majority that this case is not precisely comparable to *Davis* because, here, the victim was not facing an immediate physical threat from an assailant, and the police had arrived on the scene. But this case is also by no means directly comparable to *Crawford* because, here, the shooting had just occurred, the statements were made only blocks away from the crime, the victim was in pain from untreated wounds that would soon prove to be fatal and was having trouble talking, and it was uncertain whether he, the police, or the public were out of physical danger. For these reasons, I conclude that this case is more similar to *Davis* than to *Crawford*. And, most significantly, to the extent this case's location on the spectrum presents a close question, the Court of Appeals did not clearly err when it concluded that the emergency was ongoing and the victim's statements were non-testimonial.

Finally, the majority's decision is clouded by the prosecution's abandonment of its original argument that the victim's statements were dying declarations. The majority reasonably concludes that the prosecution abandoned this argument, which it raised only at the preliminary examination, by continuing to advance only its alternative theory that the victim's statements were excited utterances.[5] This was a reasonable strat-

[5] I disagree with the majority's secondary conclusion that the prosecution necessarily conceded that the statements were *not* dying declarations. See *ante* at 156-157. The prosecution did pursue only the excited utterance theory and admittedly never established the requisite foundation for a dying declaration. But I am not convinced that the prosecution's statement—that there was a "lack of proof on whether the

egy at the time this trial took place. As the majority observes, before the United States Supreme Court issued *Crawford*, hearsay statements admissible under a "firmly rooted hearsay exception"—including "excited utterances" or "spontaneous declarations"—did not violate the Confrontation Clause. *Ante* at 151 n 17, citing *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), and *White v Illinois*, 502 US 346, 355-356 n 8; 112 S Ct 736; 116 L Ed 2d 848 (1992). *Crawford* and *Giles v California*, ___ US ___; 128 S Ct 2678; 171 L Ed 2d 488 (2008), have subsequently suggested that dying declarations—*but not some or all excited utterances*—may remain admissible under *Crawford*, although unconfronted, because the dying declaration is an historical exception to hearsay rules that predated the Confrontation Clause. *Giles*, *supra* at ___, 128 S Ct at 2682; *Crawford*, *supra* at 56 n 6, 58 n 8; and see the majority's discussion *ante* at 142 n 6, 153 n 18. The victim's statements here seem to qualify as dying declarations. He had been shot in the stomach at most 25 minutes before he spoke to the officers. He was lying on the ground, bleeding, in pain, and having trouble speaking. He had not yet received medical attention. He died a few hours later. Accordingly, his statements likely would have qualified as "statement[s] made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." MRE 804(b). Although the prosecution chose

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deceased knew he was dying at the time"—constituted a concession that the victim's statements could never be considered dying declarations. See *ante* at 155 n 20. The prosecution may have been admitting only that it could not support an argument on this point because it had not chosen to undertake the potentially difficult task of establishing the requisite proofs. In any event, the prosecution's failures in these regards exemplify my primary concern: that the majority here creates bad law from bad facts resulting from the incomplete nature of the record.

not to establish a circumstantial foundation for the applicability of MRE 804(b), opting instead to advance the equally useful argument that the statements were excited utterances, the prosecution may well have successfully done so had this trial occurred *after* the release of *Crawford* when the import of dying declarations as exceptions to the Confrontation Clause became apparent. Then, if dying declarations prove to be accepted as historical exceptions to the Confrontation Clause, we would have no reason to resolve the close question here concerning whether the victim's statements were also made in the course of an ongoing emergency.

Therefore, I question the majority's decision to rest its precedential analysis of *Crawford* and *Davis* on a fact-intensive Court of Appeals decision that does not even consider the legal argument that is arguably most relevant to the outcome of this case post-*Crawford*. Moreover, the majority acknowledges that defendant should not be faulted for failing to raise the Confrontation Clause issue at trial because *Crawford* had yet to be decided. *Ante* at 151 n 17. Yet it fails to give the same consideration to the prosecution, which had equally little reason to presume that its choice between two formerly equal theories for admission would become decisive on the basis of later-decided law. Even if the prosecution entirely abandoned its argument, why should we not give the parties the same consideration in light of the intervening changes in the law? At a minimum, I would not analyze the Confrontation Clause issue on the basis of the victim's excited utterances under these facts; in my view, if the prosecution had not abandoned its attempt to classify the statements as dying declarations, we likely would not have to reach the contentious question whether there was also an ongoing emergency under *Crawford* and *Davis*.

In conclusion, the Court of Appeals did not clearly err when it decided that the victim's statements were admissible because they were non-testimonial under *Crawford* and *Davis*. Further, particularly because the appeals panel made reasonable, close calls in answering the fact-intensive questions presented, I would not reverse its decision where the statements were also likely dying declarations that would be excepted from the rule of *Crawford*. Accordingly, I would affirm.

YOUNG, J., concurred with CORRIGAN, J.

PEOPLE v HOLDER

Docket No. 137486. Decided June 10, 2009.

Gregory L. Holder pleaded guilty in the Genesee Circuit Court, Archie L. Hayman, J., of various crimes that he had committed after receiving an early discharge from parole. Over one year later, the Michigan Department of Corrections (DOC) sent notice to the defendant that it had cancelled his parole discharge, and requested that the court amend the defendant's judgment of sentence to reflect that, because the defendant was on parole when the crimes were committed, the defendant's sentences were to run consecutively to parole. The court did so without providing notice or a hearing, and the defendant appealed. The Court of Appeals, MURRAY, P.J., and TALBOT and WILDER, JJ., denied the defendant's delayed application for leave to appeal for lack of merit in the grounds presented. The Supreme Court ordered and heard oral argument on whether to grant the defendant's application for leave to appeal or take other peremptory action. 483 Mich 890 (2009)

In a unanimous opinion by Justice YOUNG, the Supreme Court *held*:

The defendant was not on parole at the time he was sentenced, and the DOC's effort to retroactively cancel the defendant's parole discharge had no legal effect on the defendant's parole status. Because the original judgment of sentence was valid when imposed, the sentencing court had no authority to modify it in response to the DOC's request pursuant to MCR 6.429(A).

1. The plain language of the statutory provision addressing parole discharge requires the parole board to enter a final order of discharge if a prisoner has faithfully performed all the conditions and obligations of parole. In contrast to the statutory provisions that provide explicit authorization to revoke parole, nothing in the applicable statute permits the DOC to cancel or revoke a parole discharge order once the final order of discharge has been entered and the certificate of discharge issued to the prisoner. Further, applicable caselaw holds that discharge from parole, once delivered and accepted, cannot be recalled. There is no statutory basis to conclude that the DOC retains any continuing authority over a parolee once parole has been terminated; accordingly, there is no

basis to conclude that the Legislature impliedly intended to grant the DOC the authority to rescind a final order of parole discharge.

2. While the DOC has an obligation to ensure that any sentence executed is free from errors, it is not a party to the underlying criminal proceedings. Accordingly, any notices that the DOC sends to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein merely advisory.

Sentence vacated and case remanded for reinstatement of the original judgment of sentence.

1. PAROLE — DEPARTMENT OF CORRECTIONS — PAROLE REVOCATION AFTER DISCHARGE.

The Michigan Department of Corrections does not have the authority to revoke a final order of parole discharge (MCR 6.429[A]).

2. SENTENCES — DEPARTMENT OF CORRECTIONS — SENTENCING ERRORS — NOTICES TO COURTS AND PARTIES REGARDING SENTENCING ERRORS.

Notices that the Department of Corrections sends to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein are only advisory.

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Dale A. DeGarmo*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Jacqueline J. McCann*) for the defendant.

Amicus Curiae:

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, and *Charles C. Schettler, Jr.*, and *Heather S. Meingast*, Assistant Attorneys General, for the Michigan Department of Corrections.

YOUNG, J. Defendant received an early parole discharge from the Michigan Department of Corrections (DOC). He committed several crimes seven months after receiving his parole discharge. After being sentenced for these crimes, the defendant received notice

from the DOC that his parole discharge was "cancelled." The DOC subsequently sent correspondence to the sentencing judge and the parties, informing the judge of the parole discharge cancellation and asking the judge to amend defendant's judgment of sentence to reflect that the sentence imposed was to be served consecutively to the sentence for which defendant was on parole. The judge complied with the request, amending the judgment of sentence without notice to defendant.

We hold that defendant was not on parole at the time he was sentenced, and the DOC's effort to retroactively cancel defendant's parole discharge had no legal effect on defendant's parole status. Because the original judgment of sentence was valid when imposed, the sentencing judge had no authority to modify it pursuant to MCR 6.429(A). Accordingly, we vacate the amended sentence and remand this case to the circuit court to reinstate the original judgment of sentence.

Additionally, we reiterate that sentencing is the responsibility of our courts, and notices sent to courts from the DOC concerning sentencing errors are merely advisory and informational in nature. Any judge receiving such a notice must identify the nature of the claimed error and determine whether the error actually implicates a defendant's sentence. Ultimately, however, any corrections or modifications to a defendant's sentence must comply with the relevant statutes and court rules.

## FACTS AND PROCEDURAL HISTORY

Defendant was sentenced to prison for narcotics crimes in 1999 and was paroled in April 2004. Beginning in June 2005, the police placed defendant under surveillance after a confidential informant's tip led to two controlled cocaine purchases. For reasons not

stated in the record, defendant was given an *early* parole discharge by the DOC on July 22, 2005.

On March 1, 2006, the police investigation ended, resulting in the recovery of large amounts of narcotics, drug paraphernalia, and guns. Defendant reached a plea agreement with the prosecutor. At the plea hearing in January 2007, the prosecutor stated that there were no agreements for specific sentences but that consecutive sentencing would not apply. Further, the prosecutor elected to forgo any sentencing enhancement under the statutes pertaining to habitual offenders[1] and repeat drug offenders.[2] The presentence investigation report, prepared by the DOC on February 26, 2007, indicated that defendant was *not* on parole.

One month later, defendant was sentenced to concurrent terms of imprisonment as follows: 99 to 240 months for delivery of between 50 and 449 grams of cocaine,[3] 225 to 475 months for possession with intent to deliver over 1,000 grams of cocaine,[4] and 12 to 60 months for being a felon in possession of a firearm.[5] Defendant was also sentenced to a mandatory consecutive two-year term of imprisonment for possession of a firearm during the commission of a felony.[6]

In May 2007, the DOC sent defendant two notices informing him that the parole discharge granted in July 2005 was "cancelled." In January 2008, the DOC sent correspondence to the parties and to the sentencing judge, stating that defendant's discharge from parole had been "cancelled" and that defendant was on parole when the offenses were committed. The department requested

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[1] MCL 769.12.

[2] MCL 333.7413.

[3] MCL 333.7401(2)(a)(*iii*).

[4] MCL 333.7401(2)(a)(*i*).

[5] MCL 750.224f.

[6] MCL 750.227b.

that the judge "issue an amended judgment" to reflect that defendant's sentences were to run "consecutive to parole."[7] A few days later, without providing notice or a hearing to either defendant or the prosecutor, the judge entered an amended judgment of sentence.

After the Court of Appeals denied leave to appeal, this Court heard oral argument on defendant's application for leave to appeal.[8] We also invited the Attorney General to participate and address the DOC's authority to seek an amendment of defendant's sentence.

## STANDARD OF REVIEW

In reviewing questions of statutory construction, our purpose is to discern and give effect to the Legislature's intent. We begin by examining the plain language of the statute; where that language is unambiguous, we presume that the Legislature intended the meaning clearly expressed and enforce that statute as written.[9] We must give the words of a statute their plain and ordinary meaning, and only where the statutory language is ambiguous may we look outside the statute to ascertain legislative intent.[10]

## ANALYSIS

### I

Generally speaking, "a prisoner's release on parole is discretionary with the parole board."[11] A paroled pris-

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[7] Pursuant to MCL 768.7a(2), if a person is convicted and sentenced for a felony committed while on parole, the term of imprisonment for the later felony does not begin to run until the remaining portion of the previous offense has expired.

[8] 483 Mich 890 (2009).

[9] *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999).

[10] *Id.* at 330.

[11] MCL 791.234(11).

oner is not considered released; rather, the prisoner is simply permitted to leave the confinement of prison.[12] Indeed, a parolee explicitly "remain[s] in the legal custody and under the control of the department" while on parole.[13] Once parole has been granted, it may be rescinded for cause if a parole violation has been proven by a preponderance of the evidence.[14] Moreover, the DOC possesses the statutory authority to rescind a parole order before a prisoner leaves prison[15] and to amend an existing order of parole.[16]

The statutory provision addressing parole discharge can be found at MCL 791.242(1), which provides:

> If a paroled prisoner has faithfully performed all of the conditions and obligations of parole for the period of time fixed in the order of parole, and has obeyed all of the rules and regulations adopted by the parole board, the prisoner has served the full sentence required. The parole board shall enter a final order of discharge and issue the paroled prisoner a certificate of discharge.

The plain language of the statute states that the parole board is required to enter a final order of discharge if a prisoner has "faithfully performed" all the "conditions and obligations of parole." In stark contrast to the statutory provisions providing explicit authorization to revoke parole, nothing in this statute permits the DOC to "cancel" or revoke a parole discharge order once the final order of discharge has been entered and the certificate of discharge issued to the prisoner.

In the absence of statutory authorization permitting the DOC to rescind a parole discharge order, this

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[12] MCL 791.238(6).

[13] MCL 791.238(1).

[14] MCL 791.240a. See also MCL 791.241.

[15] MCL 791.236(2).

[16] MCL 791.236(3).

Court's opinion in *In re Eddinger*[17] remains viable and instructive. Discussing the nature of parole discharge, the *Eddinger* Court stated:

> The purpose of a parole is to keep the prisoner in legal custody while permitting him to live beyond the prison inclosure so that he may have an opportunity to show that he can refrain from committing crime. It is a conditional release, the condition being that if he makes good he will receive an absolute discharge from the balance of his sentence; but if he does not make good he will be returned to serve his unexpired time. *The absolute discharge is something more than a release from parole. It is a remission of the remaining portion of his sentence. Like a pardon, it is a gift from the executive, and like any other gift it does not become effective until it is delivered and accepted. After delivery it cannot be recalled.*[18]

The Attorney General concedes that no express statutory authority exists permitting the revocation of a parole discharge order. However, the Attorney General argues that such authority is "necessarily implied" in order to give "effect" to the DOC's authority to grant parole discharge orders pursuant to MCL 791.242(1). Moreover, the Attorney General notes that, pursuant to *People v Young*,[19] a writ of mandamus may be filed against the DOC, challenging the department's decision to discharge a less-than-model prisoner from parole. The Attorney General maintains that if the DOC can be subject to a mandamus action, then it must have the "corollary authority" to rescind an order of parole discharge.

Because the propriety of the decision in *People v Young* is not properly before us in the present case, we

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[17] 236 Mich 668; 211 NW 54 (1926).

[18] *Id.* at 670 (emphasis added).

[19] 220 Mich App 420; 559 NW2d 670 (1996).

do not address it.[20] Additionally, we decline the Attorney General's invitation to hold that the DOC has the "implied authority" to rescind a final order of discharge where the Legislature has not conferred such authority.[21] Given the Legislature's express grant of authority to the DOC to grant parole, revoke parole, rescind an order of parole before a prisoner is released, and amend an existing order of parole, there is no basis to conclude that the Legislature impliedly intended to grant the DOC the authority to rescind a final order of parole discharge. Indeed, because the DOC's ability to exert custody and control over a paroled prisoner is statutorily limited to those "on parole,"[22] there is no statutory basis to conclude that the DOC retains *any* continuing authority over a parolee once parole has been terminated. While we agree with the Attorney General that permitting the DOC to rescind an order of parole discharge "makes practical sense" and is "good policy," it is a matter that should be addressed by our Legislature, not this Court.

II

According to the DOC, the department routinely sends correspondence advising courts and parties of sentencing errors. This is done in order to fulfill the

[20] We note, however, that the clear language of MCL 791.242(1) merely indicates that the parole board is compelled to release a prisoner from parole where the prisoner has *completely* complied with *all* of the rules and conditions imposed by the parole board for the *entire* duration of his parole period. The statutory language does not otherwise place any limitations on the DOC's authority to discharge a prisoner from parole.

[21] An agency such as the DOC has no inherent authority, and the limitations of its power and authority "must be measured by the statutory enactments from which it is created." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 202 n 17; 631 NW2d 733 (2001).

[22] MCL 791.238(1).

department's statutory duty to classify prisoners and accurately compute their sentences,[23] as well as to satisfy an agreement made after an investigation by the Auditor General. The letters, identifying sentencing errors described by the department as generally "clerical in nature," are intended to provide information to the sentencing court and the parties. Once the information is provided, the DOC contends that impetus is on the sentencing court and the parties to rectify the identified errors pursuant to the law and our court rules. In this case, however, the letter sent by the DOC did not merely provide information. Rather, the letter directly asked the court to "issue an amended" judgment of sentence as a result of its cancellation of defendant's parole discharge.

While the DOC certainly has an obligation to ensure that any sentence executed is free from errors, the department is not a party to the underlying criminal proceedings under either MCR 6.429[24] or MCR 6.435.[25] As a result, we wish to reiterate that *any* notices sent from the DOC to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein merely advisory. Any judge receiving such a notice must ascertain the nature of the claimed error, determine whether the error implicates a defendant's sentence, and consider the curative action recommended by the DOC. It is imperative, however, that any corrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules.[26] Significantly, if the claimed error is sub-

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[23] MCL 791.264.

[24] MCR 6.429(A) permits "*either party*" to file a "motion to correct an invalid sentence." (Emphasis added.)

[25] MCR 6.435(A) permits the court to correct clerical errors "on its own initiative or on motion *of a party* . . . ." (Emphasis added.)

[26] See, e.g., MCL 769.27, which provides:

stantive, the court may modify the sentence only "[a]fter giving the parties an opportunity to be heard" *and* if "it has not yet entered judgment in the case . . . ." MCR 6.435(B). Similarly, if the original judgment of sentence was valid when entered, MCR 6.429(A) controls and mandates that the court "may not modify a valid sentence after it has been imposed except as provided by law."

Here, because the original judgment of sentence was valid when imposed, the court had no authority to modify it in response to the DOC's letters. MCR 6.429(A). Accordingly, we vacate the amended judgment of sentence and remand this case to the circuit court to reinstate the original judgment of sentence.

KELLY, C.J., and CAVANAGH, WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with YOUNG, J.

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

PEOPLE v BORGNE

Docket No. 134967. Argued January 21, 2009 (Calendar No. 1). Decided July 1, 2009. Rehearing granted in part at 485 Mich 868.

A jury in the Wayne Circuit Court, Cynthia G. Hathaway, J., convicted Michael J. Borgne of armed robbery and possession of a firearm during the commission of a felony for stealing a purse at gunpoint from a woman at a gas station. At trial, the defendant testified that, on the night of the robbery, he had been waiting for a taxi across the street from the gas station when he heard gunshots, from which he fled into an abandoned building and waited for the police to arrive. The defendant stated that he had unsuccessfully tried to tell the police this version of events immediately after his arrest, but chose to remain silent after he was advised of his rights under *Miranda v Arizona*, 384 US 436 (1966). The prosecution repeatedly referred to the defendant's decision to remain silent during its cross-examination of the defendant and its closing argument, with no objection from the defense. The defendant appealed his convictions, claiming that the prosecutor's references to his post-arrest, post-*Miranda* silence violated his Fourteenth Amendment due process rights under *Doyle v Ohio*, 426 US 610 (1976). In a split decision, the Court of Appeals, METER, P.J., and OWENS, J. (TALBOT, J., dissenting), agreed and reversed the defendant's convictions, holding that the prosecution's improper references to the defendant's silence under these circumstances constituted plain error requiring reversal. Unpublished opinion per curiam of the Court of Appeals, issued August 9, 2007 (Docket No. 269572). The Supreme Court granted the prosecution's application for leave to appeal. 480 Mich 1193 (2008).

In an opinion by Justice CAVANAGH, joined by Chief Justice KELLY and Justices WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, the Supreme Court *held*:

The defendant's constitutional rights were violated when the trial court erroneously allowed the prosecution to use the defendant's post-arrest, post-*Miranda* silence against him. However,

because this was not a plain error that affected the defendant's substantial rights, his convictions are affirmed.

1. *Doyle*'s general prohibition on referring to a defendant's post-arrest, post-*Miranda* silence applies to the prosecutor's cross-examination of the defendant and closing argument. The prosecutor's own questions establish that the silence to which he was referring occurred after the defendant was arrested, had been apprised of his constitutional right to remain silent, and had invoked that right. It is clear that the prosecutor was emphasizing the negative implications of the defendant's silence.

2. The prosecutor's use of the defendant's silence does not fall under *Doyle*'s one exception, which allows the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. This exception only applies if a defendant "opens the door" to impeachment by falsely testifying about his or her post-arrest, post-*Miranda* conduct. A prosecutor may not use a defendant's testimony regarding actions that occurred before the *Miranda* warnings were given as a means to impeach the defendant with post-*Miranda* silence. In this case, the defendant's testimony that he had tried to describe his exculpatory version of events immediately after being placed under arrest did not trigger the impeachment exception, because that testimony related to conduct that happened before he was advised of his right to remain silent.

3. The prosecution's use of the defendant's post-arrest, post-*Miranda* silence constituted a clear and obvious error. However, the defendant cannot prove that the error affected his substantial rights by causing him prejudice. The prosecutor's references to the defendant's silence, while numerous, were not pervasive, and were intended only to impeach the defendant's exculpatory version of events. The prosecution presented an otherwise strong case based on compelling, untainted evidence, including the victim's identification of the defendant as her assailant and bystander descriptions of a later incident in which the defendant shouted to the victim from a passing car that he was the one who had robbed her. Accordingly, although the prosecutor's constitutional violation is not taken lightly, reversal of the defendant's convictions is not required.

Chief Justice KELLY, concurring, wrote separately to reiterate her view that, in cases involving unpreserved constitutional error, a defendant's conviction should be affirmed only if the reviewing court is satisfied that the error is harmless beyond a reasonable doubt. She further stated that the refusal to find error requiring reversal under the plain-error standard set forth in *People v Carines*, 460 Mich 750

(1999), in cases where there is a "wealth of incriminating evidence" essentially exempts criminal defendants from the constitutional right to due process of law, and therefore that standard should be reexamined at the earliest possible moment.

Justice YOUNG, concurring, joined all but footnotes 8 and 17 of the majority opinion, stating that the views contained therein regarding the plain-error analysis of *People v Carines* would have been better placed in a concurring statement.

Reversed.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — RIGHT TO REMAIN SILENT — POST-ARREST SILENCE — EVIDENCE OF POST-ARREST SILENCE.

The prosecution generally may not refer at trial to the silence of a defendant who has been arrested and informed of his or her right to remain silent (US Const, Ams V, XIV).

2. CONSTITUTIONAL LAW — CRIMINAL LAW — RIGHT TO REMAIN SILENT — POST-ARREST SILENCE — EVIDENCE OF POST-ARREST SILENCE — IMPEACHMENT EXCEPTION TO INADMISSIBILITY OF POST-ARREST SILENCE.

The prosecution may not impeach a defendant's trial testimony regarding actions that occurred before the *Miranda* warnings were given by referring to the defendant's post-*Miranda* silence unless the defendant has falsely testified about his or her post-arrest, post-*Miranda* conduct (US Const, Ams V, XIV).

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, *John D. Dakmak*, Prosecuting Attorney, and *Mark G. Sands*, Assistant Attorney General, for the people.

State Appellate Defender (by *Jacqueline J. McCann* and *Kim M. McGinnis*) for the defendant.

Amicus Curiae:

*John Hallacy*, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

CAVANAGH, J. In this case we must decide whether defendant Michael Borgne's constitutional rights under *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91

(1976), were violated, and, if they were, what effect that has on his convictions.[1] We hold that defendant's rights under *Doyle* were violated when the trial court erroneously allowed the prosecution to use defendant's post-arrest, post-*Miranda*[2] silence against him. However, we also hold that the error did not amount to plain error affecting defendant's substantial rights; therefore, the Court of Appeals judgment is reversed and defendant's convictions are affirmed.

## I. FACTS AND PROCEDURE

On the evening of December 14, 2004, the complaining witness, Caroline Kessler, was fueling her car at a gas station in Detroit. She went into the convenience store at the station, and when she returned to finish pumping the gas, a man approached her from behind. The man put his arm around her and told her to give him her purse. When Kessler turned around, she saw a man with a gun pointed at her. The man grabbed her purse and ran away.

Kessler testified at trial that she got a good look at her assailant. She said he was wearing a blue jacket with red stripes and white lettering on the back. She also noticed that, under the jacket, he was wearing a black hooded sweatshirt, with the hood on his head. He was wearing blue jeans. She said he was Caucasian, clean shaven, young, of medium build, and only a few inches taller than her (she is 5' 2").

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[1] The issues in this decision are similar to another case that we decide today: *People v Shafier*, 483 Mich 205; 768 NW2d 305. Accordingly, much of the analysis in this opinion is very similar, and at times the same, as that in *Shafier*. However, the cases were argued separately, and they are distinct enough that we have not combined them in one opinion.

[2] See *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

As the man ran away, Kessler followed him, while yelling out that he had robbed her. But after crossing the street, she stopped and turned back to the gas station. Before she started back, however, she noticed a man chasing the assailant as a result of her cries for help. When she got back to the gas station she asked the attendant to call the police and then called her brother. Her brother, along with a friend, responded almost immediately because he lived nearby. Eventually, Kessler, her brother, and the friend went out looking for the assailant. They found the man who had chased the assailant waiting outside an abandoned commercial building. When the police arrived, Kessler described the man who robbed her. The police officers then entered the building and emerged with defendant in handcuffs. Defendant was wearing blue jeans and a blue and red jacket, with a black hooded sweatshirt underneath. Upon seeing defendant, Kessler immediately identified him as the man who robbed her.

Kessler also testified that about two weeks later she was in a minor automobile accident several blocks away from the site of the robbery. While Kessler was stopped to exchange information with the other driver, a blue mini-van drove past. Kessler was outside her car talking to the person whose car she had hit when the blue minivan stopped next to her and its driver yelled out his open window, "I'm the motherfucker what robbed you, ha, ha, ha." Kessler immediately recognized the driver as defendant. She immediately told the other motorist that it was defendant who had just yelled at her. The other driver corroborated Kessler's spontaneous reaction to the event.

Defendant was charged with armed robbery, MCL 750.529, and possessing a firearm while committing a felony, MCL 750.227b. The first trial ended in a mistrial because the jurors had improperly discussed the case.

At the second trial, the prosecution presented defendant's red and blue coat and black hooded sweatshirt as evidence in its case-in-chief. The prosecution also produced Kessler's direct testimony in which she identified defendant as the man who robbed her, the man whom the police had taken from the abandoned building, and the man who had yelled at her from the blue minivan.

In his defense, defendant testified that on the night in question he was simply waiting for a taxi across the street from the gas station. While waiting, he heard gunshots from across the street and fled into the alleyway, and then into the abandoned building. Once in the building, he said he heard shots being fired into the building. He claimed to have waited there until the police arrived. When the police arrived, they arrested him, took him out of the building, and led him to a police car. He testified that on the way to the police car he tried to tell the police the shooting story, but they put him in the backseat of the police car.

It is uncontested that defendant was then taken to the police precinct, where police officers administered *Miranda* warnings and attempted to interrogate him. However, defendant invoked his right to silence and asked for an attorney. Thereafter, defendant made no statements about the case until trial.

At trial, the prosecution made broad use of defendant's post-*Miranda* silence during both its cross-examination of defendant and its closing argument to impeach the defendant's exculpatory testimony. Defendant never objected to this use of his pretrial silence. Defendant was convicted as charged of armed robbery and possessing a firearm during the commission of a felony.

Defendant appealed, and the Court of Appeals reversed his convictions in a split decision. *People v*

*Borgne*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 2007 (Docket No. 269572). The majority held that the prosecution's use of defendant's post-*Miranda* silence violated his constitutional due process rights under *Doyle* and that the error constituted plain error, which required a new trial. The dissent would have affirmed the convictions on the ground that defendant's post-*Miranda* silence was admissible under an exception to *Doyle*. This Court granted leave to appeal to decide whether defendant's constitutional rights under *Doyle* had been violated and, if they had, whether reversal was warranted.

## II. STANDARD OF REVIEW

Defendant claims that his constitutional due process rights under the Fourteenth Amendment were violated. Constitutional questions are reviewed de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). Defendant concedes, however, that his claim of error was not preserved at trial. This Court reviews the effect of an unpreserved constitutional error for plain error. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

## III. ANALYSIS

### A. THE GENERAL RULE OF *DOYLE v OHIO*

The first question in this case is whether a *Doyle* violation occurred. *Doyle* dealt with a criminal defendant's Fifth Amendment right under the United States Constitution against compelled self-incrimination, which has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment.[3]

[3] See *Malloy v Hogan*, 378 US 1, 3; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

Specifically, *Doyle* analyzed a defendant's post-arrest silence during a custodial interrogation following *Miranda* warnings. In *Doyle*, the defendants were caught taking part in an illicit narcotics sale. *Doyle*, 426 US at 611-612. Once the police interceded, both defendants were given *Miranda* warnings. *Id*. at 612. At trial, the defendants argued that they had been framed by a police informant pretending to be a seller, who tricked them into trying to buy the narcotics from him. *Id*. at 612-613. The defendants had never mentioned this exculpatory story before trial. *Id*. at 613-614. The prosecution used this pretrial silence to undercut the defendants' claims of innocence as follows:

> *Q.* [*The Prosecutor*] [I]f that is all you had to do with this and you are innocent, when [the officer] arrived on the scene why didn't you tell him? [I]n any event you didn't bother to tell [the police] anything about this?
>
> *A.* [*Defendant*] No, Sir.
>
> * * *
>
> *Q.* . . . You are innocent?
>
> *A.* I am innocent. Yes Sir.
>
> *Q.* That's why you told the police . . . when they arrived . . . about your innocence?
>
> *A.* I didn't tell them about my innocence. No.
>
> *Q.* You said nothing at all about how you had been set up?
>
> * * *
>
> *Q.* As a matter of fact, if I recall your testimony correctly, you said instead of protesting your innocence, as you do today, you said in response to a question of [defense counsel],—"I don't know what you are talking about."
>
> *A.* I believe what I said,—"What's this all about?" If I remember, that's the only thing I said. . . . I was question-

> ing, you know, what it was about. That's what I didn't know. I knew that I was trying to buy [drugs], which was wrong, but I didn't know what was going on. I didn't know that [the complaining witness] was trying to frame me, or what-have-you.
>
> *Q.* All right,—But you didn't protest your innocence at that time?
>
> *A.* Not until I knew what was going on. [*Id*. at 614, 614 n 5.]

The prosecutor in *Doyle* also referred to the defendants' silence in his closing argument. *Id.* at 614 n 5. The defendants objected to each of these references. *Id.* at 614, 614 n 5. Those objections were overruled, and the defendants were convicted of various drug charges. *Id.*

The United States Supreme Court reversed the defendants' convictions and summarized its decision as follows:

> The question . . . is whether a state prosecutor may seek to impeach a defendant's exculpatory story, told for the first time at trial, by cross-examining the defendant about his failure to have told the story after receiving *Miranda* warnings at the time of his arrest. We conclude that use of the defendant's post-arrest silence in this manner violates due process, and therefore reverse the convictions of both petitioners. [*Doyle*, 426 US at 611.][4]

The *Doyle* Court reasoned that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id*. at 618. Further,

> it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the

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[4] The Court left no doubt that its holding was grounded in constitutional principles: "[T]he use for impeachment purposes of [the defendants'] silence, at the time of arrest and after receiving *Miranda* warnings, violated the *Due Process Clause of the Fourteenth Amendment*." *Id*. at 619 (emphasis added).

> time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. [*Id*. at 619 (citation and quotation marks omitted).]

And, relying on its earlier decision in *United States v Hale*, 422 US 171; 95 S Ct 2133; 45 L Ed 2d 99 (1975), the *Doyle* Court noted that "every post-arrest silence is insolubly ambiguous . . . ." *Doyle*, 426 US at 617. It is unclear whether it is merely evidence of the defendant's legitimate invocation of his right against compelled self-incrimination or evidence that he is fabricating his defense theory at trial. Therefore, "[a]fter an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right." *Id*. at 619 n 10. This Court has long approved of these principles, and we were somewhat prescient in our pre-*Doyle* acceptance of them in *People v Bobo*, 390 Mich 355, 359-361; 212 NW2d 190 (1973).

Since *Doyle*, the United States Supreme Court has articulated exactly when the general rule from that case applies. It has held that *Doyle*'s rule does not apply—i.e., a defendant's silence may be used to impeach his exculpatory testimony—if the silence occurred either (1) before arrest or (2) after arrest and before *Miranda* warnings were given. See *Fletcher v Weir*, 455 US 603, 605-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 239-240; 100 S Ct 2124; 65 L Ed 2d 86 (1980). This is because, under the United States Constitution, use of a defendant's silence only deprives a defendant of due process when the government has given the defendant a reason to believe both that he has a right to remain silent and that his

invocation of that right will not be used against him, which typically only occurs post-arrest and post-*Miranda*. See *Fletcher*, 455 US at 605-607. This Court has also adopted this structure: " '*Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances.' " *People v Cole*, 411 Mich 483, 488; 307 NW2d 687 (1981), quoting *Anderson v Charles*, 447 US 404, 408; 100 S Ct 2180; 65 L Ed 2d 222 (1980).

In the present case, we must evaluate whether *Doyle*'s general rule applies to the silence that the prosecutor used against defendant. The prosecutor referred to defendant's silence both during his cross-examination of defendant and in his closing argument. Defendant's silence was referred to in cross-examination as follows:

> *Q.* [*The Prosecutor*] And then you had the opportunity to sit down with Sargent [sic] Dunbeck here when you were under arrest?
>
> *A.* [*Defendant*] Yes.
>
> *Q.* That was at the precinct, correct?[5]
>
> *A.* Yes.
>
> *Q.* Okay. You never told Sargent [sic] Dunbeck any of this [shooting story], did you?
>
> *A.* I believe I may have said I was being shot at.
>
> *Q.* You were advised of your constitutional rights, correct?
>
> *A.* Yes, sir.
>
> *Q.* No question that you were under arrest and you didn't have to give a statement?
>
> *A.* Yes, sir.

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[5] The prosecution concedes that *Miranda* warnings had been given at this point.

*Q.* You could have a lawyer there if you wanted to?

*A.* Yes, sir.

*Q.* You had the opportunity to give your version of the event?

*A.* Yes, sir.

*Q.* You could stop answering questions at any time?

*A.* Yes, sir.

*Q.* That was no surprise to you?

*A.* Yes, sir.

*Q.* She was polite to you, she wasn't beating you over the head with a phone book or anything like that?

*A.* No.

*Q.* No problems with Sargent [sic] Dunbeck?

*A.* No.

*Q.* But you never made a statement did you?

*A.* No, I did not want to make a statement without an attorney present.

*Q.* Okay. If you were arrested and knew you were being arrested for armed robbery, somebody was accusing you of robbing them at gunpoint.

*A.* I was going to wait for an attorney to help me address the matter.

*Q.* You never gave a statement after the fact though, did you?

*A.* No, I did not. I was advised not to.

*Q.* This is the first time you're giving a statement?

*A.* Yes, sir.

*Q.* First time anyone has heard this version of events from you?

*A.* Yes, sir.

*Q.* Were you concerned about finding the person that was shooting at you that night?

*A.* Yes, I was.

* * *

*Q.* And then when you had the chance to sit down with Sargent [sic] Dunbeck you didn't say anything that [sic]?

*A.* I wanted a lawyer present for any statement given.

*Q.* You never gave a statement ever in this case?

*A.* No, I did not. After that I had retained a lawyer and was advised not to give a statement.

*Q.* Well, you didn't retain a lawyer until after the preliminary examination in this case, right?

*A.* Yes, sir.

*Q.* So when you were arrested that night [in] the early morning hours of now December 15, 2004 you didn't have a specific lawyer in mind, did you?

*A.* No.

*Q.* And it wasn't like you were in the process of consulting with the attorney, correct?

*A.* No, I wasn't.

*Q.* And then about two weeks later or so you go to the preliminary examination you still haven't retained an attorney.

*A.* I had a State appointed attorney.

*Q.* Correct. And you never gave a statement at that point with the State appointed attorney did you?

*A.* Never had a chance to.

*Q.* You didn't do it in court, did you?

*A.* Never had a chance to. I was never allowed to talk while I was in the courtroom. The lawyer advised me not to. That's when we fired the lawyer and retained Johnathan [sic] Jones.

*Q.* And up until today you still have given [sic] a statement in this case, not until the 11th hour of the trial, correct?

*A.* No, sir.

*Q.* This is basically the end of the trial right here.

*A.* Yes, sir. I wanted everyone to hear my side.

The prosecutor then used this line of questioning in closing argument as follows:

> Mr. Borgne out that night [sic] and he sits down with Sargent [sic] Dunbeck in the police station, you're under arrest for Armed Robbery, someone's saying you robbed 'em. What's your side of the story? Well, nothing. Let me think about it. A year goes by there's no statement ever given. If somebody was trying to kill Mr. Borgne he never mentions it. No concern over who's trying to kill him. There's no statement at all. Is that going to make sense, ladies and gentlemen? It defies logic.
>
> Forget whether he robbed somebody. If someone's trying to kill you and the police were there and had you in custody, you might want to at least mention it. You might want to say I'm gonna put it down and sign my name and here, for all eternity I said it. Somebody tried to kill me. Nothing like that. Nothing like that until today, a year and a day later. It defies logic. It doesn't make any sense.

We conclude that *Doyle*'s general rule applies to this line of questioning and this closing argument. The prosecutor's own questions establish that the silence to which he was referring occurred (1) after defendant was arrested, (2) after defendant had been read the *Miranda* warnings, and (3) after defendant chose to remain silent. Moreover, it is clear that the prosecutor was emphasizing the negative implications of defendant's post-arrest, post-*Miranda* silence.[6] Thus, *Doyle*'s general rule applied,

[6] This Court has recognized that the state constitution's protection against the use of a defendant's post-arrest, post-*Miranda* silence is at least as extensive as that provided by the federal constitution. See *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). Because defendant's due process rights were so clearly violated under the federal constitution in this case, however, it is not necessary to evaluate the protection provided by the state constitution.

and it should have proscribed the prosecutor's use of defendant's silence in this case.

The only way the prosecutor's use of defendant's silence would be allowed is if an exception to *Doyle* applied.

### B. THE IMPEACHMENT EXCEPTION TO *DOYLE v OHIO*

The *Doyle* Court noted a single exception to its general rule:

> [P]ost-arrest silence [can] be used by the prosecution to contradict a defendant who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest. In that situation the fact of earlier silence would not be used to impeach the exculpatory story, but rather to challenge the defendant's testimony as to his behavior following arrest. [426 US at 619 n 11.]

This exception can aptly be described as the impeachment exception.

This exception did not apply in *Doyle* because the defendants in that case never claimed to have told the authorities their exculpatory story before trial. The exception only applies when a defendant falsely testifies that he already told his exculpatory story to the authorities. At that point, the exception allows the prosecutor to impeach that averment with proof that the defendant actually remained silent before trial.

The impeachment exception only applies to allow use of a defendant's silence that would otherwise be prohibited by *Doyle*'s general rule.[7] Intuitively, in order for the impeachment exception to apply to allow use of other-

[7] In fact, the impeachment exception expressly applies when a defendant "testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Doyle*, 426 US at 619 n 11.

wise *Doyle*-prohibited silence, the door must be opened by a defendant's testimony regarding his post-arrest, post-*Miranda* conduct. Thus, a prosecutor may not use a defendant's testimony regarding his actions before *Doyle* applied as a means to open the door to impeach the defendant with his post-*Doyle* silence. *Doyle*'s general rule and its impeachment exception apply to silence occurring after a defendant has been arrested and given *Miranda* warnings. Accordingly, if the prosecution wants to use the impeachment exception, its use must be based on defendant's testimony regarding his post-arrest, post-*Miranda* actions.

In this case, the prosecutor argues that the exception applies because defendant "opened the door" to impeachment in the following portion of his direct-examination testimony:

> *Q.* [*Defense counsel*] When you came out of the building with the two officers did anyone make any comments or gestures toward you?
>
> *A.* [*Defendant*] Yes, sir.
>
> *Q.* And who was that?
>
> *A.* Caroline Kessler [the victim].
>
> *Q.* Okay.
>
> *A.* She made a comment that I—she said "that's the man, that's the man that robbed me."
>
> *Q.* Did anyone else speak that you remember?
>
> *A.* The officer asked me where the purse was and where the gun was. I didn't have any idea what he was talking about. I tried to describe the shooting to him and he put me in the back seat of the police car.

We conclude that the exception was not triggered by this exchange because defendant never testified that he

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*Doyle*'s reference to "arrest" encompasses both a physical seizure of one's person and advising of the right to remain silent under *Miranda*.

made post-*Miranda* attempts to explain his story. Defendant's only testimony regarding an attempt to explain his story was related to his pre-*Miranda* conduct (when he was being escorted to the police car). If the prosecutor had wanted to impeach defendant regarding this pre-*Miranda* silence, *Doyle* would have presented no prohibition. But, for whatever reason, the prosecutor chose not to so impeach defendant. Instead, the prosecutor repeatedly asked defendant why he did not explain his side of the story after being taken to the precinct and after being given *Miranda* warnings. The prosecutor also repeatedly made defendant admit that he remained silent during that time. Finally, the prosecutor used this silence in his closing argument to bolster the contention that defendant's exculpatory story was not credible. None of these uses of defendant's post-arrest, post-*Miranda* silence is supported by defendant's testimony regarding his post-arrest, post-*Miranda* actions. In sum, the defendant did not open the door to the impeachment exception with his fleeting reference to his failed attempt to tell his story before *Doyle* was even applicable.

To counter this conclusion, the prosecution relies on *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993). In *Allen*, the Court stated:

> [D]efendant did not claim to have told the police the same version of his exculpatory story upon arrest. Rather, his claim on redirect examination was that the trial was his first opportunity to tell his version of the events. We believe that this case falls within the exception permitting impeachment of a defendant's version of his postarrest behavior. Although defendant's testimony would not have permitted the prosecutor to argue that his postarrest silence was inconsistent with his claim of innocence, it did permit the prosecutor to attempt to discredit defendant's testimony by showing that defendant did have an opportu-

> nity before the trial to tell his side of the story. Having raised the issue of his opportunity to explain his version of the events, he opened the door to a full and not just a selective development of that subject. [*Id.* at 103 (citations and quotation marks omitted).]

Thus, *Allen* extended *Doyle*'s impeachment exception to include not only instances when a defendant is allegedly lying about his post-arrest behavior, but when a defendant is falsely asserting that the trial presented his first opportunity to tell his side of the case.

We do not reach the merits of this extension because the prosecution would not benefit from it in this case. Defendant was arrested in the abandoned building and immediately escorted to a police car. At trial, during direct examination, defendant testified that he unsuccessfully tried to tell his side of the story as he was being escorted to the police car. It was not until he reached the police station that he was given *Miranda* warnings and was interrogated. At that point he invoked his right to silence and, after obtaining counsel, decided to remain silent until trial. Even under *Allen*'s extension of the exception, the prosecution would be incorrect in arguing that defendant opened the door to the impeachment exception by claiming to have tried to tell his story to the arresting officers because there was no door to open at that point—*Doyle* was not even applicable at that time. Indeed, defendant had only been arrested; he had not been given *Miranda* warnings. Under United States Supreme Court precedent, the prosecutor was free to impeach defendant on his silence before *Doyle* applied, and could have asked why defendant did not tell his side of the story after being put into the police car. See footnote 7 of this opinion. But all the prosecutor's impeachment tactics here related to defendant's silence after he was brought to the precinct and given *Miranda* warnings.

Accordingly, we hold that the impeachment exception did not apply in this case, and, as noted, the general rule in *Doyle* was violated by the prosecution's use of defendant's post-arrest, post-*Miranda* silence.

### C. PLAIN ERROR AFFECTING SUBSTANTIAL RIGHTS

Recognizing that the prosecution's use of defendant's silence constituted error under *Doyle*, we must now decide whether that error merits reversing defendant's conviction. Both parties agree that this case involves an unpreserved claim of constitutional error. This Court determines whether this type of error warrants reversal under the plain-error standard of review articulated in *People v Grant*, 445 Mich 535, 547-553; 520 NW2d 123 (1994), and *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999).[8]

There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. *Carines*, 460 Mich at 763. First, there must have been an error. *Id*. Second, the error must be plain, meaning clear or obvious. *Id*. Third, the error must have affected substantial rights. *Id*. This "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings."[9] *Id*. The defendant bears the burden of establish-

[8] I continue to think that this Court erred by adopting the federal plain-error doctrine, for the reasons stated in Justice LEVIN's *Grant* dissent, and erred further by extending the doctrine to unpreserved, constitutional error, for the reasons stated in then-Justice KELLY's *Carines* dissent. See *Grant*, 445 Mich at 554-557, (LEVIN, J., dissenting); *Carines*, 460 Mich at 775-783, (KELLY, J., dissenting). Nonetheless, as I have in other cases, I recognize that *Carines* is the law of the land in Michigan. See *McNally*, 470 Mich at 5.

[9] Both this Court and the United States Supreme Court have left open the possibility that there is a category of errors for which the third prong of the plain-error standard is automatically met. See *Grant*, 445 Mich at

ing prejudice. *Id*. Fourth, the error must have "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *Id*. (quotation marks and brackets omitted).

In this case, as noted, a *Doyle* violation occurred, which equates to a legal error. Therefore, the first plain-error element is met. The second plain-error element is also met because this *Doyle* violation was clear and obvious. Indeed, absent an exception, a prosecutor is not permitted to use a defendant's post-arrest, post-*Miranda* silence against him. In this case, the prosecutor clearly and obviously used the defendant's post-arrest, post-*Miranda* silence against him. This error was plain.

The third plain-error element, however, is not met in this case because defendant cannot prove that the error affected his substantial rights by causing him prejudice. We acknowledge that it is difficult for an appellate court to know what effect the prosecutor's use of defendant's post-*Miranda* silence might have had on the jury. Nonetheless, we hold that defendant has not shown that the error is prejudicial, considering (1) the extent of the prosecutor's comments, (2) the extent to which the prosecution attempted to tie defendant's silence to his

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551-552, 552 n 30 (stating that a defendant should establish prejudice in order to avoid forfeiture of an unpreserved issue "[e]xcept, of course, in the class of cases in which prejudice is presumed"). See also *Puckett v United States*, 556 US ___; 129 S Ct 1423, 1432; 173 L Ed 2d 266 (2009) (stating that "[t]his Court has several times declined to resolve whether 'structural' errors—those that affect 'the framework within which the trial proceeds,' —automatically satisfy the third prong of the plain-error test"). In any event, this issue does not arise in this case because we agree with the United States Supreme Court's determination that a *Doyle* violation is not the type of error from which prejudice would generally be presumed. See *Brecht v Abrahamson*, 507 US 619, 629; 113 S Ct 1710; 123 L Ed 2d 353 (1993).

guilt, and (3) the relative strength of the other evidence against defendant.[10] In contrast to *People v Shafier*, 483 Mich 205; 768 NW2d 305 (2009), in which we apply these same factors, the *Doyle* error in this case does not support a finding of prejudice.

First, in this case, the prosecutor's references to defendant's post-arrest, post-*Miranda* silence, while numerous, were not pervasive. The prosecutor only referred to defendant's silence under the mistaken belief that defendant had raised the subject in his fleeting mention of having tried to tell his exculpatory story while being escorted to the police car. The prosecutor also referred to defendant's silence in closing argument, but it, again, was only an attempt to impeach defendant's exculpatory story. In comparison, in *Shafier*, the prosecutor was the first party to broach defendant's silence, bringing it up in the opening statement, and it played a major role throughout the prosecution's case-in-chief.

The second element also shows that a less prejudicial *Doyle* error occurred in this case than that in *Shafier*. Again, the prosecutor in this case used the defendant's

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[10] Federal courts of appeals have considered similar factors when evaluating whether a *Doyle* violation warrants reversal under plain-error review. See, e.g., *Guam v Veloria*, 136 F3d 648, 652-653 (CA 9, 1998). Plain-error review, as articulated in *Carines* and *Grant*, is based on the federal courts' interpretation of FR Crim P 52(b). See *Carines*, 460 Mich at 762-766; *Grant*, 445 Mich at 547-550, 552-553. Although Michigan courts are of course not bound by the federal courts' application of FR Crim P 52(b), and plain-error review is an inevitably case-specific and fact-intensive inquiry, we find the factors adopted by the federal courts of appeals useful for plain-error review in this case. While *Veloria* was a "plain error" case, the factors it used to evaluate the effect of a *Doyle* error on a trial are traceable to *United States v Newman*, 943 F2d 1155 (CA 9, 1991), which applied the "harmless beyond a reasonable doubt" standard from *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). In footnote 9 of *Carines*, this Court distinguished "plain error" review from "harmless error" review. *Carines*, 460 Mich at 764, n 9. We do not intend to nullify that distinction by our use of the *Veloria* test.

silence to argue that defendant's exculpatory story should not be believed. This use of silence did not obviate the prosecutor's need to independently prove that defendant committed the crime. And the prosecutor here presented compelling, largely consistent, untainted evidence to prove this defendant's guilt. In contrast, the evidence in *Shafier* consisted entirely of a credibility contest between the defendant and his accuser; although the accuser's sisters also testified on her behalf, their testimony contained numerous inconsistencies. Thus, the prosecution in that case, in addition to using the defendant's silence to impeach his claim of innocence, argued that the defendant was guilty because he did not verbally protest in the face of accusations of heinous crimes.[11] In contrast, the prosecution in this case did not overtly tie defendant's post-arrest, post-*Miranda* silence to its argument that defendant was guilty of the charged crime.

Finally, in evaluating the third element, we note that the compelling, untainted evidence against defendant shows how strong the prosecution's case was. First, the testimony of Kessler (the victim) is substantial in its probity regarding defendant's guilt. It is uncontested that she looked right at her assailant from an arm's-length distance when he robbed her. She then chased him in the direction of where defendant was later found. She described what her assailant was wearing,

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[11] The prosecutor in *Shafier* made the following closing argument:

> What we heard is that the defendant made no statements. We heard that he didn't ask Officer LaBonte any questions. Why? You're being arrested for [criminal sexual conduct]. You're being taken out of your home on a Sunday night. Why? Why? Because between June of 2004 and January of 2005 the defendant had been making his daughter do things that no person speaks about. Adults don't even talk about it between themselves. [*Shafier*, 483 Mich at 217.]

which generally matched defendant's clothing when he was arrested shortly thereafter. We acknowledge that Kessler's description of her assailant did not perfectly match defendant's appearance when he was arrested.[12] Yet, much of her general description of her assailant did match defendant, a Caucasian with brown hair who was wearing a blue jacket with red stripes, a hooded sweatshirt underneath the jacket, and blue jeans. Further, Kessler made numerous identifications of defendant as her assailant. She unequivocally identified defendant as her assailant as he was being escorted from the abandoned building.[13] Kessler was also able to identify defendant as her assailant when he drove past her and yelled a self-incriminating obscenity at her.[14] Here, again, Kessler made an unequivocal identification that the driver was both her assailant and defendant. This was corroborated by a bystander with whom Kessler was talking at the time. Finally, Kessler made two unequivocal in-court identifications of defendant as her assailant.

We also note the uniquely incriminating aspect of the blue van driver's statement to the victim. This is the equivalent of an open confession to the crime. And, with

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[12] Kessler wrongly described defendant as being clean-shaven and five feet, five inches tall, when in actuality defendant had facial hair and is five feet, nine inches tall. In addition, a police officer testified that Kessler "described defendant as wearing 'a medium light blue jacket with red strips [sic, stripes] or red lettering,' whereas the lettering on the jacket defendant was wearing was white." Kessler's direct testimony, however, was more accurate; when asked what her assailant was wearing she stated, "[B]lue jacket with red strips [sic, stripes] with white lettering on the back of it."

[13] The arresting officers testified that, upon seeing defendant, Kessler yelled out, "That's him, that's the man that robbed me."

[14] Some days after the robbery, Kessler had stopped her car for a minor traffic accident in which she was involved. While she was standing outsider her car, a blue van drove by, stopped, and the driver yelled, "I'm the motherfucker that robbed you, ha, ha, ha."

two witnesses corroborating it, we accept as true that someone drove by the victim and shouted the obscene confession. It strains reason to contemplate who, other than the actual assailant, would have done such an act. This makes the victim's unwavering identifications of defendant as both the driver and her assailant more credible.

Finally, the circumstances leading to defendant's apprehension are also highly incriminating. Shortly after the robbery, defendant was found crouching in the corner of an abandoned building that was only a few blocks from the crime scene. The building is located in the direction that the assailant fled from the crime scene. Moreover, after being robbed, Kessler cried for help and a bystander attempted to follow the assailant. The bystander was later found waiting outside the abandoned building where defendant was found.[15]

Each of these pieces of evidence is untainted and independent from the *Doyle* violation in this case. And, in the aggregate, they stand in stark contrast to the sometimes inconsistent evidence that was presented against the defendant in *Shafier*. There, the only evidence against the defendant was the testimony of his adopted daughters, who were shown to be children caught in a parental dispute. Moreover, the daughters' allegations were somewhat incongruous. Thus, in comparison to the case against the defendant in *Shafier*, the strength of the evidence against this defendant is substantial.

In sum, after analyzing these three factors, we conclude that defendant has not met his burden of proving

[15] Defendant claimed that he had fled to the building after hearing gunshots while he was waiting for a taxi across the street from the crime scene. However, he did not produce any witnesses in the vicinity of the crime scene to corroborate the gunshots. And none of the prosecution witnesses, who were around the crime scene, testified to hearing any gunshots.

prejudice under *Carines*.[16] Without proof of prejudice, analysis of the plain-error element is irrelevant; therefore, defendant is not entitled to appellate relief under *Carines*.[17]

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[16] In reaching a different conclusion, the Court of Appeals majority focused on the errors in Kessler's description of defendant's height, facial hair, and jacket-lettering color. The Court of Appeals majority also noted that this case was a credibility contest and that "[i]t is not a stretch to conclude that, in the absence of the tainted evidence and arguments, the jurors might have considered defendant's version of events plausible and might have found the discrepancies in the case sufficient to raise a reasonable doubt regarding defendant's guilt." *Borgne*, *supra* at 5. The Court of Appeals majority concluded that it "simply cannot conclude, given the facts of this case, that the flagrant and repeated violation did not affect the outcome of the lower court proceedings." *Borgne*, *supra* at 6.

We disagree with this conclusion and reverse it. First, we believe that Kessler's descriptive errors are not so damaging to her credibility that it establishes prejudice. On the contrary, they were minor errors in light of the abundant and untainted incriminating evidence. Second, the Court of Appeals simply applied the wrong legal standard to gauge the effect of those inaccuracies. Indeed, the test under *Carines* and *Grant* is not, as the Court of Appeals articulated, whether it is a "stretch to conclude" that the defendant "might have" been convicted without the *Doyle*-violative evidence and arguments. It is also not whether the appellate court "cannot conclude [that the] violation did not affect the outcome of the lower court proceedings." The question is whether the *defendant can* show prejudice, i.e., that "the error *affected* the outcome of the lower court proceedings." *Carines*, 460 Mich at 763 (emphasis added). Thus, the Court of Appeals applied the wrong standard to the facts of this case. This may have caused its incorrect legal conclusion.

[17] I do, nonetheless, acknowledge that the *Doyle* errors in this case present a close question regarding whether they "seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *Carines*, 460 Mich at 763 (quotation marks and brackets omitted). But, as the *Carines* paradigm currently stands, a defendant would not be entitled to relief if, despite the error seriously affecting the fairness and integrity of the trial, he could not prove prejudice. This seems to be an anomaly that should not stand, and it is another reason that I continue to disagree with the *Carines* and *Grant* procedure. As has long been my position, I would instead subject this unpreserved constitutional error to harmless-error analysis. Yet, accepting that my position has yet to win the favor of this Court, I offer no opinion regarding that standard's application in this case.

It is, nevertheless, important to make clear that the prosecutor's violation of *Doyle* in this case is not taken lightly. *Doyle* violations are constitutional violations, and prosecutors commit an offense against the constitution and its principles by misdeeds such as those seen in this case. Had it not been for the wealth of incriminating evidence against defendant (which begs the question of why a prosecutor would even risk a *Doyle* violation), the prosecutor's trial victory would not be affirmed. To be clear, the prosecutor has not won this appeal; rather, the defendant has lost it because he has not proven that the *Doyle* violation entitles him to a new trial under the plain-error doctrine.

## IV. CONCLUSION

We agree with the Court of Appeals holding that a *Doyle* violation occurred in this case. But the defendant's convictions are affirmed, and the Court of Appeals is reversed on that issue, because defendant did not show plain error affecting his substantial rights under *Carines*.

Reversed.

KELLY, C.J., and WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with CAVANAGH, J.

KELLY, C.J. (*concurring*). I concur in the majority opinion. However, I continue to believe that this Court should not have extended the plain-error doctrine to the kind of unpreserved constitutional error present in this case. As I stated in my dissent in *People v Carines*, I believe that, when there is unpreserved constitutional error, a defendant's conviction should be affirmed only " 'if the reviewing court is satisfied that the error is harmless beyond a reasonable doubt.' "[1]

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[1] *People v Carines*, 460 Mich 750, 778; 597 NW2d 130 (1999) (KELLY, J., dissenting), quoting *People v Graves*, 458 Mich 756, 482; 581 NW2d 229 (1998).

It appears that, under the *Carines* plain-error standard, there is never error requiring reversal when there is a "wealth of incriminating evidence."[2] Under those circumstances, the judicial system essentially exempts criminal defendants from the constitutional right to due process of law.

In the interest of preserving the integrity of the judicial system, we should re-elevate due process to its proper place. The present blatant and repeated abrogation of people's constitutional rights threatens the foundation of the court system.

I recognize that *Carines* remains the law in Michigan and cannot be ignored, but I believe the Court should reexamine it at the earliest possible moment.

YOUNG, J. (*concurring*). I concur in the result and analysis of the majority opinion. I write separately because I will not join footnotes 8 and 17, in which Justice CAVANAGH "dissents" from the *Carines*[1] plain-error analysis in his own opinion. Justice CAVANAGH is entitled to such views, but his opposition to this Court's precedent and preservation of his view are better placed in a concurring statement.

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[2] *Ante* at 203.

[1] *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

PEOPLE v SHAFIER

Docket No. 135435. Argued January 21, 2009 (Calendar No. 2). Decided July 1, 2009.

Harold E. Shafier III was charged in the Allegan Circuit Court, George R. Corsiglia, J., with three counts of first-degree criminal sexual conduct (CSC) and two counts of second-degree CSC on the basis of allegations that he had sexually abused his adopted minor daughter. At trial, the prosecution made multiple, direct references to the fact that the defendant had remained silent after being arrested and advised of his rights under *Miranda v Arizona*, 384 US 436 (1966). The defendant appealed his convictions, claiming that the prosecutor's references to his post-arrest, post-*Miranda* silence violated his Fourteenth Amendment due process rights under *Doyle v Ohio*, 426 US 610 (1976). The Court of Appeals, SCHUETTE, P.J., and O'CONNELL, J. (DAVIS, J., dissenting), affirmed, holding that, although the prosecutor's repeated references to the defendant's silence amounted to constitutional error, reversal was not required because the defendant had not established that the error affected his substantial rights. 277 Mich App 137 (2007). The Supreme Court granted the defendant's application for leave to appeal. 480 Mich 1193 (2008).

In an opinion by Justice CAVANAGH, joined by Chief Justice KELLY and Justices WEAVER, CORRIGAN, MARKMAN and HATHAWAY, the Supreme Court *held*:

The prosecution's repeated references to the defendant's post-arrest, post-*Miranda* silence violated the defendant's constitutional due process rights under the United States Constitution. Because the violation amounted to plain error that affected the defendant's substantial rights and seriously affected the fairness and integrity of the trial, his conviction must be reversed and the case must be remanded to the trial court for further proceedings.

1. Under *Doyle* and its progeny, references to a defendant's post-arrest, post-*Miranda* silence are generally prohibited unless the reference was so minimal that the silence was not

submitted to the jury as evidence from which it could draw any permissible inference. In this case, the prosecution made repeated references to the defendant's silence throughout the trial, both as substantive evidence of the defendant's guilt and for purposes of impeachment, thereby violating the defendant's federal due process rights.

2. Because the *Doyle* violation in this case is an unpreserved constitutional error, it is reviewed for plain error to determine whether the error warrants reversal. First, the prosecution's references to the defendant's post-arrest, post-*Miranda* silence constituted error, and the defendant did not waive his rights. Second, this error was plain, as it was an obvious violation of the defendant's due process rights under *Doyle* and its progeny. Third, the defendant established that the error was prejudicial, considering the frequency and extent of the prosecutor's comments, the extent to which the prosecutor attempted to tie the defendant's silence to his guilt, and the overall strength of the case against the defendant and the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to the defendant's silence. Fourth, this is the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial. The violation of the defendant's due process rights rendered the trial fundamentally unfair and cast a shadow on the integrity of our state's judicial processes. Therefore, reversal is warranted.

Chief Justice KELLY, concurring, wrote separately to reiterate her view that, in cases involving unpreserved constitutional error, a defendant's conviction should be affirmed only if the reviewing court is satisfied that the error is harmless beyond a reasonable doubt. She further stated that the refusal to find error requiring reversal under the plain-error standard set forth in *People v Carines*, 460 Mich 750 (1999), in cases where there is a "wealth of incriminating evidence" essentially exempts criminal defendants from the constitutional right to due process of law, and therefore that standard should be reexamined at the earliest possible moment.

Justice YOUNG, concurring, joined all but footnote 14 of the majority opinion, stating that the views contained therein regarding the plain-error analysis of *People v Carines* would have been better placed in a concurring statement.

Reversed and remanded to the trial court for further proceedings.

1. CONSTITUTIONAL LAW — CRIMINAL LAW — RIGHT TO REMAIN SILENT — POST-ARREST SILENCE — EVIDENCE OF POST-ARREST SILENCE.

The prosecution generally may not refer at trial to the silence of a defendant who has been arrested and informed of his or her right to remain silent (US Const, Ams V, XIV).

2. CONSTITUTIONAL LAW — CRIMINAL LAW — RIGHT TO REMAIN SILENT — POST-ARREST SILENCE — EVIDENCE OF POST-ARREST SILENCE — PLAIN-ERROR REVIEW — PREJUDICE TO A CRIMINAL DEFENDANT.

To determine whether the prosecution's improper use at trial of a defendant's silence constitutes prejudicial plain error, courts should consider the extent of the prosecution's references to the silence, the extent to which the prosecution attempted to tie the defendant's silence to his or her guilt, and the overall strength of the case against the defendant when considered in light of the degree to which the jury's assessment of the evidence might have been affected by the prosecution's references to the defendant's silence.

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, *Frederick Anderson*, Prosecuting Attorney, and *Douglas E. Ketchum*, Assistant Prosecuting Attorney, for the people.

*Christine DuBois* for the defendant.

Amicus Curiae:

*John Hallacy*, *Kym L. Worthy*, and *Timothy A. Baughman* for the Prosecuting Attorneys Association of Michigan.

CAVANAGH, J. We granted leave to appeal in this case to determine whether the prosecution's references to defendant's post-arrest, post-*Miranda*[1] silence violated defendant's constitutional due process rights, and, if so, whether defendant is entitled to a new trial.[2] We

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] The issues in this case are similar to those presented in another case we decide today: *People v Borgne*, 483 Mich 178; 768 NW2d 290. Accordingly,

hold that defendant's due process rights were violated. Further, the violation amounted to plain error that affected defendant's substantial rights and seriously affected the fairness and integrity of the trial. We reverse defendant's conviction and remand to the trial court for further proceedings.

## I. BASIC FACTS AND PROCEEDINGS

Defendant, Harold E. Shafier III, was charged with three counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct for allegedly sexually assaulting his 13-year-old daughter, AS. Defendant and his wife adopted AS and her three sisters in 1995. In January 2005, defendant's wife reported to the police that AS was alleging that she had been sexually assaulted by defendant. Defendant was arrested immediately. During the arrest, defendant asked why he was being arrested, and the officer told him that he was under arrest for criminal sexual conduct. The officer gave him the *Miranda* warnings, and defendant remained silent thereafter.

At trial, AS testified that defendant sexually assaulted her on a daily basis from July 2004 until he was arrested. She testified that the abuse escalated over time from kissing and touching to digital penetration and oral sex.[3] She listed a few settings where the abuse occurred but initially had some difficulty describing

much of the analysis in this opinion is very similar, and at times the same, as that in *Borgne*. However, the cases were argued separately and they are distinct enough that we have not combined them in one opinion.

[3] AS's allegations escalated over time. Initially, AS told her mother that defendant had touched her breasts and genital area. At the preliminary examination, AS alleged that there had been incidents involving oral sex. Finally, at trial, AS alleged specific incidents that she had not previously mentioned.

specific incidents. AS described one instance in which one of her sisters walked in while defendant was performing oral sex on AS. The sister, age 11, testified and corroborated this story, although there were discrepancies between their accounts.[4] Another sister, age 17, testified that she once walked into the family's barn and found AS and defendant standing close to each other and that it appeared to her that they were about to kiss or had just been kissing.[5] AS and her sisters testified that defendant would sometimes take one or more of the girls to the store with him upon their request and buy everyone candy, but that he probably bought AS the most candy. Defendant's wife testified that she thought defendant had been favoring AS by taking her shopping and visiting her school.

Defendant testified in his own defense and adamantly maintained that he had never sexually assaulted any of his daughters. He denied the factual circumstances of the specific allegations that AS and her sisters made. He stated that it would have been physically impossible for the alleged incident of oral sex to have occurred in the manner described by AS and her sister because the table on which it was supposed to have occurred was covered with boxes at the time. Defendant also denied favoring AS. He stated that he had begun stopping at AS's school to

[4] The discrepancies were in regard to when the incident occurred, the exact physical positions of AS and defendant, and the actions of each of the three people after the sister's interruption.

[5] This sister also testified that defendant had sexually assaulted her when she was younger. At the preliminary examination, she stated that defendant had touched her breasts twice, but one of the times was accidental. At trial, she alleged for the first time that defendant had regularly touched her, kissed her, and digitally penetrated her when she was between the ages of 11 and 13.

check her progress because she was the only child not doing well in school. He testified that, after school, he often took one or more of the children shopping with him and would buy candy for any of the children who requested it.

Defendant testified that he suspected that his wife encouraged their daughters to make false allegations against him because she was jealous of the time he was spending with their daughters. It is undisputed that up to and during the period of the alleged incidents, the relationship between defendant and his wife had deteriorated. Defendant testified that he had become increasingly angry with his wife's treatment of the children and consciously decided to become more involved in the children's lives in July 2004. Defendant stated that his wife had reacted with jealousy and anger as he increased the time he spent with the girls.

At trial, the prosecutor referred to defendant's post-*Miranda* silence multiple times, including in his opening and closing statements, direct and redirect examinations of the arresting officer, and cross-examination of defendant. Defense counsel objected during the prosecutor's cross-examination of defendant, but the basis for the objection was unclear.

After two hours of deliberation, the jury announced that it was deadlocked. The court instructed the jury to continue to deliberate. On the second day, after rehearing portions of the trial testimony, the jury acquitted defendant of three counts of first-degree criminal sexual conduct and convicted him of two counts of second-degree criminal sexual conduct.

Defendant appealed, and a divided Court of Appeals panel affirmed his convictions. *People v Shafier*, 277 Mich App 137; 743 NW2d 742 (2007). The major-

ity held that the prosecutor's use of defendant's post-*Miranda* silence in his case-in-chief violated defendant's constitutional rights, reasoning that the prosecutor's references "were not inadvertent and they were numerous" and that "the prosecutor asked the jury to infer that defendant was guilty because he did not take the affirmative step of questioning the arresting officer . . . or declaring his innocence . . . ." *Shafier*, 277 Mich App at 140, 142-143. The majority held that defendant was not entitled to a new trial, however, because defendant did not establish that the violation was plain error affecting his substantial rights. *Id.* at 143-144. The Court of Appeals dissent would have granted defendant a new trial because "[t]here is no way to know what effect those breaches had on the jurors' minds, particularly considering the jurors' initial announcement that they were deadlocked." *Id.* at 145 (DAVIS, J., dissenting). This Court granted defendant's application for leave to appeal.

## II. STANDARD OF REVIEW

Defendant raises an unpreserved claim of constitutional error. Constitutional questions are reviewed de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008). This Court reviews the effect of an unpreserved constitutional error under the plain-error standard. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

## III. ANALYSIS

### A. VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS

Defendant argues that his constitutional due process rights were violated under *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976), and its

progeny. We hold that the prosecution's repeated references to defendant's post-arrest, post-*Miranda* silence violated defendant's due process rights under the United States Constitution.[6]

1. RULE OF *DOYLE v OHIO* AND ITS PROGENY

The United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V.[7] *Miranda v Arizona*, 384 US 436, 444-439, 467-468; 86 S Ct 1602; 16 L Ed 2d 694 (1966), established "guidelines for law enforcement agencies and courts to follow" in order to protect the privilege against compelled self-incrimination during custodial police interrogations. Thus, under *Miranda*, every person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning. *Id.* at 444-445. As a general rule, if a person remains silent after being arrested and given *Miranda* warnings, that silence may not be used as evidence against that person. *Wainwright v Greenfield*, 474 US 284, 290-291; 106 S Ct 634; 88 L Ed 2d 623 (1986). Therefore, in general, prosecutorial references to a defendant's post-arrest, post-*Miranda* silence violate a defendant's due process rights under the Fourteenth Amend-

[6] This Court has recognized that the Michigan Constitution's protection against the use of a defendant's post-arrest, post-*Miranda* silence is at least as extensive as that provided by the United States Constitution. See *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990). Because defendant's due process rights were so clearly violated under the United States Constitution in this case, however, it is not necessary to evaluate the protection provided by the state constitution.

[7] The Fifth Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See *Malloy v Hogan*, 378 US 1, 3; 84 S Ct 1489; 12 L Ed 2d 653 (1964).

ment of the United States Constitution.[8] See *Wainwright*, 474 US at 290-291; *Doyle*, 426 US at 618-620.

The United States Supreme Court has explained the rationales behind the constitutional prohibition against the use of a defendant's post-arrest, post-*Miranda* silence. To begin with, a defendant's silence may merely be the defendant's invocation of the right to remain silent, as opposed to a tacit acknowledgement of guilt. "[E]very post-arrest silence is insolubly ambiguous . . . ." *Doyle*, 426 US at 617. Further, *Miranda* warnings provide an implicit promise that a defendant will not be punished for remaining silent. *Id.* at 618. Once the government has assured a person of his right to remain silent, "breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Wainwright*, 474 US at 291.

Consistent with these rationales, a defendant's post-arrest, post-*Miranda* silence cannot be used to impeach a defendant's exculpatory testimony, see *Doyle*, or as direct evidence of defendant's guilt in the prosecutor's

[8] The United States Constitution does not prohibit impeaching a defendant with pre-arrest silence. See *Fletcher v Weir*, 455 US 603, 605-607; 102 S Ct 1309; 71 L Ed 2d 490 (1982); *Jenkins v Anderson*, 447 US 231, 239-240; 100 S Ct 2124; 65 L Ed 2d 86 (1980). Federal courts of appeals are split on whether it violates a defendant's Fifth Amendment rights under the United States Constitution for pre-*Miranda* silence to be used in the prosecution's case-in-chief. See generally *Combs v Coyle*, 205 F3d 269, 285 (CA 6, 2000) (summarizing the position of each circuit for pre-arrest, pre-*Miranda* silence). See also *United States v Frazier*, 408 F3d 1102, 1111 (CA 8, 2005) (holding that post-arrest, pre-*Miranda* silence may be used in the prosecution's case-in-chief in some circumstances); *United States v Moore*, 322 US App DC 334, 344; 104 F3d 377 (1997) (holding that post-arrest, pre-*Miranda* silence may not be used in the prosecution's case-in-chief). This Court has not addressed this issue. See *McNally*, 470 Mich at 7 n 4. These issues are not before this Court today, and this opinion has no effect on their resolution.

case-in-chief, see *Wainwright*, 474 US at 292-294.[9] "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance that the invocation of those rights will not be penalized." *Id*. at 295. There are limited exceptions to this general rule, but none applies here.[10] This Court has adopted this understanding of a defendant's due process rights and stated that post-arrest, post-*Miranda* silence "may not be used substantively or for impeachment purposes since there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge." *People v McReavy*, 436 Mich 197, 218; 462 NW2d 1 (1990).

In general, any reference to a defendant's post-arrest, post-*Miranda* silence is prohibited, but in some circumstances a single reference to a defendant's silence may not amount to a violation of *Doyle* if the

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[9] In *Doyle*, the Court held that the prosecution could not use a defendant's post-arrest, post-*Miranda* silence to impeach the credibility of a defendant's exculpatory testimony. *Doyle*, 426 US at 618. The prosecution attempted to use the defendants' silence to impeach the credibility of the defendants' claim, told for the first time at trial, that they had been framed. *Id*. at 611-614. The Court reasoned that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." *Id*. at 618.

In *Wainwright*, the Court held that the prosecution could not use a defendant's post-arrest, post-*Miranda* silence to meet the prosecutor's burden of showing beyond a reasonable doubt that the defendant was not insane. *Wainwright*, 474 US at 286, 289-296. The Court explained that *Doyle*'s reasoning applied with equal force because "[t]he implicit promise, the breach, and the consequent penalty are identical in both situations." *Id*. at 292.

[10] For example, in *Doyle*, the Court noted that the prosecution may use evidence of a defendant's post-arrest, post-*Miranda* silence to challenge a defendant "who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." *Doyle*, 426 US at 619 n 11. This exception is not applicable here because defendant never claimed that he told the police an exculpatory story after he was given his *Miranda* warnings.

reference is so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference . . . ." *Greer v Miller*, 483 US 756, 764-765; 107 S Ct 3102; 97 L Ed 2d 618 (1987). See also *People v Dennis*, 464 Mich 567, 577-580; 628 NW2d 502 (2001). For example, in *Greer*, there was no *Doyle* violation where the defense counsel immediately objected to a question by the prosecution about defendant's post-arrest, post-*Miranda* silence, and the trial court twice gave a curative instruction to the jury.[11] *Greer*, 483 US at 759, 764-765.

2. FURTHER BACKGROUND

In this case, the prosecutor made repeated references to defendant's post-arrest, post-*Miranda* silence. In the prosecutor's opening statement, he said that the jury would hear that after defendant was arrested, he "didn't say anything, not a word. [The officer] told him why he was being arrested, he was arrested and no statements were made." Next, in the presentation of the case-in-chief, the prosecutor deliberately elicited testimony from the arresting officer regarding defendant's post-arrest, post-*Miranda* silence. The following exchange occurred regarding the circumstances of the arrest:

> *A.* [*The Arresting Officer*] I asked [defendant] if he knew what we were here about—what we were there about and he stated he did not. I then placed him under arrest and informed him he was under arrest for criminal sexual conduct, advised him of his *Miranda* rights which is the right to remain silent and I'm sure we've all seen that, and I placed him in the rear of my patrol vehicle. He did not make any statements to me prior to getting to jail.

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[11] In *Greer*, the defendant testified that he was innocent, but two other people had confessed their guilt to him. *Greer*, 483 US at 758. On cross-examination, the prosecutor asked the defendant, " 'Why didn't you tell this story to anybody when you got arrested?' " *Id*. at 759. Defense counsel immediately objected, and the trial court sustained the objection and twice instructed the jury to ignore the reference. *Id.*

*Q.* [*The Prosecutor*] So he never made any statements to you. He was fully aware of what you were arresting him for?

*A.* Not reference [sic] the criminal sexual conduct, correct.

On cross-examination, the defense attorney asked the arresting officer questions that clarified that the officer did not ask defendant any questions after arresting him and giving him his *Miranda* warnings. On the prosecutor's redirect examination, the prosecutor followed up with additional questions regarding defendant's silence:

*Q.* [*The Prosecutor*] [Defendant] didn't make any statements about the CSC charge, did he?

*A.* [*The Arresting Officer*] No, he did not.

*Q.* Never asked you about it?

*A.* No, he did not.

After the prosecutor concluded presentation of his case, defendant testified in his own defense. Defense counsel asked why defendant was silent after he was given his *Miranda* warnings, and defendant stated that it was because he "watched a lot of TV and with something like that I didn't know what to say, I mean I was shocked . . . so I just kept my mouth shut and I was going to wait until I talked to somebody."[12] When the prosecutor cross-examined defendant, the following exchange occurred:

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[12] The full exchange between defense counsel and defendant regarding defendant's silence was as follows:

*Q.* [*The Defense Counsel*]. Were you nervous [when being arrested]?

*A.* [*Defendant*]. Oh yes, scared shit—scared to death.

*Q.* Did you—what—you just got silent then?

*A.* Yeah, I didn't say anything, yeah.

*Q.* Okay. Why did you not say anything?

*Q.* [*The Prosecutor*] [Y]ou didn't say a single word about being arrested for criminal sexual conduct. Is that right?

*A.* [*Defendant*] When I got to the police station—

*Q.* Yes or no. Is that right?

*A.* Yes.

Finally, the prosecutor began his closing argument by highlighting the significance of defendant's silence. The prosecutor stated:

> What we heard is that the defendant made no statements. We heard that he didn't ask Officer LaBonte any questions. Why? You're being arrested for CSC. You're being taken out of your home on a Sunday night. Why? Why? Because between June of 2004 and January of 2005 the defendant had been making his daughter do things that no person speaks about. Adults don't even talk about it between themselves.

3. APPLICATION OF *DOYLE v OHIO* AND ITS PROGENY

It is clear that the prosecution's use of defendant's silence violated defendant's due process rights under the federal constitution.

The prosecutor's examination of the arresting officer established that the silence to which the prosecutor referred occurred post-arrest and post-*Miranda*. A ref-

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*A.* Just watched a lot of TV and with something like that I didn't know what to say, I mean I was shocked that he even said that [I was being arrested for CSC] so I just kept my mouth shut and I was going to wait until I talked to somebody.

*Q.* Was he [the officer] cooperative with you in talking with you or was he pretty short with you?

*A.* He just told me what I had to—what he told, what he felt I had to know and that was it, yeah.

*Q.* Okay. So, he wasn't volunteering information.

*A.* No.

erence to a defendant's post-arrest, post-*Miranda* silence generally constitutes a *Doyle* violation unless the reference was so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference . . . ." *Greer*, 483 US at 764-765. In this case, the prosecution clearly crossed this line by repeatedly using defendant's post-arrest, post-*Miranda* silence as evidence of defendant's guilt in its case-in-chief and to impeach the defendant's testimony that he was innocent. The prosecutor impliedly asked the jury to infer guilt from defendant's silence through references to defendant's silence in his opening statement and his examination of the arresting officer. In his closing argument, the prosecutor expressly asked the jury to infer guilt from defendant's silence by explaining that the reason defendant had been silent was because "the defendant had been making his daughter do things that no person speaks about." Further, in his cross-examination of defendant, the prosecutor attempted to use defendant's silence to impeach defendant's credibility.

In sum, the state gave defendant his *Miranda* warnings, which constituted an implicit promise that his choice to remain silent would not be used against him. The state then breached that promise by attempting to use defendant's silence as evidence. Depending on the circumstances of the case, even a single reference to a defendant's post-arrest, post-*Miranda* silence, either as evidence of substantive guilt or impeachment, may violate a defendant's due process rights. Where, as in this case, the prosecution makes repeated references to a defendant's silence, both as substantive evidence of guilt and for purposes of impeachment, the violation is clear. Therefore, we affirm the Court of Appeals holding that the prosecutor's repeated references to defendant's

post-arrest, post-*Miranda* silence violated the due process rights guaranteed to defendant by the United States Constitution.

### B. PLAIN-ERROR REVIEW

The *Doyle* violation in this case is an unpreserved, constitutional error.[13] This Court determines whether this type of error warrants reversal under the plain-error standard of review articulated in *People v Grant*, 445 Mich 535, 547-553; 520 NW2d 123 (1994), and *People v Carines*, 460 Mich 750, 765-766; 597 NW2d 130 (1999).[14]

#### 1. ELEMENTS OF PLAIN-ERROR REVIEW

There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. *Carines*, 460 Mich at 763. First, there must have been an error. *Id.* "Deviation from a legal rule is 'error' unless the rule has been waived." *Grant*, 445 Mich at 548 (quotation marks and citation omitted). Second, the error must be plain, meaning clear or obvious. *Carines*, 460 Mich at 763. Third, the error must have affected substantial rights. *Id.* This

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[13] The Court of Appeals dissent suggests that defendant may have preserved this issue. *Shafier*, 277 Mich App at 144-145 (DAVIS, J., dissenting). We will not address the issue of preservation, however, because the parties agreed that defendant failed to preserve an objection to any constitutional error in this case.

[14] I continue to think that this Court erred by adopting the federal plain- error doctrine, for the reasons stated in Justice LEVIN's *Grant* dissent, and erred further by extending the doctrine to unpreserved, constitutional error, for the reasons stated in then-Justice KELLY's *Carines* dissent. See *Grant*, 445 Mich at 554-557 (LEVIN, J., dissenting); *Carines*, 460 Mich at 775-783 (KELLY, J., dissenting). Nonetheless, as I have done in other cases, I recognize that *Carines* is the law in Michigan. See *McNally*, 470 Mich at 5.

"generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings."[15] *Id.* The defendant bears the burden of establishing prejudice. *Id.* Fourth, if the first three requirements are met, reversal is only warranted if the error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* (quotation marks and brackets omitted).

2. APPLICATION OF PLAIN-ERROR REVIEW

In this case, the four requirements of plain-error review are met, and, therefore, reversal is warranted.

First, there was an error. Defendant's due process rights were violated by the prosecution's references to defendant's post-arrest, post-*Miranda* silence, and defendant did not waive his rights.

Second, the error was plain. As discussed, the error was an obvious violation of a defendant's due process rights under *Doyle* and its progeny.

Third, defendant has shown that the error affected his substantial rights. Under the third prong of plain-

[15] Both this Court and the United States Supreme Court have left open the possibility that there is a category of errors for which the third prong of the plain-error standard is automatically met. See *Grant*, 445 Mich at 551-552, 552 n 30 (stating that a defendant should establish prejudice in order to avoid forfeiture of an unpreserved issue "[e]xcept, of course, in the class of cases in which prejudice is presumed"); *Carines*, 460 Mich at 763 n 8. See also *Puckett v United States*, 556 US ___; 129 S Ct 1423, 1432; 173 L Ed 2d 266 (2009) (stating that "[t]his Court has several times declined to resolve whether 'structural' errors—those that affect 'the framework within which the trial proceeds,'—automatically satisfy the third prong of the plain-error test"). In any event, this issue does not arise in this case because we agree with the United States Supreme Court's determination that a *Doyle* violation is not the type of error from which prejudice would generally be presumed. See *Brecht v Abrahamson*, 507 US 619, 629; 113 S Ct 1710; 123 L Ed 2d 353 (1993).

error review, a defendant must generally show that the error was prejudicial. It is difficult for an appellate court to know what effect the prosecutor's repeated use of defendant's post-*Miranda* silence might have had on the jury. Nonetheless, we hold that defendant has shown that the error is prejudicial, considering (1) the extent of the prosecutor's comments, (2) the extent to which the prosecutor attempted to tie defendant's silence to his guilt, and (3) the overall strength of the case against defendant when considered in light of the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to defendant's silence.[16] In contrast to the other *Doyle* case we decide today, *People v Borgne*, 483 Mich 178; 768 NW2d 290 (2009), in which we consider these same factors, the error in this case was clearly prejudicial.

To begin with, the more extensive a prosecutor's references to a defendant's post-arrest, post-*Miranda* silence, the more likely it is that the references had a

[16] Federal courts of appeals have considered similar factors when evaluating whether a *Doyle* violation warrants reversal under plain-error review. See, e.g., *Guam v Veloria*, 136 F3d 648, 652 (CA 9, 1998). Plain-error review, as articulated in *Carines* and *Grant*, is based on the federal courts' interpretation of FR Crim P 52(b). See *Carines*, 460 Mich at 762-766; *Grant*, 445 Mich at 547-550, 552-553. Although Michigan courts are of course not bound by the federal courts' application of FR Crim P 52(b), and plain-error review is an inevitably case-specific and fact-intensive inquiry, we find the factors used by the federal courts of appeals useful for plain-error review in this case. While *Veloria* was a "plain error" case, the factors used there to evaluate the effect of a *Doyle* error on a trial are traceable to *United States v Newman*, 943 F2d 1155 (CA 9, 1991), which applied the "harmless beyond a reasonable doubt" standard from *Chapman v California*, 386 US 18; 87 S Ct 824; 17 L Ed 2d 705 (1967). In footnote 9 of *Carines*, this Court distinguished "plain error" review from "harmless error" review. *Carines*, 460 Mich at 764 n 9. We do not intend to nullify that distinction by our use of the *Veloria* test.

prejudicial effect. In this case, the prosecutor's references to defendant's silence were frequent throughout the trial, from the prosecutor's opening and closing statements, to his case-in-chief, to his cross-examination of defendant. The pervasiveness of the prosecutor's references to defendant's silence increases the likelihood that the references had a prejudicial effect.

Further, a prosecutor's references to a defendant's post-arrest, post-*Miranda* silence are more likely to be prejudicial the more directly or explicitly the prosecutor uses the silence to challenge a defendant's credibility or show a defendant's guilt. In this case, the references to defendant's post-arrest silence were not inadvertent references that the jury might not have connected to defendant's guilt. Instead, the prosecutor referred to defendant's silence in a manner that deliberately challenged defendant's credibility and his claim of innocence. In addition, the prosecutor impliedly suggested that defendant's silence was evidence of his guilt and even explicitly asked the jury to infer guilt from defendant's silence in his closing argument. In comparison, in *Borgne*, the prosecutor did use the defendant's silence to challenge the credibility of defendant's exculpatory story, but he did not go so far as to explicitly or impliedly suggest to the jury that it should infer guilt from the silence.[17]

Finally, the degree to which prosecutorial references to a defendant's post-arrest, post-*Miranda* silence are prejudicial depends on the overall strength of the case

[17] This comparison is not intended to suggest that a defendant's silence must be used in the prosecutor's case-in-chief in order to be prejudicial; it is certainly conceivable that the use of a defendant's silence only for impeachment purposes could be prejudicial, depending on a case's circumstances. See, e.g., *Veloria*, 136 F3d at 652-653.

against the defendant and the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to a defendant's silence. In this case, the strength of the prosecutor's overall case against defendant hinged entirely on the jury's assessments of the witnesses' credibility. It consisted mainly of AS's testimony and the corroborating testimony of her sisters, but the sisters' testimony conflicted at times with AS's. The jury's acquittal of defendant on the charges of first-degree criminal sexual conduct suggests that at least some of the jurors questioned AS's credibility as compared to defendant's, even with the prosecutor's impermissible references to defendant's silence. The trial was essentially a credibility contest between defendant and AS and her sisters, and the prosecutor's repeated references to defendant's silence might have undermined defendant's credibility. In contrast, in *Borgne*, the degree to which the jury would have found much of the evidence credible was not directly affected by the prosecutor's references to the defendant's silence. Specifically, the prosecution in *Borgne* presented physical evidence against the defendant and eyewitness testimony corroborating the victim's account of the events.

In sum, in this case, in light of the prosecutor's extensive references to defendant's silence, the extensive connection of that silence to defendant's guilt, the inconsistencies in the prosecutor's case and the other evidence presented against him, and the nature of defendant's defense—which hinged on his own credibility—we hold that the error was prejudicial.[18]

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[18] We note that, under the circumstances of this case, defense counsel's attempts during trial to lessen the impact of the *Doyle* errors by asking defendant why he did not make statements before trial, did not waive the error, cure it, or render it harmless.

Fourth, there is no question that this is the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial. The violation of defendant's due process rights rendered the trial fundamentally unfair and cast a shadow on the integrity of our state's judicial processes. Therefore, all four requirements of plain-error review are met, and reversal is warranted.

## IV. CONCLUSION

The prosecutor's references to defendant's post-arrest, post-*Miranda* silence violated defendant's due process rights under the federal constitution. The violation amounts to plain error that affected defendant's substantial rights, and it compromised the fairness, integrity, and public reputation of the judicial proceedings. Therefore, we reverse defendant's conviction and remand to the trial court for further proceedings.

KELLY, C.J., and WEAVER, CORRIGAN, MARKMAN, and HATHAWAY, JJ., concurred with CAVANAGH, J.

KELLY, C.J. (*concurring*). I concur with the majority opinion. However, I continue to believe that this Court should not have extended the plain-error doctrine to the kind of unpreserved constitutional error present in this case. As I stated in my dissent in *People v Carines*, I believe that, when there is unpreserved constitutional error, a defendant's conviction should be affirmed only " 'if the reviewing court is satisfied that the error is harmless beyond a reasonable doubt.' "[1]

[1] *People v Carines*, 460 Mich 750, 778; 597 NW2d 130 (1999) (KELLY, J., dissenting), quoting *People v Graves*, 458 Mich 756, 482; 581 NW2d 229 (1998).

It appears that, under the *Carines* plain-error standard, there is never error requiring reversal when there is a "wealth of incriminating evidence."[2] Under those circumstances, the judicial system essentially exempts criminal defendants from the constitutional right to due process of law.

In the interest of preserving the integrity of the judicial system, we should re-elevate due process to its proper place. The present blatant and repeated abrogation of people's constitutional rights threatens the foundation of the court system.

I recognize that *Carines* remains the law in Michigan and cannot be ignored, but I believe the Court should reexamine it at the earliest possible moment.

YOUNG, J. (*concurring*). I concur in the result and analysis of the majority opinion. I write separately because I will not join footnote 14, in which Justice CAVANAGH "dissents" from the *Carines*[1] plain-error analysis in his own opinion. Justice CAVANAGH is entitled to such views, but his opposition to this Court's precedent and preservation of his view is better placed in a concurring statement.

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[2] *Borgne*, 483 Mich at 203.

[1] *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

PEOPLE v WILLIAMS

Docket No. 135271. Argued January 21, 2009 (Calendar No. 3). Decided July 9, 2009.

A jury in the Oakland Circuit Court convicted Carletus L. Williams of two counts of possessing cocaine with intent to deliver. The convictions stemmed from two separate arrests in November 2004 and February 2005. The arrests took place after search warrants at two different locations revealed cocaine, sales paraphernalia, and guns. The court, Mark Goldsmith, J., granted the prosecution's motion for joinder over the defendant's objection, ruling that the offenses were related under MCR 6.120(B) because they both involved drug trafficking. In an unpublished opinion per curiam, issued October 25, 2007 (Docket No. 266807), the Court of Appeals, OWENS, P.J., and BANDSTRA and DAVIS, JJ., affirmed, holding that the offenses were part of a single scheme or plan to earn money by selling drugs. The Supreme Court granted the defendant's application for leave to appeal. 481 Mich 884 (2008).

In an opinion by Justice CORRIGAN, joined by Justices WEAVER (except for part IV), YOUNG, and MARKMAN, the Supreme Court *held*:

The trial court correctly applied the unambiguous language of the versions of MCR 6.120(A) and (B) that were then in effect to determine that the offenses in this case were related and, consequently, that joinder was appropriate. Because MCR 6.120(A) and (B) permitted joinder in a greater range of circumstances than *People v Tobey*, 401 Mich 141 (1977), the court rule superseded *Tobey*, which should no longer be viewed as dispositive regarding issues of joinder and severance against a single criminal defendant. Consequently, *People v Daughenbaugh*, 193 Mich App 506 (1992), which held that MCR 6.120 represented a codification of the decision in *Tobey*, is overruled.

1. When the defendant was tried, the plain language of MCR 6.120 permitted joinder of offenses that were related, meaning that they comprised either the same conduct or a series of connected acts or acts constituting part of a single scheme or plan. The offenses with which the defendant was charged were plainly related under MCR 6.120, because, in both cases, he was engaged

in a scheme to break down cocaine and package it for distribution. Even if one views the defendant's two arrests as discrete moments in time, direct evidence indicated that he was engaging in the same particular conduct on those dates. Accordingly, the trial court complied with what the language of MCR 6.120 unambiguously required. This analysis is reinforced by that of the Sixth Circuit Court of Appeals, which has applied the analogous federal rules in the same fashion.

2. *Tobey*, which preceded the adoption of MCR 6.120, relied on *People v Johns*, 336 Mich 617 (1953), *Blockburger v United States*, 284 US 299 (1932), and the 1968 draft of the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice to support its analysis. However, *Johns* did not hold that offenses must be committed at the same time for joinder to be appropriate. Further, *Blockburger* involved double jeopardy, which, unlike joinder, is a constitutional concept. Finally, the draft ABA standards on which *Tobey* relied were later revised to omit any mention that offenses must be of the same or similar character to support joinder and to instead adopt a framework of related and unrelated offenses, as did MCR 6.120.

3. Even if the defendant had established that the trial court erred by joining his cases, any error would be harmless, because evidence of each charged offense could have been introduced in the other trial under MRE 404(b) and because the jury was instructed to consider each crime separately.

Justice WEAVER concurred in all but part IV of Justice CORRIGAN's opinion, which responded to the dissent.

Affirmed.

Chief Justice KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would reverse the judgment of the Court of Appeals, stating that *Tobey* and the relevant version of MCR 6.120 can be reconciled, the lead opinion offers no persuasive reason why MCR 6.120 does not require the charges to be severed for trial, and that failing to sever the charges was not harmless error.

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, *David G. Gorcyca*, Prosecuting Attorney, and *Janice A. Kabodian*, Assistant Prosecuting Attorney, for the people.

*James Daniel Shanahan* and Carletus Lashawn Williams, *in propria persona*, for the defendant.

CORRIGAN, J. In this criminal case, we consider the joinder and severance of charges against a single criminal defendant under our court rules. MCR 6.120(A) and (B) establish when a court may join offenses charged in two or more informations against a single defendant and when a court must sever offenses charged in a single information against a single defendant. This Court first adopted MCR 6.120 on October 1, 1989. Before adopting MCR 6.120, however, we had ruled 12 years earlier that two drug sales to the same undercover agent within 12 days could not be joined because "[t]he two informations charged distinct and separate offenses, and [the defendant] was entitled to a separate trial on each offense." *People v Tobey*, 401 Mich 141, 145; 257 NW2d 537 (1977).

We conclude that the provisions of MCR 6.120 superseded *Tobey*. The unambiguous language of MCR 6.120 permits joinder in a greater range of circumstances than did *Tobey*. In this case, the trial court correctly applied the plain language of the court rule when it determined that defendant's offenses were "related." Accordingly, we affirm defendant's convictions.

## I. FACTS AND PROCEDURAL HISTORY

The Court of Appeals summarized the facts of this case as follows:

> Officers from the Oakland County Narcotics Enforcement Team executed a search warrant at a Motel 6 motel room on November 4, 2004. They knocked and announced their presence, and they forced the door open when they received no response. As they entered, defendant, the sole occupant, was just walking out of the bathroom and the toilet was in mid-flush. A bag of suspected crack cocaine was caught in the drain and an officer fished it out. Another officer broke the toilet bowl and recovered one or more small rocks. In the room itself, the officers found

some large chunks of suspected crack cocaine, several small rocks in individual "corner ties," a digital scale, a box of razor blades, a container of sandwich baggies, some individual baggies with missing corners, a pair of scissors, two handguns and ammunition, over $500 in cash, and a receipt showing that the room had been rented to defendant. The suspected narcotics weighed at least 50 grams and tested positive for cocaine.

Pontiac police officers testified that they executed another search warrant at 510 Nevada on February 2, 2005. The officers saw defendant arrive in a 1994 Ford and enter the house shortly before the warrant was executed. The officers again knocked and announced their presence, then forced the door open when they received no response. Defendant and another person were in the living room. Defendant was seated in a chair with a brown bag in his lap. He was leaning down with his right hand extended toward the floor between the chair and the television set. He ignored orders to raise his hands. On the floor where defendant had been reaching, the officers found a plastic bag containing approximately 18 rocks of suspected cocaine. The bag in defendant's lap contained sandwich baggies and a pair of scissors. A digital scale and a box of sandwich baggies were on top of the television, along with a set of keys that included a key to the 1994 Ford. Both inside the back of the television and on the floor behind it were empty baggies and used "corner ties" with cocaine residue. Defendant had over $1,000 in his wallet. Inside the trunk of the 1994 Ford, the officers found a handgun and two assault rifles. The suspected narcotics weighed just under ten grams and tested positive for cocaine.[1]

The prosecutor moved under MCR 6.120(A) and (B) to consolidate for a single jury trial the offenses charged as a result of defendant's November 4, 2004, and February 2, 2005, arrests. In the alternative, the prosecutor moved to introduce evidence of each offense in

[1] *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (Docket No. 266807), at 1-2.

the other trial under MRE 404(b). Defendant objected to both motions. The trial court granted the prosecutor's motion for joinder, holding that the offenses were "related" under MCR 6.120(B) because "[b]oth of the acts that are involved here do appear to the Court to be parts of a single scheme or plan; namely, drug trafficking and therefore they would appear to be related offenses." The trial court further explained that "[t]he Court is concerned about the potential for prejudice, but the Court believes there actually is a greater risk of prejudice if we had separate trials and the Court would allow 404(b) even to be used in the form of the conduct of the offense that is not the subject of a particular trial."

With regard to the charges stemming from the November 2004 arrest, the jury convicted defendant of possession with intent to deliver 50 grams or more, but less than 450 grams, of cocaine, MCL 333.7401(2)(a)(*iii*), being a felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. With regard to the February 2005 arrest, the jury convicted him of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), being a felon in possession of a firearm, carrying a concealed weapon in a vehicle, MCL 750.227(1), and one count of felony-firearm.

In an unpublished opinion per curiam, the Court of Appeals affirmed. It held that the trial court did not err by concluding that the offenses were "related" under MCR 6.120(B). The Court explained:

> The offenses here were not discrete, unrelated sales. Rather, they indicated a single scheme or plan to earn money by selling cocaine. In both, defendant was found in possession of enough cocaine to indicate an intent to sell it, as well as the necessary equipment to prepare it for sale and weaponry to defend the operation. The evidence there-

> fore indicated that both of defendant's offenses were connected parts of an ongoing scheme or plan to sell drugs.[2]

Defendant then applied for leave to appeal in this Court. We granted his application for leave and directed the parties to address "(1) whether the defendant was entitled to separate trials under MCR 6.120; (2) whether *People v Tobey*, 401 Mich 141 (1977), is consistent with MCR 6.120; and (3) if the joinder was erroneous, whether the error may be deemed harmless."[3]

## II. STANDARD OF REVIEW

Generally, this Court reviews questions of law de novo and factual findings for clear error. *People v McRae*, 469 Mich 704, 710; 678 NW2d 425 (2004); MCR 2.613(C). The interpretation of a court rule, like matters of statutory interpretation, is a question of law that we review de novo. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). To determine whether joinder is permissible, a trial court must first find the relevant facts and then must decide whether those facts constitute "related" offenses for which joinder is appropriate. Because this case presents a mixed question of fact and law, it is subject to both a clear error and a de novo standard of review.

Additionally, when this Court reviews preserved nonconstitutional errors, we consider the nature of the error and assess its effect in light of the weight and strength of the untainted evidence. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). Similarly, MCR 2.613(A) provides that

> [a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything

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[2] *Williams*, *supra* at 2.

[3] *People v Williams*, 481 Mich 884 (2008).

> done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

We recognize that both the statute and the court rule present "different articulations of the same idea." *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972).

## III. ANALYSIS

The same legal principles that govern the construction and application of statutes apply to court rules. *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004). When construing a court rule, we begin with its plain language; when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation. *Id*.

Defendant alleges that the trial court violated MCR 6.120. Defendant argues that his offenses do not constitute either "the same conduct" or "a series of connected acts or acts constituting part of a single scheme or plan" as the *Tobey* Court defined those terms. Defendant further contends that his interpretation of the court rule is consistent with a Court of Appeals decision in which the Court applied *Tobey*'s definitions of the relevant terms.[4] Because the offenses charged were "unrelated," defendant claims that he had an absolute right to severance upon his objection to the prosecutor's motion to consolidate under MCR 6.120(B).

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[4] *People v Daughenbaugh*, 193 Mich App 506; 484 NW2d 690 (1992), mod in part and lv den in part 441 Mich 867 (1992).

At the time of defendant's trial, MCR 6.120(A) and (B) provided in relevant part:[5]

> (A) Permissive Joinder. An information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.
>
> (B) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on
>
> (1) the same conduct, or
>
> (2) a series of connected acts or acts constituting part of a single scheme or plan.

The plain language of MCR 6.120 permits joinder if offenses are "related." Offenses are "related" if they comprise either "the same conduct" or "a series of connected acts or acts constituting part of a single scheme or plan." MCR 6.120(B)(1) and (2). Accordingly, the court rule then in effect unambiguously provided three potential bases on which joinder is permissible.

In this case, the record reflects that the trial court correctly applied the plain language of MCR 6.120 to the facts presented when it concluded that the offenses

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[5] The Court amended MCR 6.120 effective January 1, 2006. Currently, MCR 6.120(B)(1) states that:

> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

Because the trial court decided this issue before January 1, 2006, under the former rule, we analyze this case with the rule then in effect.

charged were "related." After hearing arguments from the parties, the trial court specifically addressed the language of MCR 6.120(A) and (B). The court concluded that the offenses charged in both cases reflect defendant's "single scheme or plan" of drug trafficking. MCR 6.120(B)(2). Consequently, defendant had no right to sever these "related" offenses. MCR 6.120(B).[6] The trial court noted that in light of the relevant facts, a single jury trial was appropriate and, further, the court stated that it would "be cautioning the jury that they need to find that both events have to meet the standard of proof beyond a reasonable doubt."

We conclude that the trial court did not violate the unambiguous language of MCR 6.120. The offenses charged were plainly "related" under MCR 6.120(B)(2). In both cases, defendant was engaged in a scheme to break down cocaine and package it for distribution. Evidence of acts constituting part of defendant's single scheme was found in both the motel room and the house at 510 Nevada. Even if one views defendant's first arrest in November and his second arrest in February as discrete moments in time, direct evidence indicated that he was engaging in the same particular conduct on

[6] The dissent argues that MCR 6.120(B) "is mandatory and *requires* that unrelated offenses be severed upon a timely motion to sever." *Post* at 268 n 37. We agree that if the offenses charged were "unrelated," defendant would have a right to severance under MCR 6.120(B). In this case, however, the record reveals that the trial court analyzed the relevant facts and concluded that the charged offenses were "related"; therefore, defendant had no right to severance. Generally, a trial court's "ultimate ruling on a motion to sever is reviewed for an abuse of discretion." *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). Because the dissent cites no caselaw and advances no cogent argument to support its underlying assumption that the trial court abused its discretion, the dissent's repeated insistence that severance is mandatory for "unrelated" offenses is unavailing.

those dates.[7] The charges stemming from both arrests were not "related" simply because they were "of the same or similar character."[8] Instead, the offenses charged were related because the evidence indicated that defendant engaged in ongoing acts constituting parts of his overall scheme or plan to package cocaine for distribution.[9] Accordingly, the trial court complied with what the language of MCR 6.120 unambiguously required.[10]

Our interpretation of MCR 6.120 is reinforced by the analysis of the United States Court of Appeals for the Sixth Circuit in several cases addressing the analogous

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[7] Likening us to a magician, the dissent contends that our statement is "a semantic sleight of hand." *Post* at 258. Although we conclude that defendant's charged offenses constitute "part of a single scheme or plan" under MCR 6.120(B)(2), we nevertheless note that discussion of whether the charged offenses involved "the same conduct" is also relevant for a reviewing court to consider because it reflects an alternative definition of "related offenses" under MCR 6.120(B)(1).

[8] See 2 ABA Standards for Criminal Justice (2d ed), ch 13, p 11 ("Offenses committed at different times and places are not 'related' merely because they are of the same or similar character.").

[9] The dissent complains that "[n]othing in the record supports or even suggests that defendant's two arrests were anything more than two discrete occurrences of packaging illegal drugs." *Post* at 258 n 17. The dissent's concession that defendant's actions constituted two "occurrences of packaging illegal drugs" provides additional support for our conclusion that defendant's acts constituted parts of his scheme or plan to package cocaine for distribution.

[10] Although the trial court complied with the unambiguous language of MCR 6.120, the Court of Appeals construed the court rule too broadly. In our judgment, joinder may not be permitted if a reviewing court concludes that the only link to an ongoing scheme or plan is "to earn money" through some criminal enterprise. *Williams, supra* at 2. Moreover, in light of the myriad evidence indicating that defendant was engaged in an ongoing scheme or plan to package cocaine for distribution, whether his underlying motive was to earn money is immaterial.

federal rules.[11] In *United States v Saadey*, 393 F3d 669 (CA 6, 2005), the court held that joinder of counts for filing false tax returns with counts for filing false credit applications against the defendant was appropriate "[b]ecause the credit application counts contained financial figures that were materially different from those reported on his tax returns . . . ." *Id*. at 678. The court concluded that the multiple counts revealed "a common scheme to defraud." *Id*. A second case involved a defendant charged with conspiracy to commit violent acts against the United States and its officers, in which the court had joined the defendant's drug-related and firearms-related counts. *United States v Graham*, 275 F3d 490 (CA 6, 2001).[12] The district court ruled that,

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[11] FR Crim P 8(a) provides that two or more offenses may be charged in the same indictment "if the offenses charged . . . are of the same or similar character or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan."

FR Crim P 14(a) states that severance is proper if joinder of offenses would prejudice the defendant:

> If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires.

[12] The dissent asserts that in *Graham, supra*, the court based its holding "on the motive underlying the defendant's perpetration of each offense . . . ." *Post* at 260. Moreover, the dissent contends that "the cases cited by the lead opinion all involve situations in which each joined offense was committed with a particular motive or goal underlying the defendant's conduct." *Post* at 261. In so doing, the dissent fails to explain why defendant's actions here do not reflect an underlying motive or particular goal each time that he was observed packaging cocaine for distribution. Indeed, in the seminal case used in LaFave, Criminal Procedure (3d ed), § 17.1(a), to illustrate the "common scheme or plan" aspect of the federal rule, the court held "that charges of bribery, tax evasion, and mail fraud were properly joined because they all were instances of the defendant using his public office for personal gain." *Id*. at 4, citing *United States v Barrett*, 505 F2d 1091 (CA 7, 1974); see also

based on the grand jury's indictment, the conspiracy to manufacture marijuana was part of "a common scheme or plan" to sell drugs to finance violence. *Graham*, *supra* at 512. On appeal, the court agreed that joinder of the counts was proper, reaffirming the well-established principle that " '[w]hen the joined counts are logically related, and there is a large area of overlapping proof, joinder is appropriate.' " *Id*., quoting *United States v Wirsing*, 719 F2d 859, 863 (CA 6, 1983). Similarly, in *United States v Jacobs*, 244 F3d 503, 507 (CA 6, 2001), the court held that the district court had not abused its discretion by denying the motion to sever charges arising from two separate incidents in which the defendant abducted his estranged wife. The court distinguished the defendant's appeal from another case "[b]ecause, as the district court properly concluded, both abductions were part of a common scheme, the counts in the indictment are factually intertwined . . . ." *Id*. The court concluded, "Here, even if the charges were tried separately, evidence from each crime would have been admissible in the trial of the other because of the common scheme or plan." *Id*. The admissibility of evidence in other trials is an important consideration because "[j]oinder of . . . other crimes cannot prejudice the defendant more than he would have been by the admissibility of the other evidence in a separate trial." *United States v Harris*, 635 F2d 526, 527 (CA 6, 1980).

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*United States v Fortenberry*, 914 F2d 671 (CA 5, 1990) (holding that car bombing and weapons charges were properly joined where all charges allegedly arose from defendant's attempt to exact revenge on persons involved in his divorce). Therefore, although the dissent attempts to distinguish cases in which the court permitted joinder of those offenses committed with the same motive, we conclude that the broad acceptance of a variety of underlying motives by our sister courts provides yet another basis to conclude that the charged offenses in this case were properly joined.

Having determined that defendant was not entitled to separate trials under MCR 6.120, we next consider whether *Tobey* is consistent with MCR 6.120.[13] *Tobey*, which predated the enactment of MCR 6.120 by approximately 12 years, also analyzed the permissible circumstances for joinder. However, the *Tobey* Court took a much narrower view of the circumstances in which joinder may be appropriate than that set forth in MCR 6.120. This narrower view of *Tobey* can be seen when one compares *Tobey*'s original analysis of the defendant's conduct with the language later enacted in MCR 6.120.[14] Because the differences between *Tobey* and MCR 6.120 cannot be reconciled without undermining the plain language of the court rule, we conclude that MCR 6.120 superseded *Tobey*. Consequently, courts should no longer view *Tobey* as dispositive on issues of joinder and severance.[15] Consistent with our decision,

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[13] The dissent asserts that our decision is inherently flawed because we have adopted "cart-before-the-horse reasoning" by analyzing whether defendant was entitled to separate trials before analyzing whether *Tobey* is consistent with MCR 6.120. *Post* at 251. In so doing, the dissent fails to mention that we have analyzed the issues before us in the same sequence set forth in our order granting defendant's application for leave and in the same sequence that the parties themselves addressed the issues. See *Williams*, *supra* 481 Mich at 884.

[14] Compare MCR 6.120(B)(2) ("a series of connected acts or acts constituting part of a single scheme") with *Tobey, supra* at 153 ("The undercover police agent testified that he never gave Tobey his telephone number or address . . . . The officer stated that he 'always called down' any time he wished to see Tobey to make a purchase, and responded affirmatively to the question whether the sales and purchases were 'always initiated' by him."). Notably, the unambiguous language of MCR 6.120 does not require that a reviewing court consider the factors that the *Tobey* Court apparently found dispositive, including whether the undercover agent had always initiated the drug sales or whether the defendant had some means to locate the undercover agent.

[15] The staff comment to MCR 6.120 states that "[e]laboration on this standard may be found in *People v Tobey*, 401 Mich 141 (1977)." The staff comment erroneously implied that *Tobey* is entirely consistent with the

we also reject the analysis of *Daughenbaugh* in accordance with the plain language of MCR 6.120.[16]

In *Tobey*, the Court concluded that charges arising from two drug sales to the same undercover agent within 12 days were improperly joined because "[t]he two informations charged distinct and separate offenses, and Tobey was entitled to a separate trial on each offense." *Tobey*, *supra* at 145. Because MCR 6.120 did not yet exist, the *Tobey* Court's discussion of permissible circumstances for joinder relied on three primary sources. First, the Court quoted its earlier opinion in *People v Johns*, 336 Mich 617; 59 NW2d 20 (1953), which had noted that " 'this Court has emphasized that the offenses charged in the several counts must arise

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unambiguous language of MCR 6.120. Moreover, a staff comment to the Michigan Court Rules is not binding authority. *People v Grove*, 455 Mich 439, 456; 566 NW2d 547 (1997). Because the staff comment should not be considered an authoritative construction of MCR 6.120, we only address the unambiguous language of the court rule and this Court's prior decision in *Tobey*. See MCR 1.101. Consequently, the dissent's reliance on the staff comment to buttress its argument that "*Tobey* is virtually identical to the language in MCR 6.120 and is in no way inconsistent" is misplaced. *Post* at 256.

[16] As we have discussed, MCR 6.120 superseded *Tobey* because the unambiguous language of the court rule cannot be reconciled with *Tobey*. Therefore, the Court of Appeals erred when it concluded that MCR 6.120 codified *Tobey*. *Daughenbaugh, supra* at 509. The dissent contends that *Daughenbaugh* should nevertheless be viewed as "persuasive authority" for the proposition that MCR 6.120 codified our earlier decision in *Tobey*. *Post* at 256. We reject the dissent's reliance on obiter dictum from *Daughenbaugh* as persuasive authority. Additionally, we note that *Daughenbaugh* cited no authority and omitted any analysis of the plain language of MCR 6.120 in support of its conclusion. *Daughenbaugh, supra* at 509. Instead, the Court of Appeals held that the charged offenses were "unrelated" and that severance was mandatory under two of the three primary sources on which *Tobey* had relied. *Id*. at 509-510. Perplexingly, the dissent asserts that our analysis of these sources "is of questionable assistance," *post* at 251, but nonetheless describes the corresponding analysis in *Daughenbaugh* as "entitled to some weight." *Post* at 256 n 11.

out of substantially the same acts *committed at the same time*.' " *Tobey*, *supra* at 148-149, quoting *Johns*, *supra* at 623 (emphasis in *Tobey*). Second, the Court relied on *Blockburger v United States*, 284 US 299, 301-302; 52 S Ct 180; 76 L Ed 306 (1932), to support its conclusion that, for double jeopardy and joinder purposes, it would be inappropriate for consecutive sales of heroin made to the same person on different days to constitute one offense. *Tobey*, *supra* at 149-150. Third, the *Tobey* Court discussed the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968). *Id.* at 150-153.

None of the sources discussed in *Tobey* can be reconciled with the unambiguous language of MCR 6.120. First, *Tobey* relied on *Johns* for the proposition that "the offenses charged in the several counts must arise out of substantially the same acts *committed at the same time*." *Tobey*, *supra* at 149 (quotation marks and citation omitted; emphasis in original).[17] Yet, *Johns* did not conclude that offenses must be "committed at the same time" in order for joinder to be appropriate. Instead, the Court described the general principle that

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[17] Although *Tobey* referred to this language from *Johns*, as well as earlier caselaw that quoted such language approvingly, the dissent nevertheless insists that *Tobey* reached the exact opposite conclusion about temporal proximity "in the context of offenses committed as part of a single scheme." *Post* at 253 n 5. This claim, however, does not comport with *Tobey*'s discussion of *Johns*. *Tobey, supra* at 148-149, quoting *Johns*, *supra* at 623 (" 'It is to be noted that this Court has emphasized that the offenses charged in the several counts must arise out of substantially the same acts *committed at the same time*.' "); *id.* at 152 ("[c]ounts charging Johns with maintainng [sic] a gaming room table and with keeping a place where gambling was permitted were joined. 'The acts committed . . . occurred within an hour and a half and out of substantially the same transaction.' "). The dissent, however, fails to acknowledge *Tobey*'s discussion of *Johns* and instead relies on the commentary accompanying the ABA Standards. See *Tobey*, *supra* at 152 n 15.

> where the several offenses charged, though distinct in point of law, yet spring out of substantially the same transaction, or are so connected in their facts as to make substantially parts of the same transaction, or connected series of facts, the defendant can not be prejudiced in his defense by the joinder, and the court will neither quash nor compel an election. [*Johns*, *supra* at 623.]

Moreover, the unambiguous language of MCR 6.120 does not mandate the existence of temporal proximity between several offenses.[18] Instead, MCR 6.120(B)(2) permits joinder of offenses that were not committed at the same time but nevertheless constitute "a series of connected acts or acts constituting part of a single scheme or plan."

*Tobey*'s reliance on *Blockburger* "for double jeopardy and joinder purposes" is similarly unavailing. Generally, joinder is a "discrete, nonconstitutional concept[] that should not be conflated with the constitutional double jeopardy protection." *People v Nutt*, 469 Mich 565, 592 n 28; 677 NW2d 1 (2004). In *Tobey*, however, the Court reasoned that, "[f]or double jeopardy and joinder purposes each sale is separate conduct, a separate act and transaction, and, as the Court of Appeals correctly noted, a separate and distinct criminal offense." *Tobey*, *supra* at 149. Additionally, *Tobey* quoted extensively from *Blockburger* to buttress its conclusion that "[w]hile Tobey's conduct in selling heroin on different days to the same person is substantially similar conduct, it is not the same conduct or act." *Id*. In so doing, *Tobey* conflated the constitutional double jeopardy protection with the nonconstitutional concept of joinder. Consequently, we find *Tobey*'s discussion of *Blockburger* unpersuasive.

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[18] We agree with the dissent that multiple offenses may be "related" as part of a single scheme or plan despite a lack of temporal proximity. See *post* at 261 n 25.

*Tobey*'s discussion of the draft ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), refers to an earlier version. Soon after the Court decided *Tobey*, the ABA published revised standards.[19] These revised standards endeavored to "incorporate and extend the approach of the original standards."[20] Unlike the draft version on which *Tobey* relied, the revised ABA standards first introduced the concept of "related" and "unrelated" offenses.[21] When the Court adopted MCR 6.120 in 1989, it also used the framework of "related" and "unrelated" offenses. In contrast, *Tobey* made no mention of "related" or "unrelated" offenses. Instead, *Tobey* emphasized that the draft version permitted "joinder of offenses which 'are of the same or similar character', or which 'are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan'."[22] Both the revised standards and MCR 6.120, however, omitted any suggestion that offenses should be "of the same or similar character," as the draft ABA version had provided.[23] The incongruities between the draft ABA ver-

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[19] See 2 ABA Standards for Criminal Justice (2d ed, ch 13).

[20] *Id.* at 6.

[21] *Id*. at 9-10. Specifically, Standard 13-1.2 provides that "[t]wo or more offenses are related offenses if they are based upon the same conduct, upon a single criminal episode, or upon a common plan." Moreover, Standard 13-1.3 provides that "[u]nrelated offenses are any offenses which are not 'related' offenses."

[22] *Tobey, supra* at 150, citing ABA Standards Relating to Joinder and Severance (Approved Draft, 1968), Standard 1.1.

[23] The dissent claims that "just as *Tobey* rejected connecting offenses solely on the basis that they are of 'the same or similar character,' MCR 6.120 omits that language from its definition of 'related' offenses." *Post* at 254. In so doing, however, the dissent fails to acknowledge that neither *Tobey* nor the draft ABA standards mentions "related" offenses at all. See *Tobey, supra* at 150-153. Similarly, the dissent omits any discussion of the

sion on which *Tobey* relied and the plain language of MCR 6.120 reinforce our conclusion that MCR 6.120 superseded *Tobey*.

Finally, we conclude that even if defendant successfully had established that the trial court erred by joining his two cases, any error would be harmless. Under MCL 769.26, a preserved, nonconstitutional error is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Lukity*, *supra* at 495-496. Similarly, MCR 2.613(A) provides that an error is not grounds for disturbing a judgment "unless refusal to take this action appears to the court inconsistent with substantial justice."

In this case, the evidence of each charged offense could have been introduced in the other trial under MRE 404(b).[24] See, e.g., *People v Sabin (After Remand)*, 463 Mich 43, 63-65; 614 NW2d 888 (2000).[25] Indeed, the prosecutor moved to allow MRE 404(b) evidence as an

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revised ABA standards, which, unlike the draft version, no longer permitted the joinder of offenses " 'of the same or similar character, even if not part of a single scheme or plan.' " *Id*. at 151 n 13, quoting Draft Standard 1.1.

[24] MRE 404(b) provides, in relevant part:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[25] See also *Krist v Foltz*, 804 F2d 944, 947-948 (CA 6, 1986) (agreeing with the Michigan Court of Appeals decision that while joinder of two robbery counts may have been improper, similarity in details of the two robberies and their closeness in time would have made evidence of one

alternative to its motion to consolidate.[26] The trial court concluded that defendant would suffer greater prejudice if the court allowed evidence of the charged offenses in two separate trials under MRE 404(b) than if the court permitted joinder. Moreover, the trial court instructed the jury that it "must consider each crime separately in light of all of the evidence in this case" and further that it "may find the defendant guilty of all or any combination of these crimes or not guilty."

We note that, besides being consistent with this Court's caselaw, the trial court's conclusion is also consistent with that of the District of Columbia Court of Appeals, which has stated that "a misjoinder may be deemed harmless only if all or substantially all of the evidence of one offense would be admissible in a separate trial of the other." *Byrd v United States*, 551 A2d 96, 99 (DC, 1988) (citation and quotation marks omitted).[27] The United States Supreme Court also has

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crime admissible at the separate trial of the other; therefore, the petitioner suffered no prejudice from his counsel's failure to move for severance).

[26] The dissent contends that evidence of each charged offense could have been introduced in the other trial under MRE 404(b) "[o]nly once such a [single] scheme has been shown." *Post* at 269. The dissent's argument, however, ignores the many bases on which MRE 404(b) permits evidence of other crimes, including "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." See note 24 of this opinion.

[27] The language of FR Crim P 8(a) closely tracks the language of MCR 6.120. Nevertheless, some differences exist between the rules, including the concept of misjoinder. Failure to meet the requirements of FR Crim P 8(a) constitutes misjoinder as a matter of law. *United States v Chavis*, 296 F3d 450, 456-457 (CA 6, 2002). Unlike the federal rule, however, 1A Gillespie, Michigan Criminal Law & Procedure (2d ed), § 17:36, pp 227-228, states:

> Where two distinct offenses were not committed at the same time, or were committed on different days,[11] or where the first was committed before a second and separate offense was

stated, "[i]mproper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial." *United States v Lane*, 474 US 438, 446, n 8; 106 S Ct 725; 88 L Ed 2d 814 (1986).

Therefore, even if the trial court had erred by joining the charges, we cannot conclude that such an error was outcome determinative.[28]

IV. FURTHER RESPONSE TO CHIEF JUSTICE KELLY'S DISSENT

Chief Justice KELLY asserts that we have "implicitly" incorporated "same or similar character" language into MCR 6.120 "by denying severance of offenses that are of the same or similar character under the misnomer of a single scheme or plan." *Post* at 264. Not only does Chief Justice KELLY fail to adequately explain how we have implicitly read language into the court rule, she

committed,[12] and they cannot be shown by the same evidence, they nonetheless can be joined in the same information, there being no such thing as misjoinder of offenses in Michigan.[13]

[11] *People v. Dupree*, 175 Mich. 632, 141 N.W. 672 (1913).

[12] *People v. Goulette*, 82 Mich. 36, 45 N.W. 1124 (1890).

[13] MCR 6.120(A).

[28] Our conclusion is also consistent with a recent case denying an application for a writ of habeas corpus, in relevant part because the petitioner was not prejudiced by the joinder of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). *Couturier v Vasbinder*, 2008 WL 4613055 (ED Mich, 2008). In *Couturier*, the petitioner allegedly engaged in sexual contact with three first-grade students while the students sat on his lap. The district court concluded that the "[p]etitioner was not prejudiced by the joinder of the charges, because both the trial court and the Michigan Court of Appeals found that each of the charges was admissible under M.R.E. 404(b) against the other charges to show that petitioner had a 'plan, scheme, or system' to sexually assault the different victims."

also ignores our explicit statement concerning "same or similar character" offenses. See *supra* at 235. Moreover, the plain language of MCR 6.120 does not permit the joinder of those offenses that are only "of the same or similar character." Accordingly, we reject Chief Justice KELLY's assertion. Our analysis begins with the plain language of the court rule and enforces the meaning expressed, without further judicial construction or interpretation. See *In re KH*, *supra* at 628.

Chief Justice KELLY contends that "[o]ther jurisdictions with similar court rules have correctly rejected" interpretations consistent with our interpretation of "single scheme or plan." *Post* at 261-262 n 25. She further argues that many jurisdictions "consider a finding of a common motive or goal to be a precondition for establishing a single or common scheme or plan under the joinder and severance rules." *Post* at 262 n 25. In so doing, Chief Justice KELLY again presupposes that defendant's actions do not reflect a common motive or particular goal each time that he was observed packaging cocaine for distribution. To buttress her argument, Chief Justice KELLY cites three cases that do not advance her position.

In *State v Denton*, 149 SW3d 1 (Tenn, 2004), for example, the Tennessee Supreme Court explained the unique rubric developed through that state's court rules and caselaw to address joinder and severance issues. See *Denton*, *supra* at 12-13. Although Chief Justice KELLY acknowledges that Tenn R Crim P 14(b)(1) and MCR 6.120 differ, she asserts that any differences between the two rules are irrelevant because *Denton* "interpreted the common scheme or plan clause, not the evidentiary admissibility question." *Post* at 262 n 25. We reject Chief Justice KELLY's flawed assertion that the common scheme or plan clause can be

isolated from the evidentiary admissibility clause because the clauses are compound propositions. Under Tenn R Crim P 14(b)(1), a defendant has the right to severance unless the offenses charged are "part of a common scheme or plan *and the evidence of one would be admissible in the trial of the others*." Indeed, this latter conjunctive requirement, which is entirely absent in MCR 6.120, functions as the primary inquiry in Tennessee.[29] The Tennessee Supreme Court thus explained that, "in addition to showing that the offenses are part of a common scheme or plan, there is also a question of evidentiary admissibility that must be addressed." *Denton*, *supra* at 13.[30] Because of these differences, we question how much value, if any, should be assigned to Chief Justice KELLY's repeated invocation of *Denton* and Tenn R Crim P 14(b)(1) throughout her dissent.

Additionally, in *State v McCrary*, 621 SW2d 266 (Mo, 1981), the Missouri Supreme Court found no abuse of discretion in the trial court's refusal to sever the offenses charged against the defendant when the offenses revealed "ample evidence of the existence of a plan of harassment and revenge aimed at the [defendant's former partner and her new] family." *McCrary*, *supra* at 271-272. The Missouri Supreme Court thus

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[29] See *State v Burchfield*, 664 SW2d 284, 286 (Tenn, 1984) ("The primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed.").

[30] Three types of evidence showing a common scheme or plan exist in Tennessee:

> (1) offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) offenses that are part of a larger, continuing plan or conspiracy; and (3) offenses that are all part of the same criminal transaction." [*Denton, supra* at 13, citing *State v Shirley*, 6 SW3d 243, 248 (Tenn, 1999).]

upheld the joinder of offenses against the defendant for three discrete occurrences, including carrying a concealed weapon on March 12, 1978, an assault on November 16, 1978, and a firebombing on March 8, 1979. *Id*. at 271.

Similarly, in *State v Oetken*, 613 NW2d 679, 688 (Iowa, 2000), the defendant argued that his trial counsel was ineffective because his attorney did not move to sever two burglary charges that defendant asserted were not part of "common scheme or plan." The Iowa Supreme Court disagreed, concluding that sufficient evidence supported the existence of a common scheme or plan, where the defendant "traveled through the rural countryside in search of homes that were unoccupied during traditional work hours, he knocked to ascertain the abodes were indeed vacant, broke and entered the premises through the rear doors, and proceeded to steal small portable objects such as TVs, VCRs, and guns." *Id*. at 699. The Iowa Supreme Court has affirmed its interpretation of what constitutes a "common scheme or plan" in more recent decisions as well.[31] Indeed, the analysis in these cases does not justify Chief Justice KELLY's reliance on them.

Moreover, several recent decisions reflect that other jurisdictions with similar court rules have adopted interpretations consistent with ours. The Mississippi Supreme Court has held that a "common scheme or plan" existed when the defendant was charged with three counts of forging prescriptions involving two different pharmacists over a five month period. See

[31] See *State v Elston*, 735 NW2d 196, 199 (Iowa, 2007) (concluding that the charges against the defendant were part of a "common scheme or plan" even though "the temporal proximity of the alleged indecent contact and sexual exploitation offenses was not close and the modus operandi allegedly employed by [the defendant] was dissimilar.").

*Rushing v State*, 911 So 2d 526, 536 (Miss, 2005) ("Succinctly stated, these counts involve too many similar factors when viewed together, to be anything but clearly linked and part of the same common scheme or plan."). Similarly, the Wyoming Supreme Court has held that the trial court did not abuse its discretion in refusing to sever a first-degree attempted sexual assault charge from attempted first-degree sexual assault charges involving a different victim. *Lessard v State*, 158 P3d 698, 704 (Wy, 2007). The court reasoned that the charged offenses constituted parts of a "single scheme or plan" even though "the criminal acts occurred at different locations and against different victims . . . ." *Id*. The Vermont Supreme Court also rejected the argument that because the charged offenses were separated in time, they cannot constitute a "common plan or scheme," explaining that "there is no hard-and-fast rule regarding time limits, and . . . the necessary proximity must vary with the circumstances." *State v Willis*, 181 Vt 170, 181; 915 A 2d 208 (2006) (citation and quotation marks omitted). Moreover, the Massachusetts Supreme Court affirmed a trial court decision to join four counts of aggravated rape and murder, stating that "the evidence supported a finding of 'a common plan by the defendant to prey upon similarly situated cocaine-addicted women for sexual gratification . . . .' " *Commonwealth v Gaynor*, 443 Mass 245, 259-260; 820 NE2d 233 (2005). In light of these decisions, we reject the view that our interpretation of the court rule somehow deviates from the interpretation of other jurisdictions concerning analogous rules.

## V. CONCLUSION

The trial court correctly applied the unambiguous language of MCR 6.120(A) and (B) in determining that

the offenses in this case were "related" and consequently that joinder was appropriate. We further conclude that MCR 6.120 superseded the Court's earlier decision in *Tobey* and, therefore, courts should no longer view *Tobey* as dispositive regarding issues of joinder and severance against a single criminal defendant. Instead, courts must give effect to the plain language of the court rule. Accordingly, we affirm defendant's convictions.

WEAVER (except for part IV), YOUNG, and MARKMAN, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*concurring*). I concur in all except part IV of Justice CORRIGAN's opinion.

KELLY, C.J. (*dissenting*). I respectfully dissent. The majority erroneously concludes that MCR 6.120 superseded *People v Tobey*.[1] I disagree because the court rule and *Tobey* can be reconciled. Moreover, in rejecting *Tobey*, the opinion offers no persuasive reason why MCR 6.120 does not require that defendant's alleged offenses be severed for trial. I therefore disagree with its analysis and conclusions. The offenses should have been separately tried, and the failure to sever them was not harmless error. Therefore, I would reverse the judgment of the Court of Appeals.

There are three flaws in the majority's analytical approach. *Tobey* and MCR 6.120 are currently the controlling authority on joinder and severance. Thus, I believe the appropriate initial question for the Court is whether the two standards for joinder and severance are reconcilable.

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[1] *People v Tobey*, 401 Mich 141; 257 NW2d 537 (1977).

However, the starting point for the majority's analysis is its own determination that the offenses in this case were "related" under MCR 6.120. Only then does it proceed to determine whether *Tobey* is consistent with the court rule. This cart-before-the-horse reasoning certainly makes it easier to conclude that the two standards are irreconcilable, given that *Tobey* explicitly held that essentially the same offenses were *not* properly joined. But this approach prejudges the central question at issue.

Second, the majority never compares the language of *Tobey* with the language of MCR 6.120. Yet it concludes that the language of *Tobey* is inconsistent with the "plain language" of MCR 6.120.[2]

Third, the majority engages in lengthy and largely irrelevant criticism of the language in the authority that *Tobey* relies on to support its holding. This analysis is of questionable assistance in determining whether the two standards can be reconciled because it ignores the language of *Tobey*'s actual holding.

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[2] The majority evades this failure to compare the relevant language by comparing MCR 6.120(B)(2) and the defendant's conduct in *Tobey*. *Ante* at 238 and 238-239 n 15. This is not the same as comparing the *standards* from the two cases. Moreover, it is immensely unhelpful to the majority's argument that "the unambiguous language of MCR 6.120 does not require that a reviewing court consider the factors that the *Tobey* Court apparently found dispositive[.]" *Ante* at 238 n 14. MCR 6.120 does not have *any* "factors" or describe *any* factual circumstances to which it does or does not apply. Therefore, the fact that MCR 6.120 does not require a reviewing court to consider "whether the undercover agent had always initiated the drug sales" is irrelevant.

Despite its failure to compare the language of *Tobey* with MCR 6.120, the majority confidently asserts that "the *Tobey* Court took a much narrower view of the circumstances in which joinder may be appropriate," *ante* at 238, and that "the differences between *Tobey* and MCR 6.120 cannot be reconciled without undermining the plain language of the rule," *id*. It reaches these conclusions without ever comparing the pertinent language of *Tobey* and MCR 6.120.

Therefore, the majority provides little basis for its conclusion that *Tobey* is irreconcilable with MCR 6.120. The opinion's often reiterated conclusion that *Tobey* is inconsistent with the "unambiguous language" of MCR 6.120 does not become more persuasive through repetition.

## I. MCR 6.120 AND *TOBEY* ARE RECONCILABLE AND CONSISTENT WITH ONE ANOTHER

Any meaningful analysis of whether *Tobey* is consistent with MCR 6.120 requires the answers to two key questions. First, for joinder and severance purposes, what relationship must exist between the charged criminal offenses? Second, under what circumstances is joinder allowed or severance mandated? If the answers to these questions are consistent under both a *Tobey* analysis and an MCR 6.120 analysis, the two can be applied harmoniously. I will address each of the questions separately.

### A. *DEFINITION OF "RELATED" OFFENSES*[3]

The majority's attempt to distinguish the language of MCR 6.120 from the authority cited in *Tobey* ignores *Tobey*'s central holding. Certainly, some of the authority on which *Tobey* relies quotes language that differs from the language of the court rule.[4] However, *Tobey*'s hold-

[3] The majority observed that *Tobey* did not use the terms "related" or "unrelated" to modify "offenses." *Ante* at 242. We note that the joinder and severance standards from *Tobey* and MCR 6.120 are mutually consistent, and that is the fact more worthy of observation. See Part I(A), Part I(B), and note 7 of this opinion.

[4] The majority addresses *Tobey*'s citation of *People v Johns*, 336 Mich 617; 59 NW2d 20 (1953), *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), and the American Bar Association (ABA) Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968).

ing did not incorporate any language from those sources that is inconsistent with the definition of "related" offenses in MCR 6.120.[5]

The key portion of the *Tobey* opinion states:

> We adhere again to our earlier precedents and hold: a judge must sever two or more offenses when the offenses

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[5] Contrary to the majority's implication, *Tobey* did not "mandate the existence of temporal proximity between several offenses." *Ante* at 241. Rather, *Tobey* simply stated that, when a defendant commits separate offenses at different times, joinder of the separate offenses for trial is permitted only under certain circumstances. When MCR 6.120 was enacted, it defined those circumstances as "related" offenses, using language virtually identical to *Tobey*'s definition.

The majority opines that this claim does not comport with the *Tobey* Court's discussion of *Johns*. *Ante* at 238-239 n 15. This argument is misguided because the *Tobey* Court concluded that *Johns* involved "a series of connected acts," not a single scheme or plan. *Tobey*, *supra* at 152. In fact, *Tobey* said exactly the opposite in the context of offenses committed as part of a single scheme. *Tobey*, *supra* at 152 n 15 ("joinder is allowed for offenses which are part of a single scheme, *even if considerable time passes between them*.") (emphasis added).

The majority similarly rejects as "unpersuasive" *Tobey*'s conclusion that "each sale is separate conduct, a separate act and transaction, and . . . a separate and distinct criminal offense" because it relied on *Blockburger*. *Ante* at 241. It contends that *Tobey* erred because joinder and double jeopardy are distinct concepts, joinder being a nonconstitutional concept and double jeopardy being a constitutional protection. *Id*., quoting *People v Nutt*, 469 Mich 565, 592 n 28; 677 NW2d 1 (2004). Despite the majority's isolated quotation from *Nutt*, nothing in *Nutt* undermines *Tobey*'s holding. *Nutt* defined "same offense" using the "same elements" test from *Blockburger*. In doing so, *Nutt* rejected the broader "same transaction" test for defining what constitutes the same offense, overruling *People v White*, 390 Mich 245; 212 NW2d 222 (1973). The majority offers no explanation for why this narrow definition of the "same offense" for double jeopardy purposes should be defined more broadly in the joinder and severance context. I am not persuaded that a defendant's conduct should be considered "the same conduct" for joinder purposes when it simultaneously constitutes separate and distinct criminal offenses for double jeopardy purposes.

> have been joined for trial solely on the ground that they are of the "same or similar character" and the defendant files a timely motion for severance objecting to the joinder . . . a judge has no discretion to permit the joinder for trial of separate offenses committed at different times *unless the offenses "are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan*."[6]

*Tobey* therefore held that joinder is appropriate when charged offenses are of the same or similar character, but the charges must be severed if a timely motion for severance is filed. *Tobey* also held that offenses cannot be joined unless they are based on (1) the same conduct, (2) a series of acts connected together, or (3) a series of acts constituting parts of a single scheme or plan. The language used in 1 through 3 is virtually identical to the language used in MCR 6.120 when it defines what constitutes a "related" offense.[7]

Moreover, just as *Tobey* rejected connecting offenses solely on the basis that they are of "the same or similar character," MCR 6.120 omits that language from its definition of "related" offenses.[8] Therefore, the court rule's definition of "related" offenses requires the same

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[6] *Tobey*, *supra* at 153 (citations omitted; emphasis added).

[7] I note that the standards need not be "identical" to be consistent with one another. Nevertheless, an illustration of the very minor differences between the two standards seems appropriate. These differences are inconsequential, as can be seen below:

> *Tobey*: "based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan."
>
> MCR 6.120(B): "based on the same conduct, or a series of connected acts or acts constituting part of a single scheme or plan."

[8] Therefore, contrary to the contention of the majority, the fact that MCR 6.120 omits any reference to conduct of the "same or similar

connection between criminal offenses for joinder and severance purposes that *Tobey* did.

B. *NEGATIVE JOINDER AND AFFIRMATIVE RIGHT TO SEVERANCE*

The second question in the analysis is whether *Tobey* and MCR 6.120 allow joinder and mandate severance of offenses in a manner consistent with one another. MCR 6.120 permits joinder of offenses under any circumstances, which *Tobey* did not. However, MCR 6.120 also requires severance of "unrelated" offenses upon a defendant's timely motion for severance. As discussed previously, MCR 6.120 defined "related" offenses using language virtually identical to that used in *Tobey*.

Thus, the sole substantive difference between *Tobey* and MCR 6.120 concerns whether joinder of offenses is allowed in the first instance. But where, as in the case before us, a defendant makes a timely motion for severance, this distinction makes no practical difference and does not render the two irreconcilable.[9]

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character" in its definition of related offenses supports my position. The Michigan rule's definition of related offenses is significantly narrower than that of the federal rule.

[9] Both *Tobey* and the court rule require that offenses must either not be joined or must be severed using virtually identical language to define "related" offenses. *Tobey* does not allow unrelated offenses to be joined in the first place. MCR 6.120 simply rephrases the negative joinder rule from *Tobey* as an affirmative right to severance, allowing unrelated offenses to be joined, but making severance mandatory if the defendant objects. Whether the charges are joined and then severed, or never joined in the first place, is irrelevant here. Defendant made a timely motion for severance, which is all that MCR 6.120 requires for mandatory severance of unrelated offenses.

The rewriting of the joinder and severance provisions to create an *affirmative* right to severance of unrelated offenses is significant for another reason. That an affirmative right to severance exists for defendants charged with unrelated offenses is significant when analyzing whether the erroneous denial of a motion to sever constitutes harmless error. See section on harmless error, *infra*.

C. *THE STAFF COMMENT TO MCR 6.120 AND* DAUGHENBAUGH

Finally, I note that the staff comment to MCR 6.120 states that "[t]his provision is consistent with Michigan law" and then cites *Tobey*. In *People v Daughenbaugh*, the Court of Appeals concluded that "[t]he court rule is a codification of the Supreme Court's earlier decision in [*Tobey*]."[10] The majority offers nothing to contradict this persuasive authority other than its unsupported assertion that *Tobey* is somehow inconsistent with the language of the court rule.[11] As noted earlier, the relevant language from *Tobey* is virtually identical to the language of MCR 6.120 and is in no way inconsistent.

II. APPLICATION OF THE STANDARD FOR JOINDER AND SEVERANCE

Given that *Tobey* and MCR 6.120 are consistent with one another, they provide a uniform standard for evaluating when joinder or severance of criminal charges is appropriate. The majority correctly notes that, in deciding whether severance is required, the threshold ques-

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The majority acknowledges that "some differences" exist between MCR 6.120 and the analogous federal rules, *ante* at 244 n 27. But it does not explain why its analysis is plausible given that the differences between MCR 6.120 and the federal rules are far more substantive than the differences between MCR 6.120 and *Tobey*.

[10] *People v Daughenbaugh*, 193 Mich App 506, 509; 484 NW2d 690, mod in part 441 Mich 867 (1992).

[11] The majority also objects to my reference to this dictum from *Daughenbaugh* as "persuasive authority." *Ante* at 239 n 16. However, it offers no persuasive argument to warrant rejecting the staff comment and this language from *Daughenbaugh*. My analysis of *Tobey* and MCR 6.120 leads to the conclusion that the two provide consistent standards for joinder and severance. Since the staff comment and *Daughenbaugh* are also consistent with this conclusion, they are entitled to some weight in the analysis.

tion must be whether the charged offenses were "related." At the time of defendant's trial, MCR 6.120 defined a "related" offense as either "the same conduct" or "a series of connected acts or acts constituting part of a single scheme or plan."[12]

The lower courts both concluded that the offenses in this case were "related" under the "acts constituting part of a single scheme or plan" provision of MCR 6.120. The trial court ruled that the offenses were part of a single scheme or plan to commit "drug trafficking." The Court of Appeals concluded that the offenses were part of a single scheme or plan "to earn money by selling cocaine."[13]

The majority seemingly accepts the trial court's interpretation of what may comprise a single scheme or plan, while rejecting the Court of Appeals' interpretation of the provision as "too broad[]."[14] Yet the majority does not adopt the trial court's language that defendant had a single scheme or plan to engage in "drug trafficking." Instead, it concludes, similarly, that the offenses were related because defendant had a single scheme or plan "to package cocaine for distribution."[15]

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[12] MCR 6.120(B)(1)-(2). As the majority observes, although MCR 6.120 was amended effective January 1, 2006, this case was decided under the prior version of the rule and must be analyzed accordingly. The 2006 amendment did not significantly change the language defining "related" offenses.

[13] *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2007 (Docket No. 266807), at 2.

[14] *Ante* at 235 n 10.

[15] *Ante* at 235. The majority determines that the charged offenses were "plainly 'related' " as part of an overall scheme or plan and therefore were properly joined. *Ante* at 234. Yet it makes this determination in spite of several contradictory conclusions. First, it rejects both the trial court's and the Court of Appeals' bases for finding a "single scheme or plan." See *ante* at 235. Second, it concludes that the Court of Appeals construed the single "scheme or plan" language too broadly in finding an ongoing

In doing so, the majority performs a semantic sleight of hand. It first observes that "direct evidence indicated that [defendant] was engaging in the *same particular conduct* on those dates."[16] Thus, it purports to agree with the lower courts that defendant's conduct constituted a single scheme or plan.

However, the majority actually places what it considers the "same particular conduct" under the guise of the "single scheme or plan" provision of MCR 6.120.[17]

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scheme to " 'earn money' through some criminal enterprise." *Ante* at 235 n 10. Finally, despite these contradictions, it chastises the dissent for not "support[ing] its underlying assumption that the trial court abused its discretion" in finding that the offenses were "related." *Ante* at 234 n 6. It appears that the majority itself believes that the trial court erred, because it does not adopt the trial court's finding of a single scheme to engage in "drug trafficking." However, that presents no barrier to it. It simply invents its own basis for holding that the offenses are "related."

[16] *Ante* at 234-235 (emphasis added).

[17] This conclusion simply reflects the majority's disagreement with how the *Tobey* Court defined "the same conduct or act." In effect, the majority uses its conclusion that defendant's conduct was part of an ongoing scheme "to package cocaine for distribution" to argue that the same conduct is involved in both offenses. This circular reasoning does nothing to advance the majority's argument, because it presupposes the very conclusion it is attempting to prove.

However, joinder of the charged offenses against defendant in this case was premised on the "single scheme or plan" part of MCR 6.120. Defendant's conduct was clearly not "the same conduct or act."

It was undisputed in the lower courts that defendant's crimes did not involve either "the same conduct" or "a series of acts connected together." The majority determines that an ongoing scheme or plan to "earn money by selling cocaine" is insufficient to deny severance under MCR 6.120. It also determines that an ongoing scheme or plan to "package cocaine for distribution" suffices to deny severance. I find this to be an arbitrary distinction. Moreover, I disagree with the majority that the record contains "myriad evidence" showing that defendant was engaged in an ongoing scheme to package cocaine for distribution. *Ante* at 235 n 10. Nothing in the record supports or even suggests that defendant's two arrests were anything more than two discrete occurrences of packaging illegal drugs. Separate, unrelated events are not "ongoing

As will be discussed later, there is no basis for the majority's conclusions that defendant's offenses were "related." It was not the same conduct or part of a single scheme or plan. Thus, none of the majority's analysis is tenable under the court rule or *Tobey*.

A. *THE FEDERAL RULES AND CASELAW INTERPRETING THEM*

First, the provisions of the corresponding federal rules of criminal procedure, on which the majority relies heavily to support its holding, differ significantly from MCR 6.120. FR Crim P 8(a), which loosely tracks the definition of "related" offenses in MCR 6.120, defines such offenses more broadly than our court rule.[18]

In addition, FR Crim P 14(a), which governs severance of unrelated offenses, is discretionary, not mandatory like MCR 6.120(B). The federal rule also authorizes the court to sever offenses only when joinder prejudices the defendant. Again, MCR 6.120 is inapposite because it requires a court to sever all unrelated offenses upon a timely motion by the defendant, without requiring a defendant to show prejudice.

Second, caselaw interpreting the federal rule does not support the lower courts' interpretation of what types of conduct can be considered a "single scheme or plan." For example, in *United States v Saadey*,[19] on which the majority relies, the defendant was charged

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acts." There is no evidence of an underlying single purpose motivating defendant's actions in each offense, aside from the extraordinarily broad one used by the lower courts and the majority.

[18] FR Crim P 8(a) allows joinder when the offenses charged "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan."

[19] *United States v Saadey*, 393 F3d 669 (CA 6, 2005).

with, among other offenses, conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO).[20]

The defendant was an investigator employed by the county prosecutor. In 1994 and 1995, he participated in a case-fixing conspiracy. He argued that the counts charging him with filing false tax returns and credit applications had been improperly joined. The Sixth Circuit Court of Appeals disagreed, concluding that joinder had been proper because all the charges filed against him stemmed from conduct that was part of his "common scheme to defraud."[21]

Another case that the majority relies on, *United States v Graham*,[22] provides an even more compelling illustration of the connection necessary to establish a common scheme or plan. In *Graham*, the court upheld joinder of numerous drug and firearm charges against the defendant. However, the court based its holding on the motive underlying the defendant's perpetration of each offense, which was encapsulated in a charge of conspiracy to commit offenses against the United States.

The defendant in *Graham* was a member of a local militia organization that planned to attack government targets. He also grew and sold marijuana, the proceeds of which he used to purchase weapons for his militia activity. Testimony at the defendant's trial established that each of the charged offenses was directly related to the larger conspiracy and underlying motive for the offenses: defendant's distrust of government and participation in the militia organization.

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[20] 18 USC 1961 *et seq*.

[21] *Saadey*, *supra* at 678.

[22] *United States v Graham*, 275 F3d 490 (CA 6, 2001).

The majority also relies on *United States v Fortenberry*.[23] There, the defendant was convicted of conspiracy to commit arson, possession of an unregistered firearm, and transportation of an undeclared firearm on a commercial airliner. The Fifth Circuit Court of Appeals upheld joinder of the offenses because they involved a common plan to take revenge on persons involved in defendant's divorce and custody battle.

### B. *REQUIREMENTS FOR ESTABLISHING A SINGLE/COMMON SCHEME OR PLAN*

The underlying premise throughout these cases is that a simple string of similar offenses, in and of itself, is not sufficient to establish a single common scheme or plan. Rather, the cases cited by the majority all involve situations in which each joined offense was committed with a particular motive or goal underlying the defendant's conduct.[24] That common motive is what established the common scheme or plan and made joinder appropriate.[25]

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[23] *United States v Fortenberry*, 914 F2d 671 (CA 5, 1990).

[24] In fact, in most of the cases the majority cites, the defendant was charged with conspiracy to commit a crime in addition to the joined offenses. The courts in those cases typically determined that the other charged offenses were properly joined because the defendant committed them in order to accomplish the objectives of the underlying conspiracy.

[25] Justice CORRIGAN's opinion cites four cases from other states that it claims support its analysis. It then quotes language from two of the cases that support the conclusion that temporal proximity between offenses is not required for them to be properly joined. See *ante* at 249, quoting *Lessard v State*, 158 P3d 698, 704 (Wy, 2007); *State v Willis*, 181 Vt 170, 181; 915 A2d 208 (2006). As stated in note 5 of this opinion, I agree that temporal proximity between offenses is not required to establish that offenses are "related" as part of a single scheme or plan. These cases therefore fail to advance the majority's argument.

Moreover, the majority's broad definition of "single scheme or plan" is inconsistent with the language and purpose of the court rule. Other

Hence, each of these cases involves situations in which the joined offenses were either planned in advance of their commission or committed to further the defendant's unified goal. This interpretation is what distinguishes acts committed as part of a "single scheme or plan" from acts that are of "the same or similar character."[26] That these two distinct provisions

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jurisdictions with similar court rules have correctly rejected such interpretations. See *State v Denton*, 149 SW3d 1, 15 (Tenn, 2004) ("A larger plan or conspiracy in this context contemplates crimes committed in furtherance of a plan that has a readily distinguishable goal, not simply a string of similar offenses"). I acknowledge that Tennessee's severance rule differs from Michigan's. Nevertheless, contrary to the view of Justice CORRIGAN's opinion, *Denton* is relevant here because it interpreted the common scheme or plan clause, not the evidentiary admissibility question. Thus, the differences between the rules were not relevant to this portion of *Denton*'s analysis.

In fact, many courts consider a finding of a common motive or goal as a precondition for establishing a single or common scheme or plan under the joinder and severance rules. *State v McCrary*, 621 SW2d 266, 271 (Mo, 1981) ("We find that the essential test in determining whether a common scheme or plan exists, in a case involving a single defendant acting alone, is the requirement that all the offenses charged must be 'products of a single or continuing motive.' ") (citation and emphasis deleted); *State v Oetken*, 613 NW2d 679, 688 (Iowa, 2000). Justice CORRIGAN's opinion correctly notes that *McCrary* and *Oetken* upheld joinder in those cases. Nevertheless, they *do* support my conclusion that finding the existence of a common or single scheme or plan requires more than the fact that the offenses were similar in nature. For example, in *McCrary*, the defendant's broader goal in committing each offense was his "plan of harassment and revenge aimed at the Penermon family." *Id.* at 272.

[26] Authority from other jurisdictions discussing the proper interpretation of a common or single scheme or plan, as opposed to conduct of the same or similar character, supports this interpretation. Compare *United States v Jawara*, 474 F3d 565, 574 (CA 9, 2007) ("[S]ituations where we have determined that a 'common scheme or plan' exists . . . typically involve a concrete connection between the offenses that goes beyond mere thematic similarity."); with *McLeod v State*, 581 So 2d 1144 (Ala Crim App, 1990) (finding no error in the joinder of four counts of unlawful distribution of cocaine because all four offenses were clearly of the same character); *United States v Coleman*, 22 F3d 126, 133-134 (CA

are not intended to capture the same connection between offenses is evidenced by the fact that the rules in many jurisdictions include both.[27]

The commentary to the revised American Bar Association's Standards for Criminal Justice supports this interpretation. It states:

> [Common plan] offenses involve neither common conduct nor interrelated proof. Instead, the relationship among offenses (which can be physically and temporally

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7, 1994), abrogated on other grounds as recognized by *Riley v Commonwealth*, 120 SW3d 622 (Ky, 2003). *Coleman* interpreted the "same or similar character" language of FR Crim P 8(a) to mean that if offenses are of a like class, although not connected temporally or evidentially, the requisites of proper joinder should be satisfied. The Court used an example that is instructive here: two armored car robberies committed months apart are offenses of the same or similar character; possessing five kilograms of cocaine and defrauding a bank, even if they occur on the same day, are not. The Court ultimately concluded that "joinder under Rule 8(a) was appropriate because Coleman was charged with four counts of possession of a firearm, identical 922(g)(1) offenses which could only vary in time and location but not in their essential elements." *Coleman*, *supra* at 134.

[27] That the court rules in some jurisdictions contain both provisions certainly suggests that they cover different types of connections between offenses. So does the commentary to the ABA standards. The majority apparently concedes that the offenses in this case were of the same or similar character. *Ante* at 235 ("The charges stemming from both arrests were not 'related' *simply* because they were 'of the same or similar character.' ") (emphasis added). Given that the charges stemming from the two arrests were for virtually the same offenses, it is difficult to see how one could not come to this conclusion. It is on this basis that I assert that the majority has read the "same or similar character" language into MCR 6.120. *Ante* at 245.

Nevertheless, the majority argues that the offenses in this case were not "related" for this reason. I agree that under MCR 6.120 and the ABA standards, same or similar character offenses are not "related" offenses. But this assertion does nothing to prove the majority's underlying point—that the offenses were part of a single scheme or plan. I fail to see how this pronouncement, which again presupposes its conclusion is correct, advances the majority's argument.

> remote) is dependent upon the existence of a plan that ties the offenses together and demonstrates that the objective of each offense was to contribute to the achievement of a goal not attainable by the commission of any of the individual offenses. A typical example of common plan offenses is a series of separate offenses that are committed pursuant to a conspiracy among two or more defendants. Common plan offenses may also be committed by a defendant acting alone who commits two or more offenses in order to achieve a unified goal.[28]

By contrast, the commentary describing offenses of the same or similar character states, "Similar character offenses normally involve the repeated commission of the same offense[,] often with the same modus operandi."[29]

Michigan has not adopted the "same or similar character" language as part of MCR 6.120. The majority implicitly does so here by denying severance of offenses that are of the same or similar character under the misnomer of a single scheme or plan.

Contrary to the majority's conclusion, defendant's acts of "packaging cocaine for distribution" do not meet the threshold for establishing a single scheme or plan. Unlike in *Fortenberry*, defendant in this case did not commit both drug offenses as part of a plan to exact revenge. Unlike in *Graham*, defendant's motive for committing these offenses did not stem from his participation in a militia organization based on an underlying distrust of government.

In this case, there is no evidence that defendant either planned his two drug offenses in advance of their

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[28] 2 ABA Standards for Criminal Justice, Commentary to Standard 13-1.2 (2d ed 1980).

[29] *Id*.

commission or that he had a unified goal for committing them. The intent to engage in "drug trafficking," or "earn money by selling cocaine," is the intent to engage in the conduct itself, not evidence of a unified goal motivating the commission of the offenses.[30] Labeling this conduct as a plan to "package cocaine for distribution" is nothing more than wordplay designed to evade this determination. Although the drug offenses in this case involve conduct of the "same or similar character," this similarity is not included in the definition of "related" offenses in MCR 6.120. Thus, although joinder under the federal rule might be appropriate,[31] MCR 6.120 mandates severance upon the defendant's timely motion to sever.

### C. *THE MAJORITY'S INTERPRETATION IS AN UNREASONABLY BROAD ONE*

The majority's analysis, taken to its logical conclusion, would eviscerate the mandatory severance provision in MCR 6.120 and give trial courts unfettered discretion to deny defendants' motions to sever. Defendants would never be entitled to severance of any drug

[30] This conclusion is supported by the Arkansas Supreme Court's decision in *Bunn v State*, 320 Ark 516; 898 SW2d 450 (1995). There, the court reversed a defendant's convictions of three counts of delivery of cocaine. The reversal resulted from the trial court's erroneous denial of the defendant's motion to sever the charged offenses. The Arkansas Supreme Court held that no single scheme or plan existed and noted that "[t]he purpose of [Arkansas's severance rule] is to give effect to the principle that the State cannot bolster its case against the accused by proving that he has committed other similar offenses in the past . . . . The record is void of any evidence that the offense charged in Count III was planned in advance or as a part of the offenses charged in Counts I and II." *Id.* at 523 (citation and quotation marks omitted).

[31] Many commentators, however, have strongly criticized joinder of offenses based solely on the grounds that they are of the same or similar character. See, e.g., LaFave, Criminal Procedure (3d ed), §17.1(b), p 762.

offenses because such offenses could always be deemed "related." Similarly, defendants charged with criminal sexual conduct offenses would never be entitled to severance; their conduct always could be deemed part of a scheme to molest victims for the defendants' sexual gratification. Such a broad construction of the joinder rules has been appropriately criticized. For example, in *State v Denton*,[32] the Tennessee Supreme Court observed that "[t]he argument that sex crimes can be construed as part of a continuing plan or conspiracy merely by the fact that they are committed for sexual gratification has previously been rejected."

Thus, under the majority's analysis, severance of the charged offenses would be unnecessary regardless how far apart in time and space the offenses occurred or the underlying motive for them. Such outcomes arguably would be appropriate if MCR 6.120 did not require severance when the offenses are of the "same or similar character." The federal rule does not require it. As noted previously, however, our rule omits such language from its definition of "related" offenses.

Under the appropriate interpretation of MCR 6.120, defendant's actions in this case were insufficiently linked to be treated as "related" and part of a "single scheme or plan." The *Tobey* Court rejected the argument that the defendant had a single scheme "to make continuous sales of drugs," because the sales were not multiple acts aimed at achieving the same goal. Presumably the defendant in *Tobey* was just as interested in "earn[ing] money" from selling drugs as was defendant in this case. However, *Tobey* expressly rejected finding a single scheme or plan under similar circum-

[32] *Denton*, *supra* at 15.

stances. Given that *Tobey* and MCR 6.120 are reconcilable, there is no basis for the majority to abandon this key holding from *Tobey*.

Finally, I note that other states with more expansive joinder and severance rules are typically far more protective of a defendant's rights in this context than the federal rule. These states also grant defendants a mandatory right to severance of multiple offenses under certain circumstances.[33] My conclusion in this case is consistent with the broad interpretation of the right to severance that courts in jurisdictions with similarly worded rules have adopted. Moreover, such an interpretation of MCR 6.120 is entirely in accord with the language of the rule and the staff comment stating that the rule is "consistent" with *Tobey*.

### III. HARMLESS ERROR

Finally, having concluded that defendant was entitled to mandatory severance of the charges against him, I also conclude that the failure to sever the charges was not harmless error.[34] MCL 769.26 states that a preserved nonconstitutional error is not grounds for reversal unless it affirmatively appears more probable than not that the error was outcome determinative.[35] MCR 2.613(A) provides that an error is not grounds for

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[33] For example, Tenn R Crim P 14(b)(1) provides:

> (1) *Involving Permissive Joinder of Offenses.* If two or more offenses are joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others.

[34] While I am not convinced that a harmless-error analysis is appropriate here, because I conclude that the error in this case was not harmless, I need not answer that question.

[35] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

disturbing a judgment unless refusal to do so appears inconsistent with substantial justice. The statute and the court rule are consistent with one other and simply reflect "different articulations of the same idea."[36]

The majority concludes that, even if the denial of defendant's motion to sever in this case were erroneous, it would be harmless because the error was not outcome determinative. It rests this conclusion on two bases. First, it concludes that the evidence of each charged offense could have been introduced at the other trial under MRE 404(b). Second, it observes that the United States Supreme Court has held that improper joinder, by itself, does not violate the United States Constitution.[37]

I believe that the trial court's failure to sever the offenses in this case cannot be deemed harmless. MCR 6.120 provides an unqualified, *mandatory* right to severance for unrelated offenses.[38] In cases where an unequivocal right has been violated, as here, the error cannot be dismissed as harmless. Deprivation of that right inevitably results in substantial prejudice.[39]

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[36] *People v Robinson*, 386 Mich 551, 562; 194 NW2d 709 (1972).

[37] *Ante* at 245, quoting *United States v Lane*, 474 US 438, 446 n 8; 106 S Ct 725; 88 L Ed 2d 814 (1986). The majority also observes that there is " 'no such thing as misjoinder of offenses in Michigan.' " *Ante* at 245 n 27, quoting 2 Gillespie, Michigan Criminal Law and Procedure (2d ed), § 17:36. Again, while technically correct, this statement is irrelevant. MCR 6.120(A) is permissive. It *allows* joinder of any and all offenses. MCR 6.120(B), by contrast, is mandatory and *requires* that unrelated offenses be severed upon a timely motion to sever.

[38] "Neither *Tobey* nor the court rule sets forth any exception to a criminal defendant's absolute right to severance of unrelated offenses. Both provide an absolute right of a criminal defendant to insist on separate trials." *Daughenbaugh*, *supra* at 510.

[39] "[A defendant] has a right to be warned by the complaint and warrant of what he is accused, and ought not to be convicted of two different crimes, committed at different times, under one information, with the evidence of each confounded as a whole, and used indiscriminately to convict him of both. Such a proceeding violates

The majority's conclusion that any error was harmless because evidence of one offense would have been admissible in the trial for the other offenses takes too much for granted. To succeed, this argument depends on the existence of the very "single scheme or plan" that would establish that the offenses were "related" and make severance unnecessary. Only once such a scheme has been shown would evidence of other offenses be admissible under MRE 404(b).[40]

Moreover, common sense dictates that an error cannot be harmless when a jury convicts a defendant of an offense that it should not have been allowed to consider. In *People v Martin*,[41] a majority of this Court held that a trial court's jury instruction that erroneously allowed the jury to consider a lesser included offense was not harmless. *Martin* is analogous here because, in both cases, the jury convicted the defendant of charges it should never have been allowed to consider. The enor-

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every principle of justice, and places him at the mercy of the prosecutor; and, as, in this case, evidence not competent to prove one of the offenses, but admissible as to the other, is used to establish both crimes. Such a trial must necessarily be an unfair and illegal one." [*Tobey*, *supra* at 154, quoting *People v Aikin*, 66 Mich 460, 472; 33 NW 821 (1887).]

[40] The majority is correct that "other acts" evidence is admissible under MRE 404(b) for purposes other than to show a defendant's common scheme or plan. However, the prosecutor argued in the trial court for joinder or, in the alternative, to introduce evidence of defendant's other crimes at the separate trials, based on defendant's common scheme. Defendant was entitled to mandatory severance of the offenses against him. Therefore, it is improper simply to assume that evidence of defendant's other crimes would be admissible for another purpose under MRE 404(b), rendering any error in failing to sever the charges harmless. Finally, even if there were another basis for admitting the evidence under MRE 404(b), it might nevertheless not be admissible if the court concluded that its prejudicial effect outweighed its probative value. See MRE 403.

[41] *People v Martin*, 482 Mich 851 (2008).

mity of the prejudice to a defendant in such circumstances is clear, and this Court recognized it in *Martin*.

IV. CONCLUSION

I dissent from the majority's conclusion that MCR 6.120 superseded *People v Tobey* and that severance of the charged offenses in this case was not required under the rule. I also believe that the error cannot be considered harmless under MCL 769.26 and MCR 2.613(A). Therefore, I would reverse the Court of Appeals judgment and remand the case to the trial court for further proceedings.

CAVANAGH and HATHAWAY, JJ., concurred with KELLY, C.J.

PEOPLE v JACKSON

Docket No. 135888. Argued April 7, 2009 (Calendar No. 2). Decided July 10, 2009.

Harvey E. Jackson was charged with several crimes in the Macomb Circuit Court, Donald G. Miller, J., after he broke into the home of a woman for whom he had worked. The court appointed an attorney for the defendant after determining that he was indigent, and the defendant pleaded no contest to charges of first-degree home invasion, assault with intent to rob while unarmed, and tampering with telephone lines. The court sentenced the defendant to eight years' imprisonment and imposed various costs and fines, including $725 for his court-appointed attorney. The court then issued an order allowing the Department of Corrections to take money from the defendant's prison account as payment for these costs. The defendant filed a delayed application for leave to appeal, arguing, among other things, that the trial court had erred by imposing the attorney fee without considering his ability to pay it. The Court of Appeals, SERVITTO, P.J., SAAD, C.J., and DONOFRIO, J., denied the application for lack of merit in the grounds presented. Unpublished order of the Court of Appeals, issued January 30, 2008 (Docket No. 282579). The Supreme Court granted the defendant's application for leave to appeal. 483 Mich 884 (2009).

In a unanimous opinion by Justice CAVANAGH, the Supreme Court *held*:

The trial court did not err by imposing the fee for the court-appointed attorney under MCL 769.1k without analyzing whether the defendant was able to pay, because this inquiry is not constitutionally required. Contrary to the holding of *People v Dunbar*, 264 Mich App 240 (2004), the assessment of a defendant's ability to pay is only necessary when that imposition is enforced and the defendant contests his or her ability to pay. The court must then consider whether that defendant remains indigent and whether payment would cause manifest hardship. The assessment of ability to pay is initially obviated for orders to remit prisoner funds under MCL 769.1*l*, because the procedure in this provision effectively presumes that the imprisoned defendant is not indigent. If the defendant in this case contests his ability to pay the

amount in the remittance order, he may ask the trial court to amend or revoke the order, at which time the trial court must decide whether the defendant's claim of extraordinary financial circumstances rebuts the presumption of nonindigency that arises from the application of the statutory procedure.

1. The three United States Supreme Court opinions on which *Dunbar* was based do not require a presentence assessment of a defendant's ability to pay a fee for his or her court-appointed attorney. *James v Strange*, 407 US 128 (1972), dealt with an equal-protection issue and had nothing to do with a defendant's ability to pay for a court-appointed attorney. *Bearden v Georgia*, 461 US 660 (1983), required an ability-to-pay assessment, but only before the defendant was imprisoned for defaulting on a probation condition to pay costs. Finally, although *Fuller v Oregon*, 417 US 40 (1974), upheld a state statute requiring an ability-to-pay assessment before a fee for a court-appointed attorney was imposed, it did not hold that such an assessment was constitutionally required. Accordingly, *Dunbar* was incorrect to the extent that it held that a criminal defendant has a constitutional right to an assessment of his or her ability to pay before a fee for a court-appointed attorney is imposed. With no constitutional mandate, *Dunbar*'s rule must yield to the Legislature's contrary intent, as expressed in MCL 769.1k, that no such analysis is required at sentencing. *Dunbar* also erred by relying on *People v Grant*, 455 Mich 221 (1997), which upheld a requirement that a court consider a defendant's ability to pay before ordering him or her to pay restitution to the victim of the crime, because that ability-to-pay requirement was mandated by a statute, not constitutionally required. Accordingly, *Dunbar* and *People v Trapp*, 280 Mich App 598 (2008), to the extent it contradicts this decision, are overruled.

2. Although a defendant does not have a constitutional right to an assessment of his or her ability to pay before a fee is imposed for a court-appointed attorney, due process principles entitle the defendant to be notified when a court attempts to enforce the fee and to be given an opportunity to contest the enforcement on the ground of indigency. If the defendant makes a timely objection to the enforcement of the fee because of indigency, the court must assess the defendant's ability to pay. Until this Court adopts specific guidelines to govern this assessment, the court should focus on whether the defendant is indigent and unable to pay at that time or whether forced payment would work a manifest hardship on the defendant at that time.

3. MCL 769.1k, which allows a trial court to impose a fee for a court-appointed attorney without first assessing the defendant's

ability to pay, is not unconstitutional because such an assessment is not constitutionally required until the fee is actually enforced.

4. Although MCL 769.1*l* does not require an assessment of an imprisoned defendant's ability to pay before the Department of Corrections may deduct funds from a prisoner's account under a court order to pay a fee for a court-appointed attorney, this provision only allows the garnishment of a prisoner's account if the balance exceeds $50. While this amount would be insufficient to sustain a defendant living among the general populace, a prisoner has no living expenses and may accordingly be presumed nonindigent under the procedure set forth in this statutory provision. Accordingly, MCL 769.1*l* is not unconstitutional.

5. Prisoners who believe that their unique individual financial circumstances rebut the presumption of nonindigency in MCL 769.1*l* may petition the court to reduce or eliminate the amount that the remittance order requires them to pay. Courts should review such claims under the guidance of MCL 771.3(6)(b), which applies to probationers seeking remission of costs owed. When reviewing a prisoner's claim, the court need not hold formal proceedings, but must receive the prisoner's petition and any proofs of unique and extraordinary financial circumstances. A prisoner's individual circumstances warrant amending or reducing the remittance order when the court, in its discretion, determines that enforcement would work a manifest hardship on the prisoner or his or her immediate family. The remittance order must be amended when the presumption of nonindigency in MCL 769.1*l* is rebutted with a conclusion that enforcement of the order would impose a manifest hardship on the prisoner or his or her immediate family.

Affirmed.

1. CRIMINAL LAW — COURT-APPOINTED ATTORNEYS — FEES FOR COURT-APPOINTED ATTORNEYS — REIMBURSEMENT OF FEES FOR COURT-APPOINTED ATTORNEYS BY DEFENDANTS.

A court is required to assess a defendant's ability to pay for a court-appointed attorney not when the fee is imposed, but when the imposition of the fee is enforced and the defendant claims to be indigent (MCL 769.1k).

2. CRIMINAL LAW — COURT-APPOINTED ATTORNEYS — FEES FOR COURT-APPOINTED ATTORNEYS — REIMBURSEMENT OF FEES FOR COURT-APPOINTED ATTORNEYS BY DEFENDANTS — DUE PROCESS.

A defendant is entitled to be notified when a court attempts to enforce the imposition of a fee for a court-appointed attorney and to be given an opportunity to contest the enforcement on the ground of indigency.

3. CRIMINAL LAW — COURT-APPOINTED ATTORNEYS — FEES FOR COURT-APPOINTED ATTORNEYS — REIMBURSEMENT OF FEES FOR COURT- APPOINTED ATTORNEYS BY DEFENDANTS — INDIGENCY DETERMINATIONS.

If a defendant timely objects to the enforcement of the imposition of a fee for a court-appointed attorney because of indigency, the court must determine whether forced payment would work a manifest hardship on the defendant at that particular time.

4. CONSTITUTIONAL LAW — CRIMINAL LAW — COURT-APPOINTED ATTORNEYS — FEES FOR COURT-APPOINTED ATTORNEYS — REIMBURSEMENT OF FEES FOR COURT-APPOINTED ATTORNEY BY DEFENDANTS — INDIGENCY DETERMINATIONS.

The statutory provision that authorizes the Department of Corrections to deduct 50 percent of a prisoner's funds that exceed $50 each month pursuant to a court order to pay a fee for that prisoner's court-appointed attorney without an assessment of the prisoner's indigency is not unconstitutional (MCL 769.1*l*).

5. CRIMINAL LAW — COURT-APPOINTED ATTORNEYS — FEES FOR COURT-APPOINTED ATTORNEYS — REIMBURSEMENT OF FEES FOR COURT-APPOINTED ATTORNEY BY DEFENDANTS — INDIGENCY DETERMINATIONS — PRESUMPTION OF NONINDIGENCY.

An order to remit a prisoner's funds to pay a fee for the prisoner's court-appointed attorney must be amended when the presumption of nonindigency is rebutted with evidence that enforcement of the order would impose a manifest hardship on the prisoner or his or her immediate family (MCL 769.1*l*).

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, *Eric J. Smith*, Prosecuting Attorney, *Robert Berlin*, Chief Appellate Attorney, and *Mary Jo Diegel*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Valerie Newman*) for the defendant.

Amicus Curiae:

*Brian A. Peppler*, *Kym L. Worthy*, *Timothy A. Baughman*, and *Marilyn A. Eisenbraun* for the Prosecuting Attorneys Association of Michigan.

CAVANAGH, J. This case presents us with several questions regarding the process by which Michigan trial courts

impose attorney fees on convicted criminal defendants who have used court-appointed attorneys. Specifically, we first asked whether *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), correctly decided that, before imposing a fee for a court-appointed attorney, a trial court must make a presentence articulation of its conclusion that the defendant has a foreseeable ability to pay the fee. We conclude that *Dunbar* was incorrect to the extent that it required a court to conduct an ability-to-pay analysis before imposing a fee for a court-appointed attorney, and we hold that such an analysis is only required once the imposition of the fee is enforced. Further, we hold that once an ability-to-pay assessment is triggered, the court must consider whether the defendant remains indigent and whether repayment would cause manifest hardship. Finally, we conclude that remittance orders of prisoner funds, under MCL 769.1*l*, generally obviate the need for an ability-to-pay assessment with relation to defendants sentenced to a term of imprisonment because the statute is structured to only take monies from prisoners who are presumed to be nonindigent.

## I. FACTS AND PROCEDURE

Before May 4, 2006, defendant, Harvey E. Jackson, did odd jobs around the home of an acquaintance, Cosma Agrusa. On that day, however, defendant broke into Agrusa's home and assaulted her. He then gathered various pieces of Agrusa's property, pulled the telephone line from the wall, and left the home. Eventually, defendant was charged with several crimes for these actions. As a result of his indigency, defendant was given court-appointed counsel, who negotiated a plea with the prosecutor. Hence, defendant pleaded nolo contendere to first-degree home invasion,[1] assault with

[1] MCL 750.110a(2).

intent to rob while unarmed,[2] and tampering with telephone lines.[3] On December 14, 2006, defendant was sentenced to an eight-year minimum prison term, which was in accordance with the plea agreement. In addition, the trial court imposed various costs and fines, including $725 for "Initial Defense Costs," i.e., his court-appointed attorney's fee. The trial court did not articulate whether it evaluated defendant's foreseeable ability to pay the attorney fee. Defendant then began serving his prison term.

On January 17, 2007, the trial court issued an order to remit prisoner funds for fines, costs, and assessments. This order allowed the Department of Corrections to begin taking money from defendant's prisoner account to satisfy the various fees and costs imposed by the trial court.

Defendant requested appellate counsel, and the State Appellate Defender Office (SADO) was appointed.[4] On defendant's behalf, SADO moved the trial court to correct defendant's sentence, arguing (among other things) that the trial court incorrectly imposed the attorney fee without considering defendant's ability to pay it. The trial court denied the motion, and SADO

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[2] MCL 750.88.

[3] MCL 750.540.

[4] As a condition to receiving both trial and appellate counsel, defendant was required to sign forms provided by the county that acknowledged defendant's obligation to reimburse the county for the cost of his court-appointed attorneys and the associated court costs. These forms also noted that if defendant was unable to pay these costs in full, he would be required to enter a reimbursement plan in accordance with his ability to pay. The forms also noted that the 20 percent late fee under MCL 600.4801 and MCL 600.4803 may be imposed for fees that were not paid within 56 days of their due date. However, the trial court never imposed any fees associated with defendant's appellate counsel, and it never imposed the statutory late fee.

filed a delayed application for leave to appeal in the Court of Appeals. The Court of Appeals denied leave to appeal for lack of merit. SADO requested leave to appeal in this Court, and we granted leave. *People v Jackson*, 483 Mich 884 (2009).

## II. STANDARD OF REVIEW

Defendant challenges the constitutionality of the procedure used to impose and enforce a fee for his court-appointed attorney. This presents a question of constitutional law, which is reviewed de novo. *Sidun v Wayne Co Treasurer*, 481 Mich 503, 508; 751 NW2d 453 (2008).[5]

## III. ANALYSIS

In this case, defendant relies on *People v Dunbar* to contend that his constitutional rights were violated when the trial court imposed a fee on him for his court-appointed attorney without expressly contemplating his foreseeable ability to pay the fee. To evaluate this claim we must assess (a) the United States Supreme Court's opinions on other states' attempts to recoup fees for court-appointed attorneys; (b) *Dunbar*'s interpretation of those opinions; (c) Michigan's recoupment procedure for fees for court-appointed attorneys; (d) the validity of *Dunbar*'s presentence ability-to-pay rule, and (e) the constitutionality of Michigan's recoupment procedure for attorney fees.

[5] The parties contest whether defendant's claim of error was preserved, which would affect the standard of review relating to defendant's entitlement to relief. However, we decline to decide that issue because our conclusion that the trial court did not err obviates the need to address the preservation issue.

A. THE UNITED STATES SUPREME COURT'S OPINIONS ON RECOUPMENT PROCEDURES FOR FEES FOR COURT-APPOINTED ATTORNEYS

In 1963 the United States Supreme Court delivered its seminal decision in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), which held that the Sixth Amendment of the United States Constitution requires that all criminal defendants be afforded legal counsel during trial. This constitutional requirement applies to the states, and it requires them to provide legal counsel to indigent criminal defendants who request an attorney. *Id*. at 342-345. Since *Gideon*, numerous states have instituted various procedures in an effort to recoup the costs of providing indigent defendants with legal counsel. Some defendants have challenged the propriety of specific recoupment procedures, which has given the United States Supreme Court occasion to evaluate the constitutionality of those procedures.

First, in *James v Strange*, 407 US 128; 92 S Ct 2027; 32 L Ed 2d 600 (1972), the Court held that a Kansas statute requiring payment of fees for court-appointed attorneys was unconstitutional because it did not give defendants who owed the state a debt the same debtor exemptions that civil debtors received under the state's laws. Specifically, a defendant who owed the state of Kansas for his court-appointed attorney could only exempt his homestead from collection, whereas the normal civil debtor had a host of other exemptions. *Id*. at 130-131. *James* held that the difference in the laws' application to indigent defendants and other civil debtors violated equal protection principles. *Id*. at 140-142.

Second, in *Fuller v Oregon*, 417 US 40; 94 S Ct 2116; 40 L Ed 2d 642 (1974), the Court reviewed a recoupment statute that gave the trial court the discretion to impose a fee for a court-appointed attorney only when

the defendant was convicted and, at the time of sentencing, adjudged to have a foreseeable ability to pay the fee. *Id*. at 44-45. The recoupment statute also allowed the defendant the opportunity to request a remission of the earlier-imposed fee when payment would impose a manifest hardship. *Id*. at 45-46. The statute also proscribed punishing the defendant for lack of payment, unless he was able to pay but simply refused. *Id*. The Court took special notice that the statute was "quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation." *Id*. at 46. Further, "those [defendants] upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no 'manifest hardship' will result." *Id*.

The *Fuller* Court did not accept the defendant's claim that the statute violated equal protection requirements because the statute was objectively rational and was not based on invidious discrimination. *Id*. at 46-50. The Court also rejected the defendant's claim that the statute infringed his constitutional right to counsel, noting that "[t]he fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel." *Id*. at 53. Accordingly, *Fuller* affirmed the constitutionality of Oregon's recoupment statute. *Id*. at 54.

Finally, in *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983), the Court considered a trial court's decision to revoke a defendant's probation, and remand him to prison, for his inability to pay a fine, which was imposed as part of his probation sentence. *Id*. at 662. Relying on notions of due process and

fundamental fairness, the Court held that in order to punish a defendant for "failure to pay a fine or restitution, a sentencing court must inquire into the reasons for the failure to pay." *Id*. at 672. "If the [defendant] willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation . . . ." *Id*. But simply punishing a defendant for his lack of payment, without analyzing his fault in the lack of payment, "would deprive [him] of his . . . freedom simply because, through no fault of his own, he cannot pay the fine." *Id*. at 672-673. "Such a deprivation would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Id*. at 673.

### B. *PEOPLE v DUNBAR*'S INTERPRETATION OF *JAMES*, *FULLER*, AND *BEARDEN*

In *Dunbar*, our Court of Appeals was faced with a criminal defendant's argument that a trial court could not impose a fee for a court-appointed attorney without indicating that it had assessed his present and future capacity to pay the fee. *Dunbar*, 264 Mich App at 251. At the time, Michigan had no legislation regarding a trial court's imposition of a fee for a court-appointed attorney. Therefore, the *Dunbar* Court looked to *James*, *Fuller*, and *Bearden* for direction. Specifically, *Dunbar* noted that these three United States Supreme Court cases were discussed by the court in *Alexander v Johnson*, 742 F2d 117 (CA 4, 1984). *Dunbar* found *Alexander*'s discussion of the cases to be persuasive. In fact, *Dunbar* expressly adopted the following portion from the *Alexander* decision:

> "Although there is no single model to which all state repayment programs must conform, the Supreme Court has carefully identified the basic features separating a

constitutionally acceptable recoupment or restitution program from one that is fatally defective. See *Fuller v Oregon*, 417 US [40, 47-54; 94 S Ct 2116; 40 L Ed 2d 642 (1974)]; *James v Strange*, 407 US [128, 135-139; 92 S Ct 2027; 32 L Ed 2d 600 (1972)]. See also *Bearden v Georgia*, 461 US 660; 103 S Ct 2064; 76 L Ed 2d 221 (1983). In *James*, the first of the three decisions bearing on this question, the Supreme Court emphasized that the indigent accepting court-appointed counsel could not be subjected to more severe collection practices than other civil debtors without running afoul of the equal protection clause. In *Fuller*, decided two years later, the Court offered important clarifications of the developing law in this area by upholding an Oregon reimbursement plan that required an indigent to repay court-appointed counsel fees as a condition of probation. The Oregon approach, the Court explained, contained none of the invidious collection practices condemned in *James*, provided an array of procedural and substantive safeguards designed to preserve the indigent's basic right to counsel, and authorized reimbursement from the defendant only when he could afford to pay without substantial hardship. Finally, in *Bearden*, decided nearly a decade later, the Court added a new gloss to the general jurisprudence in this area by ruling that an inmate violating any monetary requirement of his probation or restitution regimen cannot be imprisoned if his non-compliance results from poverty alone.

"From the Supreme Court's pronouncements in *James*, *Fuller*, and *Bearden*, five basic features of a constitutionally acceptable attorney's fees reimbursement program emerge. First, the program under all circumstances must guarantee the indigent defendant's fundamental right to counsel without cumbersome procedural obstacles designed to determine whether he is entitled to court-appointed representation. Second, the state's decision to impose the burden of repayment must not be made without providing him notice of the contemplated action and a meaningful opportunity to be heard. Third, the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on

> his own and family's finances, and the hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent. Fourth, the defendant accepting court-appointed counsel cannot be exposed to more severe collection practices than the ordinary civil debtor. Fifth, the indigent defendant ordered to repay his attorney's fees as a condition of work-release, parole, or probation cannot be imprisoned for failing to extinguish his debt as long as his default is attributable to his poverty, not his contumacy." [*Dunbar*, 264 Mich at 252-254, quoting *Alexander*, 742 F2d at 124.]

Relying on this analysis, *Dunbar* held that, before a trial court may impose a fee on a defendant for his court-appointed attorney, it must consider the defendant's ability to pay the fee. *Dunbar*, 264 Mich App at 254-255. *Dunbar* also held that the ability-to-pay inquiry does not require the trial court to make "a specific finding on the record regarding [the defendant's] ability to pay," "unless the defendant specifically objects to the reimbursement amount at the time it is ordered . . . ." *Id*. at 254. "However, [in any context,] the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id*. at 254-255, citing *People v Grant*, 455 Mich 221, 242, 243 n 30; 565 NW2d 389 (1997). And "[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay." *Id*. at 255. Finally, "[a] defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered." *Id*., citing *Grant*, 455 Mich at 242 n 27.

In essence, *Dunbar* adopted the five elements articulated in *Alexander*, and it required that they all be met before a trial court could impose a fee for a court-appointed attorney as part of a defendant's sentence. *Dunbar* then went further and expanded the third *Alexander* element by requiring trial courts to make a presentence articulation regarding a defendant's foreseeable ability to pay the fee. We generally refer to this holding as *Dunbar*'s "ability-to-pay rule."

### C. MICHIGAN'S RECOUPMENT PROCEDURE FOR FEES FOR COURT-APPOINTED ATTORNEYS

Soon after *Dunbar*, our Legislature promulgated MCL 769.1k and MCL 769.1*l*. These statutes give Michigan trial courts the power to both impose a fee for a court-appointed attorney as part of a defendant's sentence and to enforce that imposition against an imprisoned defendant. MCL 769.1k allows imposition of such fee. It states, in pertinent part:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> * * *
>
> (b) The court may impose any or all of the following:
>
> * * *
>
> (*iii*) The expenses of providing legal assistance to the defendant.

Notably, this power to impose the fee is not limited by reference to a defendant's ability to pay.

MCL 769.1*l* allows trial courts to recoup the costs imposed under § 1k by authorizing the Department of Corrections to take funds from a prisoner's prison account. This statute also operates irrespective of a defendant's ability to pay. It states, in pertinent part:

> If a prisoner under the jurisdiction of the department of corrections has been ordered to pay any sum of money as described in section 1k and the department of corrections receives an order from the court on a form prescribed by the state court administrative office, the department of corrections shall deduct 50% of the funds received by the prisoner in a month over $50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds $100.00, or the entire amount if the prisoner is paroled, is transferred to community programs, or is discharged on the maximum sentence.[6]

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[6] Defendants sentenced to probation may also be subject to an attorney-fee recoupment order. As a condition of probation, a defendant may be ordered to pay the cost of "providing legal assistance" during the prosecution of his case. MCL 771.3(2)(c); MCL 771.3(5). Unlike MCL 769.1*l*, MCL 771.3 includes provisions, consistent with the statutory requirements outlined in *Fuller*, expressly requiring the court to consider the defendant's ability to pay at the time of enforcement and before basing a revocation of probation on a failure to pay:

> (6) If the court imposes costs under subsection (2) as part of a sentence of probation, all of the following apply:
>
> (a) The court shall not require a probationer to pay costs under subsection (2) unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of costs under subsection (2), the court shall take into account the probationer's financial resources and the nature of the burden that payment of costs will impose, with due regard to his or her other obligations.
>
> (b) A probationer who is required to pay costs under subsection (1)(g) or (2)(c) and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment.

D. THE VALIDITY OF *DUNBAR*'S ABILITY-TO-PAY RULE AND THE CONSTITUTIONALITY OF MICHIGAN'S RECOUPMENT PROCEDURE FOR FEES FOR COURT-APPOINTED ATTORNEYS

In this case, the trial court relied on § 1k to impose on defendant a fee for his court-appointed attorney. The trial court then relied on § 1*l* to enforce the imposition of the attorney fee by directing the Department of Corrections to remit funds from defendant's prisoner account. If this case presented a banal question of statutory application, the trial court's actions would be summarily affirmed because they are authorized by the above-mentioned statutes. However, defendant claims that these statutes unconstitutionally infringed his Sixth Amendment right to counsel.[7] Accordingly, this case presents a more nuanced constitutional question regarding a criminal defendant's right to counsel.

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* * *

> (8) If a probationer is ordered to pay costs as part of a sentence of probation, compliance with that order shall be a condition of probation. The court may revoke probation if the probationer fails to comply with the order and if the probationer has not made a good faith effort to comply with the order. In determining whether to revoke probation, the court shall consider the probationer's employment status, earning ability, and financial resources, the willfulness of the probationer's failure to pay, and any other special circumstances that may have a bearing on the probationer's ability to pay. . . .

While the Legislature has provided for an ability-to-pay assessment before revoking a prisoner's parole on the basis of a failure to pay restitution and state costs, MCL 791.240a(11), it has not enacted any similar provisions relevant to a parolee's obligation to pay the fees of court-appointed counsel. Based solely on the statutes relevant to parolees, just like under the statutes relevant to imprisoned individuals, parolees would be subject to enforcement of attorney-fee recoupment orders irrespective of their ability to pay. Accordingly, the ability-to-pay analysis based on *Fuller* and outlined in this opinion would apply equally to parolees and prisoners.

[7] See US Const, Am VI.

*Dunbar*'s ability-to-pay rule clearly requires the trial court to (1) conduct a presentence analysis of a defendant's foreseeable ability to pay the fee for his court-appointed attorney and (2) make some articulation of that analysis. Yet, § lk allows for the imposition of a fee for a court-appointed attorney irrespective of a defendant's ability to pay, and § 1*l* allows the trial court to order that a prisoner's prison account be reduced to satisfy costs imposed under § 1k. This is usually accomplished by a remittance order, which also does not require an ability-to-pay analysis. Consequently, *Dunbar*'s ability-to-pay rule conflicts with the statutes regarding the proper method for a court to impose the attorney fee. This case requires us to resolve this conflict because the trial court here did not articulate an analysis of defendant's foreseeable ability to pay. Thus, we must adjudge the validity of *Dunbar*'s ability-to-pay rule and the constitutionality of Michigan's statutory procedure for recouping fees for court-appointed attorneys.[8]

*Dunbar* surveyed the United States Supreme Court opinions and it accepted *Alexander*'s articulation of the five elements that a recoupment procedure for fees for court-appointed attorneys must meet. *Dunbar*'s ability-to-pay rule derives from the third *Alexander* element, which states that

> "the entity deciding whether to require repayment must take cognizance of the individual's resources, the other demands on his own and family's finances, and the

[8] In the past, we have declined to answer this question. See *People v Trapp*, 482 Mich 1044 (2008) (denying leave to appeal). Irrespective of the bases for our earlier declination, we are now resolved to settle this nettlesome issue. Because we now overrule *Dunbar*, and because the Court in *People v Trapp*, 280 Mich App 598; 760 NW2d 791 (2008), relied on *Dunbar*, we also overrule *Trapp* to the extent it contradicts our decision today.

> hardships he or his family will endure if repayment is required. The purpose of this inquiry is to assure repayment is not required as long as he remains indigent." [*Dunbar*, 264 Mich App at 253, quoting *Alexander*, 742 F2d at 124.]

We accept this element's articulation of a constitutional requirement. But *Dunbar*'s ability-to-pay rule is an extension of this rule. Indeed, while the element requires that a truly indigent defendant never be required to pay the fee, the element never mandates that this indigency analysis take place before *imposing* the fee. Nonetheless, we must still analyze whether *Dunbar*'s ability-to-pay rule is constitutionally required. For several reasons, we conclude that it is not.

The germane United States Supreme Court opinions do not require a presentence ability-to-pay assessment. *James* had nothing to do with a defendant's ability to pay; it dealt with an equal protection issue. *Bearden* required an ability-to-pay assessment, but it only required such an assessment before the defendant was imprisoned for defaulting on a probation condition to pay costs. The defendant here has never had his sentence changed, increased, or amended because of his inability to pay a fee for his court-appointed attorney. *Fuller* comes the closest to supporting *Dunbar*'s ability-to-pay rule because it dealt with an Oregon statute that required an ability-to-pay assessment before imposition of the fee. Thus, the *Dunbar* ability-to-pay rule is arguably an importation of the Oregon procedure for our trial courts. But, in *Fuller*, the Court only said that Oregon's statutory structure was constitutionally valid; it did not adopt the Oregon procedure as the constitutional standard. Indeed, *Fuller*'s holding is limited to

*why* the Oregon statute was constitutional.[9] In other words, *Fuller* did not say that a postsentence, preenforcement ability-to-pay assessment would be unconstitutional. This limited interpretation of *Fuller* also comports with the United States Supreme Court's consistent resistance to deliver broad, overarching holdings applicable to each and every recoupment procedure for fees for court-appointed attorneys.[10] Therefore, this triad of constitutional cases does not mandate *Dunbar*'s presentence ability-to-pay rule.

*Dunbar* also erroneously supported its ability-to-pay rule by citing our decision in *People v Grant*, *supra*. See *Dunbar*, 264 Mich App at 255, citing *Grant*, 455 Mich at 242, 242 n 27, 243 n 30. In *Grant*, we analyzed the restitution provision of the Crime Victim's Rights Act, MCL 780.767. At that time, the statute allowed a court to require a convicted defendant to pay restitution to the victim, but the statute required the court to "consider . . . the financial resources and earning ability of the defendant, the financial needs of the defendant and

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[9] *Fuller* did not say that all other recoupment procedures must comply with the Oregon statute's requirements. Instead it simply upheld the statute because it

> merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship. [*Fuller*, 417 US at 54.]

[10] In *James*, the Court stated that "[i]t is . . . apparent that state recoupment laws and procedures differ significantly in their particulars. Given the wide differences in the features of these statutes, any broadside pronouncement on their general validity would be inappropriate." *James*, 407 US at 133. Further, in *Fuller*, the Court stated, " 'We do not inquire whether this statute is wise or desirable. Misguided laws may nonetheless be constitutional.' " *Fuller*, 417 US at 49, quoting *James*, 407 US at 133.

the defendant's dependents, and such other factors as the court considers appropriate."[11] Thus, *Grant* dealt with an ability-to-pay analysis that was expressly required by our Legislature. In this case, the applicable statute, MCL 769.1k, does not require any ability-to-pay analysis before imposing a fee for a court-appointed attorney. Unlike *Grant*'s statutorily based ability-to-pay analysis, *Dunbar*'s ability-to-pay rule is premised solely on constitutional grounds. Yet, *Grant* made no reference to any constitutional requirement for such an analysis. Thus, *Dunbar* wrongly relied on *Grant* to support its ability-to-pay rule.[12]

Further, *Dunbar*'s ability-to-pay rule frustrates the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees.[13] *Fuller* expressly noted that, despite pretrial indigency, a criminal defendant is not forever immune from being required to pay the state for the cost of his court-appointed attorney, assuming he eventually gains the ability to pay.[14]

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[11] Since that time, the statute has been amended to remove this assessment of the defendant's financial resources. Currently, the statute states: "In determining the amount of restitution to order under section 16, the court shall consider the amount of the loss sustained by any victim as a result of the offense." MCL 780.767(1).

[12] See Justice CORRIGAN's dissenting statement in *People v Carter*, 480 Mich 1063, 1071 n 10 (2008), which discussed the *Dunbar* Court's improper reliance on *Grant*.

[13] See *James*, 407 US at 141 (recognizing that "state recoupment statutes [for fees for court-appointed attorneys] may betoken legitimate state interests").

[14] A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship. [*Fuller*, 417 US at 53-54.]

And we have expressed our approval of this legitimate governmental purpose of recouping the costs of court-appointed counsel from criminal defendants. *Davis v Oakland Circuit Judge*, 383 Mich 717, 720; 178 NW2d 920 (1970). Yet, under *Dunbar*, the trial court, and thus the state of Michigan, is forced to make a forever-binding presentence guess whether a particular defendant will ever gain the ability to pay the fee. Despite our deepest wishes to the contrary, no judge is so clairvoyant, and the state should not be forever precluded from seeking repayment from a defendant who has later gained the ability to pay, simply because at the time of sentencing it wrongly concluded that the defendant would never rise above indigency.[15]

Thus, we conclude that *Dunbar* was incorrect to the extent that it held that criminal defendants have a constitutional right to an assessment of their ability to pay before the imposition of a fee for a court-appointed attorney. With no constitutional mandate, *Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing. See MCL 769.1k and 769.1*l*.

We also note that, when considering an ability-to-pay analysis, there is a substantive difference between the imposition of a fee and the enforcement of that fee. This is supported by our reasoning in *People v Music*, 428 Mich 356; 408 NW2d 795 (1987). In *Music* we were analyzing a statute, MCL 771.3(5)(a), that allowed the

[15] *Dunbar* recognized this in its concession that "[a] defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered." *Id*. at 255.

trial court to order restitution and payment of costs as part of a probation sentence. *Id*. at 358. The statute, however, provided:

> The court shall not require a probationer to pay restitution or costs unless the probationer is or will be able to pay them during the term of probation. In determining the amount and method of payment of restitution and costs, the court shall take into account the financial resources of the probationer and the nature of the burden that payment of restitution or costs will impose, with due regard to his or her other obligations.[16]

The defendant in *Music* argued that the trial court erred in imposing costs on him without establishing his ability to pay them. *Music*, 428 Mich at 358. We held that when a defendant is statutorily entitled to an ability-to-pay assessment, that assessment is not required when the fee or cost is imposed; instead, that assessment is only required at the time payment is required, i.e., when the imposition is enforced.[17] Hence, for purposes of an ability-to-pay analysis, we have recognized a substantive difference between the impo-

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[16] As indicated earlier the substance of this provision is now located at MCL 771.3(6)(a).

[17] We stated:

> "The statutory limitations on the court's discretion to require these payments, however, are directed at the court's ability to force payment through probation revocation. The statutory language allows for the imposition of restitution or costs. It then continues that if restitution or costs are imposed the court may not require payment unless the probationer is able to pay. Thus the statute makes a distinction between *imposition* and *payment*. While a court must comply with the limitations [i.e., establishing a defendant's ability to pay] in requiring payment of costs or restitution as a probation condition, the limitations are not directed at requiring a court to hold a hearing or make findings on the record at the time costs and restitution are imposed." [*Music*, 428 Mich at 360, quoting *People v Music*, 157 Mich App 375, 379-380; 403 NW2d 143 (1987).]

sition of a fee and the enforcement of that imposition. It matters not that the ability-to-pay assessment in *Music* was required by statute, whereas it is based on the United State Supreme Court's analysis in *Fuller* in the instant context. What is of import is that defendants in both contexts are entitled to an ability-to-pay assessment at some point in time; therefore, the distinction between fee imposition and fee enforcement is equally applicable to both contexts. Accordingly, like the defendant in *Music*, the instant defendant is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced.

Our decision today does not affect the minimal due process requirements that entitle a defendant to notice and an opportunity to be heard regarding the enforcement of earlier imposed costs and fees. Indeed, *whenever* a trial court attempts to enforce its imposition of a fee for a court-appointed attorney under MCL 769.1k, the defendant must be advised of this enforcement action and be given an opportunity to contest the enforcement on the basis of his indigency. Thus, trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun.[18] Even *Dunbar* recognized that these pre-enforcement challenges would be premature.[19] Nonetheless, once enforcement of the fee imposition has begun, and a defendant has made a timely objection based on his claimed inability

[18] We note that strictly legal challenges to the imposition of fees and costs under MCL 769.1k (i.e., challenges that are not based on indigency, such as the statute not applying) must be preserved when the trial court imposes the fee. If not challenged at that point, the claim of error will be seen as unpreserved.

[19] "We note that, in most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment." *Dunbar*, 264 Mich App at 256.

to pay, the trial courts should evaluate the defendant's ability to pay.[20] The operative question for any such evaluation will be whether a defendant is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time*.

Currently, the factors set forth in MCR 6.005(B) are used to determine whether a defendant's pretrial indigency entitles him to a court-appointed attorney.[21] While these factors might be an adequate gauge of the indigency of a parolee or probationer, they are largely irrelevant in relation to imprisoned individuals. We acknowledge that the trial courts require guidance, such as that provided in MCR 6.005(B), to determine whether a defendant is indigent when the court enters a posttrial order to enforce an attorney fee recoupment

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[20] While some cases may require a formal hearing for this analysis, others clearly will not. In either situation, the trial courts must exercise sound discretion in fairly and properly adjudicating a defendant's challenge to his ability to pay.

[21] The court rule requires that the trial court assess the following factors in deciding whether a defendant is indigent:

> (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; and
>
> (5) 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. [MCR 6.005(B).]

order. In fact, this Court is currently considering the adoption of guidelines specific to the determination of indigency for purposes of imposing and enforcing an obligation to pay the cost of a court-appointed attorney as part of ADM File No. 2008-23. In the meantime, trial courts should focus on whether the defendant's indigency has ended and whether payment at the level ordered would cause manifest hardship.

### E. THE CONSTITUTIONALITY OF MICHIGAN'S RECOUPMENT PROCEDURE FOR FEES FOR COURT-APPOINTED ATTORNEYS

Despite our conclusion that *Dunbar*'s ability-to-pay rule is not constitutionally mandated, we must still evaluate defendant's contention that Michigan's recoupment procedure for fees for court-appointed attorneys is unconstitutional. Defendant initially claims that MCL 769.1k is unconstitutional when trial courts apply it to impose a fee for a court-appointed attorney without conducting a presentence ability-to-pay analysis. We disagree because, as noted earlier, there is no constitutionally required ability-to-pay analysis until the fee is actually enforced.

Defendant also argues that MCL 769.1*l* is unconstitutional because it is an enforcement of the imposition of a fee for a court-appointed attorney, yet it does not require an ability-to-pay analysis. Defendant correctly notes that when a prisoner, like himself, has had a fee for a court-appointed attorney imposed on him, § 1*l* allows a trial court to order the Department of Corrections to "deduct 50% of the funds received by the prisoner in a month over $50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds $100.00 . . . ." We acknowledge that this procedure is an enforcement of the fee without an ability-to-pay assessment. But we decline to hold that

this enforcement procedure is unconstitutional, because the statute's monetary calculations necessarily conduct a preliminary, general ability-to-pay assessment before the prisoner's funds are taken.

The ability-to-pay analysis should not be confused with the underlying constitutional tenet; it is merely a procedure used to ensure compliance with the constitutional precept that no indigent defendant must be forced to pay. In other words, as long as it does not require indigent defendants to pay a fee, a procedure that enforces the fee is not unconstitutional simply because it does not require an ability-to-pay analysis. Indeed, the true issue is always indigency, no matter what test is used to evaluate the issue. And application of § 1*l*'s calculative procedure necessarily only applies to prisoners who have an apparent ability to pay.

MCL 769.1*l* inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency. The provision only allows the garnishment of a prisoner's account if the balance exceeds $50. Although this amount would be insufficient to sustain a defendant living among the general populace, it is uncontested that a prisoner's "living expenses" are nil, as the prisoner is clothed, sheltered, fed, and has all his medical needs provided by the state. The funds left to the prisoner on a monthly basis are more than adequate to cover the prisoner's other minimal expenses and obligations without causing manifest hardship. Thus, we conclude that § 1*l*'s application makes a legitimate presumption that the prisoner is not indigent.[22]

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[22] See Justice CORRIGAN's statements in *People v Banks*, 482 Mich 1051, 1052 (2008) (CORRIGAN, J., concurring), and *People v McCaa*, 481 Mich 939, 941 (2008) (CORRIGAN, J., dissenting), which contained similar arguments.

We acknowledge that one's indigency is an individualized assessment and that § 1*l*'s presumption does not result from a full individualized analysis of a prisoner's indigency. Accordingly, if a prisoner believes that his unique individual financial circumstances rebut § 1*l*'s presumption of nonindigency, he may petition the court to reduce or eliminate the amount that the remittance order requires him to pay. However, because we adjudge a prisoner's indigency at the time of enforcement on the basis of manifest hardship and because a prisoner is being provided all significant life necessities by the state, we caution that the imprisoned defendant bears a heavy burden of establishing his extraordinary financial circumstances. While we do not attempt to lay out an extensive formal structure by which trial courts are to review these claims, we do direct that they be guided by MCL 771.3(6)(b), which controls the similar situation in which a probationer seeks remission of costs owed.[23] Specifically, when reviewing a prisoner's claim, lower courts must receive the prisoner's petition and any proofs of his unique and extraordinary financial circumstances. Further, the lower courts should only hold that a prisoner's individual circumstances warrant amending or reducing the remittance order when, in its

[23] We acknowledge that a more formal construct is desirable for this issue. But until a statute or court rule is promulgated to give such formal direction, we conclude that the probation code gives adequate guidance in its handling of an analogous situation. When a probationer claims "manifest hardship" in a request to remit what is owed to the state, the probation code commands:

> A probationer who is required to pay costs . . . and who is not in willful default of the payment of the costs may petition the sentencing judge or his or her successor at any time for a remission of the payment of any unpaid portion of those costs. If the court determines that payment of the amount due will impose a manifest hardship on the probationer or his or her immediate family, the court may remit all or part of the amount due in costs or modify the method of payment. [MCL 771.3(6)(b).]

discretion, it determines that enforcement would work a manifest hardship on the prisoner or his immediate family. The trial courts are under no obligation to hold any formal proceedings. They are only required to amend the remittance order when § 1*l*'s presumption of nonindigency is rebutted with evidence that enforcement would impose a manifest hardship on the prisoner or his immediate family.[24] Beyond these basic parameters, we leave it to the trial courts, in their sound discretion, to decide how to adjudicate a prisoner's claim that his individual circumstances rebut § 1*l*'s presumption of nonindigency.[25]

Finally, we had initially intended to decide the constitutionality of a trial court's imposing a 20 percent late fee pursuant to MCL 600.4803(1). *People v Jackson*, 483 Mich 884 (2009). Section 4803(1) clearly allows imposition of this 20 percent late fee on outstanding balances of fees that the trial court imposed on a defendant, which includes the fee for a court-appointed attorney.[26] However, after further re-

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[24] The defendant in this case may make an argument of manifest hardship under this opinion's new rule if he chooses, and the trial court should receive it as if it had been made when the fee was enforced.

[25] Defendant also takes exception to the trial court's procedure of requiring criminal defendants, as a condition to obtaining court-appointed counsel, to sign a form acknowledging that they may be required to pay the applicable costs. We note that, in *Fuller*, 417 US at 51-52, the United States Supreme Court held that an attorney-fee recoupment scheme did not unconstitutionally "chill" the defendant's right to counsel. The Court specifically stated: "The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel." *Id*. at 53.

[26] The provision states:

> A person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform

view, we decline to answer this question here because the trial court did not impose this late fee on defendant, and there is no indication that it ever will. Thus, at this point, the issue is not ripe.

## IV. CONCLUSION AND APPLICATION

*Dunbar* wrongly held that a trial court is required to assess a convicted defendant's ability to pay before imposing a fee for a court-appointed attorney. The ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay. This ability-to-pay assessment is initially obviated under MCL 769.1*l*, in relation to imprisoned defendants, because the procedure in this provision creates a presumption that the prisoner is not indigent.

In this case, the trial court did not err by imposing the fee for his court-appointed attorney without conducting an ability-to-pay analysis. Further, it did not err by issuing the remittance order under MCL 769.1*l* because defendant is presumed to be nonindigent if his prisoner account is only reduced by 50 percent of the amount over $50. However, if he contests his ability to pay that amount, he may ask the trial court to amend or revoke the remittance order, at which point the trial court must decide whether defendant's claim of extraor-

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a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. A late penalty may be waived by the court upon the request of the person subject to the late penalty. [MCL 600.4803(1).]

dinary financial circumstances rebuts the statutory presumption of his nonindigency. Accordingly, the trial court is affirmed.

We do not retain jurisdiction.

KELLY, C.J., and WEAVER, CORRIGAN, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with CAVANAGH, J.

*In re* JL

Docket No. 137653. Argued March 4, 2009 (Calendar No. 11). Decided July 14, 2009.

The Department of Human Services (DHS) petitioned the Mackinac Circuit Court, Family Division, to terminate the parental rights of Cheryl L. Lee to her son. Both the respondent and her son were members of the Sault Ste. Marie Tribe of Chippewa Indians. The court, W. Clayton Graham, J., terminated the respondent's parental rights, finding that the DHS had established by clear and convincing evidence grounds for termination under MCL 712A.19b(3)(i) because the respondent's parental rights to siblings of her son had previously been terminated. The court noted that services had been provided to the respondent and that she had not benefitted from them. The court also found insufficient evidence to conclude that termination was not in the child's best interests. Finally, the court concluded that the requirements of MCR 3.980(D) had been met. That court rule prohibits termination of the parental rights of a parent of an Indian child unless there is evidence beyond a reasonable doubt, including expert testimony, that continued custody of the child by the parent will likely result in serious emotional or physical damage to the child. The court based its conclusion in part on the respondent's lack of benefit from previously provided services and her recent convictions of operating a motor vehicle while impaired. The Court of Appeals, MARKEY, P.J., and WHITBECK, J. (GLEICHER, J., concurring in part and dissenting in part), affirmed in an unpublished opinion per curiam, issued October 16, 2008 (Docket No. 283038). The Court of Appeals concluded that the DHS had proved beyond a reasonable doubt that the respondent's continued custody was likely to result in serious emotional or physical damage to the child, as required by the Indian Child Welfare Act (ICWA), specifically 25 USC 1912(f). Judge GLEICHER dissented from that conclusion and the majority's conclusion that the DHS had made active efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that those efforts had proved unsuccessful, as required by 25 USC 1912(d). The Supreme Court granted leave to appeal. 482 Mich 1116 (2008).

In an opinion by Justice CORRIGAN, joined by Justices YOUNG, MARKMAN, and HATHAWAY, the Supreme Court *held*:

The evidence demonstrated beyond a reasonable doubt that the respondent's continued custody of the child would likely result in serious emotional or physical damage to him. The extensive, relatively recent, and specifically tailored services provided to the respondent before the DHS filed this termination petition satisfied the ICWA requirement of active efforts to prevent the breakup of the Indian family.

1. The ICWA, in 25 USC 1912(d), requires the petitioner in a termination case to satisfy the court that active efforts have been made to prevent the breakup of the Indian family. The crux of the active-efforts requirement is undertaking affirmative, as opposed to passive, efforts. Active efforts require more than making reasonable efforts.

2. The DHS provided active efforts in the past in connection with the respondent's other children, but did not offer services in connection with the termination of her parental rights to this child. 25 USC 1912(d), however, does not impose a strict temporal component for the active-efforts requirement. The ICWA does not categorically require the DHS to provide services each time it commences a new termination proceeding against a parent. It requires the DHS to undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services. Trial courts must carefully assess the timing of the services provided to the parent. Services provided too long ago to be relevant to a parent's current circumstances do not establish by clear and convincing evidence that active efforts have been made and raise a reasonable doubt about whether continued custody is likely to result in serious emotional or physical damage to the child. The court must judge the timing of the services by reference to the grounds for seeking termination and their relevance to the parent's current situation.

3. 25 USC 1912(d) also does not require that active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding. The question is whether the efforts made and services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding.

4. The trial court and the Court of Appeals did not apply a conclusive presumption of unfitness based on the respondents' past conduct. Termination of parental rights based on such a presumption would be inconsistent with the standard of proof beyond a reasonable doubt found in 25 USC 1912(f). Invocation of the doctrine of anticipatory neglect to terminate parental rights solely on the basis of past behavior would also be inconsistent with that standard. The evidence concerning the respondent's past conduct in this case, however, established that she was an unfit parent in the past, and the current evidence revealed that she continued to make choices that demonstrated a lack of maturity and ability to care for a child.

Justice WEAVER concurred with the majority opinion except for its discussion concerning the adoption of a futility test. It is not necessary for the Court to determine in this case whether it should adopt that test.

Affirmed.

Justice CAVANAGH, joined by Chief Justice KELLY, concurring in part and dissenting in part, concurred fully with parts I through IV and parts V(A) and (B) of the majority opinion, but wrote separately to clarify his view regarding the proper interpretation of 25 USC 1912(d) and to dissent from the majority's application of that statute in part V(C) and the majority's application of 25 USC 1912(f) in part VI. Justice CAVANAGH would hold that to meet the requirement of active efforts, the party seeking the termination of parental rights to an Indian child must present evidence of the parent's current circumstances and ability to parent the child who is the subject of the proceeding and must assess and provide evidence of the relevancy of past efforts to the family's current circumstances and needs. The DHS did not do so in this case. He would also hold that contemporaneous, specific evidence must be presented in order for a court to determine beyond a reasonable doubt that serious emotional or physical damage to the child is likely to result, which the DHS could not have done in this case because it did not evaluate the respondent's current home, the risks it presented to a child, or the relationship of the respondent and the child. The DHS thus could not have presented evidence showing a causal link between specific conditions in the respondent's home and a likelihood of any specific serious emotional or physical damage. Justice CAVANAGH would reverse the judgment of the Court of Appeals, vacate the order terminating the respondent's parental rights, and remand the case for further proceedings.

1. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD WELFARE ACT — ACTIVE EFFORTS TO PREVENT THE BREAKUP OF INDIAN FAMILIES.

The Indian Child Welfare Act requires the Department of Human Services to undertake a thorough, contemporaneous assessment of the services provided to a parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services; the act does not categorically require the department to provide services each time it commences a new termination proceeding against a parent, but services provided too long ago to be relevant to a parent's current circumstances do not establish by clear and convincing evidence that the department made the active efforts to prevent the breakup of the Indian family that the act requires and raise a reasonable doubt about whether continued custody by the parent is likely to result in serious emotional or physical damage to the child; the court must judge the timing of the services by reference to the grounds for seeking termination and their relevance to the parent's current situation (25 USC 1912[d], [f]).

2. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD WELFARE ACT — ACTIVE EFFORTS TO PREVENT THE BREAKUP OF INDIAN FAMILIES.

The Indian Child Welfare Act does not require that active efforts to prevent the breakup of the Indian family must always have been provided in relation to the child who is the subject of the current proceeding to terminate parental rights; the question is whether the efforts made and the services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding (25 USC 1912[d]).

3. PARENT AND CHILD — TERMINATION OF PARENTAL RIGHTS — INDIAN CHILD WELFARE ACT — ACTIVE EFFORTS TO PREVENT THE BREAKUP OF INDIAN FAMILIES.

Any policy or practice of providing no services to the parent of an Indian child when the petition to terminate the parent's rights to that child is based on a prior termination of parental rights to another child does not withstand the heightened standard of the Indian Child Welfare Act, which requires active efforts to prevent the breakup of the Indian family; even if services were provided to the parent in the past, the Department of Human Services or the tribe must conduct a thorough and contemporaneous review of those services and the parent's progress or lack of progress in

> response; only if active efforts have been made and it appears that the provision of additional services is unlikely to prevent the need for termination may the department or the tribe pursue termination without providing additional services (25 USC 1912[d]).

*Kayla Lee Pelter-Nixon* for the Department of Human Services.

*Nancy B. Lucas-Dean* for Cheryl L. Lee.

*Eric G. Blubaugh* for the Sault Ste. Marie Tribe of Chippewa Indians.

Amici Curiae:

*Michael A. Cox*, Attorney General, *B. Eric Restuccia*, Solicitor General, and *H. Daniel Beaton, Jr.* and *Larry W. Lewis*, Assistant Attorneys General, for the Attorney General.

*Speaker Law Firm, PLLC* (by *Jodi M. Latuszek* and *Liisa R. Speaker*), for the Children's Law Section of the State Bar of Michigan.

*Matthew L. M. Fletcher*, *Kathryn E. Fort*, *Cameron A. Fraser*, *James A. Keedy*, *Thomas R. Myers*, and *William J. Brooks PLLC* (by *William J. Brooks*) for the American Indian Law Section of the State Bar of Michigan.

CORRIGAN, J. Respondent Cheryl Lee challenges the judgment of the Court of Appeals affirming the termination of her parental rights to her son, JL. *In re Lee*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2008 (Docket No. 283038). Respondent specifically claims error in the interpretation and application of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. She urges us to adopt the interpretation of the ICWA offered by the dissenting Court of Appeals judge. We affirm the judgment of the

Court of Appeals because petitioner the Department of Human Services (DHS), provided timely, affirmative efforts that satisfied the ICWA's "active efforts" requirement, 25 USC 1912(d). We hold that the ICWA requires the DHS to undertake a thorough, contemporaneous assessment of the services provided to the parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services. The ICWA does not, however, categorically require the DHS to provide services each time a new termination proceeding is commenced against a parent. We further reject respondent's claim that the lower courts applied a conclusive presumption of unfitness based on her past conduct in determining that respondent's continued custody was "likely to result in serious emotional or physical damage to the child." 25 USC 1912(f). Finally, we conclude that this determination was supported by evidence beyond a reasonable doubt, as required by 25 USC 1912(f).

## I. BASIC FACTS AND PROCEDURAL HISTORY

Respondent and her son, JL, are both members of the Sault Ste. Marie Tribe of Chippewa Indians. Between 1999 and 2006, respondent gave birth to four children: JL, SD, JD, and BP. JL is the oldest child. Respondent's parental rights to SD, JD, and BP were terminated in earlier proceedings that are not at issue here.

JL was born in 1999, when respondent was 16 years old and living in foster care. DHS Child Protective Services (CPS) worker Regina Frazier began working with respondent in 1998, even before respondent had children. Respondent was then both a delinquent and a victim of abuse and neglect. Respondent displayed abusive and neglectful behavior after JL's birth, so he

was removed from respondent's care in September 2000. Frazier provided wraparound services[1] until respondent moved to Sault Ste. Marie. The Sault Ste. Marie Tribe of Chippewa Indians Tribal Court assumed jurisdiction over the case in March 2002. The tribal court released JL from its jurisdiction in August 2002, when he was placed in a limited guardianship with his paternal grandmother, Lois Plank. Meanwhile, respondent gave birth to a daughter, SD, on November 24, 2001.

Anishinabek Community Family Services caseworker Penny Clark began working with respondent in 2002, when she was 18 years old and living on a reservation. Clark, who was respondent's wraparound coordinator, and several others attempted to help respondent care for SD, who was then a few months old. Clark also worked with respondent on budgeting and helped her obtain social security benefits. Although Clark enjoyed working with respondent, Clark testified that respondent could be moody and impulsive and that her impulsiveness led to trouble. Under the Family Continuity Program, Clark visited respondent in her home at least once a week. Respondent's home was often messy and unsafe; glass and cigarette butts were left within SD's reach. Clark also had concerns about respondent's ability to care for herself. At times, respondent was depressed; she failed to eat and take prenatal vitamins.

JL was returned to respondent's care in September 2003. Her third child, JD, was born on January 11, 2004, while Clark was still working with respondent. When Jill Thompson, a caseworker with the Binogii Placement Agency, began working with respondent in July 2004, three children—JL, SD, and JD—lived with

[1] Frazier testified that the wraparound program works with families who receive services from multiple agencies to coordinate those services.

respondent and Justin DuFresne, the father of SD and JD. Respondent and DuFresne failed to supervise the children; instead, JL, then five years old, was supervising his younger siblings. SD wandered into the road multiple times. Caseworkers Thompson and Clark tried to remedy this problem. Clark even installed latches on the front door so that the children could not run out. The condition of the home "ran the gamut from poor housekeeping to filthy." Like Clark, Thompson described cigarette butts on the floor and the presence of choking hazards to young children.

Respondent could not manage her finances and never sought employment. A "payee" managed respondent's finances by paying her bills with the money from respondent's social security disability payments and then giving respondent a $50 weekly allowance. Respondent purchased rent-to-own furniture that cost $30 or $35 a week. She could not afford diapers and other necessary items.

Despite the extensive efforts of Thompson and Clark, the children were removed from respondent's home in 2004. At that time, JL again became a ward of the tribal court and was again placed with his grandmother, Lois Plank. In November 2004, the trial court awarded JL's father, Tony Plank, full physical custody of JL and awarded respondent and Tony Plank shared legal custody. The court also granted respondent unsupervised visitation rights. After SD and JD were returned to respondent's care, Thompson and Clark provided services in an effort to keep them in her home, but they were observed in the street at night and were again removed in August 2005.

When Clark closed respondent's case in 2005, she had provided all the services she could offer "without staying there 24/7." She opined that respondent had not

made significant improvement. Clark participated in the termination trial involving SD and JD that was initiated because respondent had failed to supervise them. The tribal court terminated respondent's parental rights to SD and JD on June 30, 2006.[2] Respondent gave birth to another child, BP, on July 20, 2006.[3] BP was removed from respondent's care shortly after her birth. Melissa VanLuven, who was the child placement services supervisor for the Sault Ste. Marie tribe and the caseworker supervisor of Thompson and Clark, participated in the decision to petition for termination of respondent's parental rights to BP. That decision was based on an assessment of the tribe and the caseworkers that, despite the provision of services, respondent's children could not safely live in her home. The tribal court terminated respondent's parental rights to BP on January 8, 2007.

In spring 2007, the trial court granted respondent's motion for parenting time, allowing her weekly unsupervised visitation with JL. In July 2007, however, the DHS petitioned to terminate respondent's parental rights to JL on the basis of respondent's "children's protective service history" beginning on September 12,

[2] Respondent appealed the tribal court's termination order. The order was vacated on January 9, 2009, by the Sault Ste. Marie Tribe of Chippewa Indians Appellate Court. That court found that the lower court erroneously considered all the allegations against both respondent and the children's father, Justin DuFresne, when deciding to terminate respondent's parental rights, even though the two were estranged at the time of the termination proceedings. The matter was remanded for the lower court to "take such proofs as it deems appropriate as to the fitness of [respondent] alone . . . and determine what further order, if any, should be entered with regard to the parental rights of [respondent]." The parties have provided no documentation of the tribal court's disposition of the matter on remand.

[3] Michael Plank, respondent's current partner and Tony Plank's brother, is BP's biological father.

2000, specifically citing the termination of her parental rights to SD, JD, and BP.[4] The DHS filed a supplemental petition on August 20, 2007, alleging that proceedings to terminate Michael Plank's parental rights to BP were pending. The supplemental petition also alleged that Michael Plank had a history of physically abusing and neglecting two other children. In addition, the petition provided:

> 8. Cultuarlly [sic] appropriate services were provided to [respondent] for over six years, including Prevention, CPS, and Wraparound Services through Mackinac County; Protective Services, foster case services, and prevention through the [Sault Ste. Marie] Tribe, CPS services through Chippewa County DHS and CPS services through the Children's Aid in Canada. [Respondent] has also participated in the Families First Program three times, Wraparound and Family Continuity through the [Sault Ste. Marie] Tribe, Parenting Classes twice with [Sault Ste. Marie] Tribe, once through [the Strong Families/Safe Children Program], and once through the Indian Outreach Program. Although these services were offered and somewhat complied with at times, [respondent] continued to abuse and neglect her children, which led to her rights being terminated.

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[4] Both the initial and supplemental termination petitions cited MCL 722.638(1)(b)(*i*), which provides:

> (1) The department shall submit a petition for authorization by the court under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, if 1 or more of the following apply:
>
> * * *
>
> (b) The department determines that there is risk of harm to the child and either of the following is true:
>
> (*i*) The parent's rights to another child were terminated as a result of proceedings under section 2(b) of chapter XIIA of 1939 PA 288, MCL 712A.2, or a similar law of another state.

> 9. According to [respondent], she receives Social Security Disability due to having fetal alcohol syndrome. According to the National Organization of Fetal Alcohol Syndrome, the majority of persons with FAS have life-long difficulties with learning, attention, memory, and problem solving.

The supplemental petition also cited the criminal histories of respondent and Michael Plank, including respondent's 2005 and 2006 misdemeanor convictions for operating a motor vehicle while impaired and an aggravated assault conviction stemming "from a 2005 bar incident," as well as Michael Plank's August 2000 guilty plea to felony assault charges. The petition also observed that Tony Plank had been convicted of third-degree criminal sexual conduct and incarcerated.[5] Respondent denied the allegations in the petition.

At trial, caseworkers Frazier, Clark, and Thompson described the extensive services they and their agencies provided to respondent from 1999 to 2005. They testified that, despite these services, respondent failed to become an adequate parent. On the basis of her experience with respondent, Clark did not believe that respondent could appropriately care for JL full-time. She opined that termination of respondent's parental rights was in JL's best interests. Testifying as an Indian expert under 25 USC 1912(f),[6] VanLuven stated that she was satisfied that active and reasonable efforts had

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[5] The trial court terminated Tony Plank's parental rights to JL on May 13, 2008.

[6] 25 USC 1912(f) provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

been provided to prevent the termination of respondent's parental rights and that respondent's custody of JL would result in serious emotional or physical damage to him.

Respondent testified that she lived in "a cozy little log house" with Michael Plank and that she had recently completed substance abuse counseling. She had also voluntarily attended and completed parenting classes offered by the tribe. In her view, she had learned from the parenting classes how to "safely raise a child in today's society." She also testified that she visited JL as much as possible, at least twice weekly, and celebrated holidays with him. She testified that Michael Plank and JL had a good relationship and that they hunted, fished, and played together. Respondent denied that Michael Plank had ever been violent with her or JL. She acknowledged, however, that Michael Plank had been convicted of assault after the mother of his other children accused him of being violent. Respondent offered to do whatever was necessary to continue her relationship with JL. She was concerned that if her parental rights were terminated she would have to "suck up to Lois [Plank] forever in order to stay in [JL]'s life."

On cross-examination, respondent admitted that she had not worked or sought work in four years. She received social security benefits because she had been diagnosed with fetal alcohol syndrome. She stated that "[t]hey" believe she had a disability and was incapable of working. Although she acknowledged a possible learning disability, she believed herself capable of working. Respondent acknowledged her convictions of operating a motor vehicle while impaired and aggravated assault.

Eight-year-old JL testified that he liked spending time with respondent and that it was "just the usual," explaining that it was "kind of like when I'm with my

Grandma, except being with a different person." He loved and missed respondent and said he would like to spend more time with her, but also said that it was difficult to answer whether he would like to live with her because he liked living with his grandmother. He also liked spending time with Michael Plank and had no fear of him.

Addictions therapist Gary Matheny had counseled respondent weekly for about eight months. Respondent was now "clean and sober." He and respondent had discussed parenting skills, including the need for proper structure in the household and the need to avoid drinking, drugs, and fighting. Respondent's inability to get along with her "significant others" had caused many problems. Respondent had been raised in an alcoholic family, had been taken from home as a child, and had early unhealthy relationships as well as an early pregnancy. Matheny believed, however, that she had "[v]astly" overcome those background influences. He saw no symptoms of fetal alcohol syndrome in respondent, but believed she possibly suffered symptoms of "[f]etal [a]lcohol [a]ffects [sic]."[7]

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[7] According to the National Organization on Fetal Alcohol Syndrome, fetal alcohol syndrome (FAS) "is a set of physical and mental birth defects that can result when a woman drinks alcohol during her pregnancy." It "is characterized by brain damage, facial deformities, and growth deficits. Heart, liver, and kidney defects also are common, as well as vision and hearing problems. Individuals with FAS have difficulties with learning, attention, memory, and problem solving." "Fetal Alcohol Spectrum Disorders (FASD) is an umbrella term describing the range of effects that can occur in an individual whose mother drank alcohol during pregnancy. These effects may include physical, mental, behavioral, and/or learning disabilities with possible lifelong implications." FASD encompasses the term "fetal alcohol effects," which "has been popularly used to describe alcohol-exposed individuals whose condition does not meet the full criteria for an FAS diagnosis." National Organization on Fetal Alcohol Syndrome, *FAQs* <http://www.nofas.org/faqs.aspx?id=9> (accessed June 30, 2009).

The trial court terminated respondent's parental rights to JL. It found that the DHS had established grounds for termination under MCL 712A.19b(3)(i)[8] by clear and convincing evidence by presenting opinions and orders of the Sault Ste. Marie Tribe of Chippewa Indians Tribal Court terminating respondent's parental rights to JL's siblings. The court noted that termination in those cases was based on sections of the tribal code "virtually identical" to MCL 712A.19b(3)(c)(*i*) and (*ii*) and (g).[9] It further noted that those opinions "dis-

[8] MCL 712A.19b(3)(i) provides:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (i) Parental rights to 1 or more siblings of the child have been terminated due to serious and chronic neglect or physical or sexual abuse, and prior attempts to rehabilitate the parents have been unsuccessful.

[9] MCL 712A.19(3) provides, in relevant part:

> The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *
>
> (c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence, finds either of the following:
>
> (*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
>
> (*ii*) Other conditions exist that cause the child to come within the court's jurisdiction, the parent has received recommendations to rectify those conditions, the conditions have not been rectified by the parent after the parent has received notice and a hearing

cussed the services that had been provided and the apparent lack of any benefit gained by Respondent from those services." Next, the trial court found insufficient evidence to conclude that termination was not in the best interests of the child. MCR 3.977(F). Finally, the court concluded that the requirements of MCR 3.980(D)[10] had been met. The court summarized its reasoning as follows:

> This finding is based on: 1) the previous services and lack of benefit from same which raises the likelihood of some form of serious physical injury; 2) the length of time the child has been residing outside the Respondent's home and the emotional damage that would result in requiring a reunification plan; 3) the testimony presented that Respondent's lack of benefit was not due to Respondent's lack of maturity, but rather lack of ability; and 4) Respondent's most recent conduct of operating a motor vehicle while impaired due to alcohol.[11]

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> and has been given a reasonable opportunity to rectify the conditions, and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.
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> * * *
>
> (g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

[10] MCR 3.980(D) contains language similar to that of 25 USC 1912(f) and provides:

> Termination of Parental Rights. In addition to the required findings under MCR 3.977, the parental rights of a parent of an Indian child must not be terminated unless there is also evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that parental rights should be terminated because continued custody of the child by the parent or Indian custodian will likely result in serious emotional or physical damage to the child.

[11] The trial court did not specifically address the ICWA's "active efforts" requirement, 25 USC 1912(d).

Respondent appealed, and the Court of Appeals affirmed. A majority concluded that the trial court did not clearly err when it determined that (1) the statutory ground for termination in MCL 712A.19b(3)(i) had been established by clear and convincing evidence, (2) termination was not clearly contrary to JL's best interests, (3) efforts had been made to provide services designed to prevent the breakup of respondent's family, and (4) the DHS had proved beyond a reasonable doubt that respondent's continued custody was likely to result in serious emotional or physical damage to JL, 25 USC 1912(f). The appeals panel unanimously agreed that the trial court properly denied respondent's request for a jury trial. *Lee*, *supra*, slip op at 5-10.

Judge GLEICHER dissented from the majority's conclusions that the DHS had satisfied the "active efforts" requirement of the ICWA, 25 USC 1912(d), and that the record established beyond a reasonable doubt that respondent's continued custody was "likely to result in serious emotional or physical damage to the child," 25 USC 1912(f). *Lee*, *supra*, slip op at 4-11 (GLEICHER, J., concurring in part and dissenting in part.)

We granted respondent's application for leave to appeal to consider the proper interpretation of 25 USC 1912(d) and (f) of the ICWA.[12]

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[12] We directed the parties to address

> (1) whether the term "active efforts" in 25 USC 1912(d) requires a showing that there have been recent rehabilitative efforts designed to prevent the breakup of that particular Indian family; and (2) whether the "beyond a reasonable doubt" standard of 25 USC 1912(f) requires contemporaneous evidence that the continued custody of the Indian child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child before parental rights may be terminated. [*In re Lee*, 482 Mich 1116, 1116-1117 (2008) (emphasis omitted).]

II. THE INDIAN CHILD WELFARE ACT

Congress enacted the ICWA in 1978 in response to

> rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes through adoption or foster care placement, usually in non-Indian homes. [*Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 32; 109 S Ct 1597; 104 L Ed 2d 29 (1989).]

"Recognizing the special relationship between the United States and the Indian tribes and their members and the responsibility to Indian People," Congress found:

> (3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;
>
> (4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and
>
> (5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families. [25 USC 1901.]

Accordingly, it enacted the ICWA to establish "minimum Federal standards for the removal of Indian children from their families . . . ." 25 USC 1902.

The ICWA sets forth requirements with which states must comply when an "Indian child," as defined in the act, 25 USC 1903(4), is involved in a "child custody proceeding," which includes a proceeding to terminate parental rights, 25 USC 1903(1)(ii). If state or federal law "provides a higher standard of protection to the rights of the parent or Indian custodian of an Indian child" than the ICWA, the court must apply that higher state or federal standard. 25 USC 1921.

25 USC 1912 provides, in part:

> (d) Any party seeking to effect a foster care placement of, or termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.
>
> * * *
>
> (f) No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

### III. THE ADOPTION AND SAFE FAMILIES ACT AND MCL 712A.19b(3)(i)

The Adoption and Safe Families Act of 1997 (ASFA), PL 105-89, 111 Stat 2115, requires that states undertake "reasonable efforts" to "preserve and reunify families" as a condition of federal funding. 42 USC 671(a)(15)(B). The ASFA excuses proof of reasonable efforts to reunify when "the parental rights of the parent to a sibling have been terminated involuntarily[.]" 42 USC 671(a)(15)(D)(iii). MCL 712A.19a(2)(c) codifies both the "reasonable efforts"

requirement and the exception to that requirement when a prior termination has taken place. Additionally, MCL 712A.19b(3)(i), which was the state law basis for the termination of respondent's parental rights here, makes involuntary termination of parental rights to a child's sibling a ground for termination.

Because the ICWA establishes "minimum Federal standards for the removal of Indian children from their families," 25 USC 1902, and nothing in the ASFA indicates a congressional intent to supersede the ICWA, neither the ASFA nor its state law analogues relieve the DHS from the ICWA's "active efforts" requirement, 25 USC 1912(d), or from the burden of establishing beyond a reasonable doubt "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child," 25 USC 1912(f).

## IV. STANDARD OF REVIEW

This Court reviews issues involving the application and interpretation of the ICWA de novo as questions of law. *In re Fried*, 266 Mich App 535, 538; 702 NW2d 192 (2005). Under 25 USC 1912(f), "[n]o termination of parental rights may be ordered . . . in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Because Congress did not provide a heightened standard of proof in 25 USC 1912(d), as it did in 25 USC 1912(f), the default standard of proof for termination of parental rights cases, clear and convincing evidence, applies to the determination whether the DHS provided "active efforts . . . to prevent the breakup of the Indian

family" under 25 USC 1912(d). *In re Roe*, 281 Mich App 88, 100-101; 764 NW2d 789 (2008).[13]

### V. "ACTIVE EFFORTS"

The ICWA requires the petitioner in a termination case to "satisfy the court that active efforts have been made to prevent the breakup of the Indian family . . . ." 25 USC 1912(d). Respondent argues that because the DHS failed to provide *current* active efforts, termination of her parental rights to JL violated the ICWA. We disagree.

### A. COURT OF APPEALS

Respondent urges us to adopt Judge GLEICHER's dissenting view in *Roe*[14] and *Lee* that both the plain and ordinary meaning of "active" and the purpose and object of the ICWA point to a temporal requirement: "In my view, Congress's use of the term 'active efforts' signals its intent that petitioner clearly and convincingly demonstrate the provision of *current* rehabilitative efforts designed to reunite an Indian parent with the particular child that is the target of the termination proceedings." *Lee*, *supra*, slip op at 6 (GLEICHER, J., concurring in part and dissenting in part) (emphasis in

[13] Although our research disclosed no federal authority on this point, several of our sister states have employed similar reasoning. See, e.g., *In re Walter W*, 274 Neb 859, 864-865; 744 NW2d 55 (2008); *In re MS*, 624 NW2d 678 (ND, 2001)*; In re Michael G*, 63 Cal App 4th 700, 709-712; 74 Cal Rptr 2d 642 (1998).

[14] In *Roe*, the same Court of Appeals panel considered the proper interpretation of the "active efforts" requirement of 25 USC 1912(d). There, as here, Judges MARKEY and WHITBECK disagreed with Judge GLEICHER about the meaning of "active efforts." In *Roe*, however, the Court of Appeals judgment vacated the trial court's order and remanded the case for trial court findings regarding the "active efforts" requirement. *Roe*, *supra* at 91.

original). Judge GLEICHER concluded that, in light of the purposes of the ICWA and its requirement that the "state prove beyond a reasonable doubt that 'the continued custody' of the Indian child by the parent 'is likely to result in serious emotional or physical damage to the child,' " "active efforts" includes a temporal component. *Id*., quoting 25 USC 1912(f) (emphasis omitted).

The Court of Appeals majority in this case relied on its more extensive opinion in *Roe*. There it acknowledged that " 'active' may be 'characterized by current activity, participation or use,' " *Roe*, *supra* at 102, quoting *Random House Webster's College Dictionary* (1997), but agreed with "the majority of jurisdictions that have addressed this issue" that concurrent "active efforts" need not necessarily be shown in each proceeding, *Roe*, *supra* at 102. The majority concluded that, "[c]onstrued in context, [25 USC 1912(d)] only requires 'that timely and affirmative steps be taken . . . to avoid the breakup of Indian families whenever possible by providing services designed to remedy the problems which might lead to the severance of the parent-child relationship.' " *Id*. at 106 (citation omitted). Services provided in connection with a prior proceeding, or " 'formal or informal efforts to remedy a parent's deficiencies before dependency proceedings begin' " may meet the "active efforts" requirement. *Id*., quoting *In re KD*, 155 P3d 634, 637 (Colo App, 2007). The Court of Appeals majority thus "decline[d] to employ a definition of 'active' that stresses a temporal requirement." *Roe*, *supra* at 106. Instead, it defined "active efforts" as the opposite of "passive efforts." *Id*. at 106-107. Finally, it "note[d] that the majority of jurisdictions interpret 'active efforts' as imposing a higher burden than various states' 'reasonable efforts' requirement, and that numerous courts have required that the service pro-

vider 'provide *culturally relevant* remedial and rehabilitative services to prevent the breakup of the family.' " *Id*. at 108 (citations omitted).

B. ANALYSIS

We agree with the *Roe* majority that the crux of the "active efforts" requirement is undertaking affirmative, as opposed to passive, efforts:

> "Passive efforts are where a plan is drawn up and the client must develop his or her own resources toward bringing it to fruition. Active efforts, the intent of the drafters of the Act, is where the state caseworker takes the client through the steps of the plan rather than requiring that the plan be performed on its own. For instance, rather than requiring that a client find a job, acquire new housing, and terminate a relationship with what is perceived to be a boyfriend who is a bad influence, the Indian Child Welfare Act would require that the caseworker help the client develop job and parenting skills necessary to retain custody of her child." [*Id*. at 107, quoting *AA v Alaska Dep't of Family & Youth Services*, 982 P2d 256, 261 (Alas, 1999).]

We also agree that "active efforts" require more than the "reasonable efforts" required under state law. *Roe*, *supra* at 108, citing *In re Nicole B*, 175 Md App 450, 471; 927 A2d 1194 (2007), *Winston J v Alaska Dep't of Health & Social Services*, 134 P3d 343, 347 n 18 (Alas, 2006), *MW v Alaska Dep't of Health & Social Services*, 20 P3d 1141, 1146 n 18 (Alas, 2001), *In re Walter W*, 274 Neb 859, 865; 744 NW2d 55 (2008), and *In re JS*, 177 P3d 590, 593 (Okla Civ App, 2008).

The version of the DHS's Childrens Foster Care Manual in effect at the time of the termination trial provides an example of this distinction:

> ICWA requires that anytime the DHS is involved with Indian children and their families, culturally Active Efforts

must be provided. "Reasonable Efforts" as defined in other parts of current DHS policy are not sufficient.

* * *

Active Efforts require that the caseworker take a more pro-active approach with clients and actively support the client in complying with the service plan rather than requiring the service plan be performed by the client alone. Following are examples of appropriate Active Efforts that could serve as a starting point of reference; in collaboration with the child's Tribe:

a. Taking clients to initial appointments and assisting with the intake process OR

b. Transporting client, arranging transportation and child care appointments OR

c. If the client is isolated from other family members who may be in a position to provide positive support, the worker is to provide help to the families to begin conversations with those family members.

d. Assisting with completing applications.

e. Providing phone availability.

* * *

DHS is to make culturally active and appropriate efforts to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family before any consideration for removal can be made. DHS policy requires Active Efforts prior to court involvement. Active Efforts must be **documented to the court and Tribe**. [Childrens Foster Care Manual, Indian Child Welfare (June 1, 2007), pp 5-6.][15]

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[15] Although included in respondent's appendix, this version of the manual is no longer in effect and is not available online. The parties also did not provide the version of the manual in effect before June 1, 2007. The current version of the DHS's Native American Affairs manual, Native American Affairs Glossary (October 1, 2008), pp 1-2, available at

In addition, the Bureau of Indian Affairs' guidelines explain that

> [t]hese [active] efforts shall take into account the prevailing social and cultural conditions and way of life of the Indian child's tribe. They shall also involve and use the available resources of the extended family, the tribe, Indian social service agencies and individual Indian care givers. [Bureau of Indian Affairs, Guidelines for State Courts; Indian Child

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<http://www.mfia.state.mi.us/olmweb/ex/nag/glossary.pdf> (accessed June 30, 2009), provides a similar explanation:

> By definition, active efforts are more intensive than "reasonable efforts" and require the worker to thoroughly assist the family in accessing and participating in necessary services that are culturally appropriate and remedial and rehabilitative in nature.
>
> **Example**: Reasonable efforts might be the worker making a referral for services and attempts to engage the family in services, but active efforts might be the worker consulting with the tribe regarding case planning, making a referral to services, attempts to engage the family in services and providing transportation to the services.
>
> * * *
>
> Examples of active efforts include (but are not limited to):
>
> • Making appointments for the client with particular providers.
>
> • Providing transportation to and from such appointments.
>
> • Closely monitoring client(s)' participation in such services.
>
> • Continuing with ongoing efforts to secure a placement with the ICWA Placement Preferences [25 USC 1912(d)].

See also the DHS's Childrens Protective Services Manual, Supportive Services, CFP 714-2 (May 1, 2009), p 1, available at <http://www.mfia.state.mi.us/olmweb/ex/cfp/714-2.pdf> (accessed June 30, 2009) ("Reasonable efforts to prevent placement must be attempted in all situations in which the child is not at imminent risk of harm without removal from home. **Note**: The Indian Child Welfare Act requires active efforts be provided to American Indian children and their families. Reasonable efforts are not sufficient.").

Custody Proceedings, D.2, 44 Fed Reg 67584, 67592 (November 26, 1979), also available at <http:www.nicwa.org/administrative_regulations/icwa_guidelines.pdf> (accessed June 30, 2009).][16]

In this case, however, the fundamental disagreement is not about the nature of the required services, but about the timing of those services. Indeed, respondent acknowledges that the DHS and the tribe provided active efforts in the past, but argues that 25 USC 1912(d) requires *current* active efforts, which the DHS failed to provide because it did not offer services in connection with the termination of her parental rights to JL. We decline to read the word "current" into 25 USC 1912(d). This statutory language does not impose a strict temporal component for the "active efforts" requirement.

This is not to say that active efforts provided in the distant past are sufficient. Although we decline to establish an arbitrary threshold beyond which services will not satisfy the requirements of 25 USC 1912, we direct trial courts to carefully assess the timing of the services provided to the parent. Services provided too long ago to be relevant to a parent's current circumstances do not establish by clear and convincing evidence that active efforts have been made, as required by 25 USC 1912(d), and raise a reasonable doubt under 25

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[16] The most recent version of the DHS's Native American Affairs Manual, Indian Child Welfare Case Management, NAA 205 (March 1, 2009), p 1, available at <http://www.mfia.state.mi.us/olmweb/ex/NAA/205.pdf> (accessed June 30, 2009), states that the "worker must collaborate with a child's tribe immediately" and that the child's tribe will define active efforts for the department." Although this version of the Native American Affairs Manual was not yet in effect during the proceedings in this case, leaving it to the child's tribe to define "active efforts" is consistent with the ICWA's purpose of preserving Indian families and preventing unwarranted removal and termination. See 25 USC 1901.

USC 1912(f) about whether continued custody is "likely to result in serious emotional or physical damage to the child."[17] The timing of the services must be judged by reference to the grounds for seeking termination and their relevance to the parent's current situation.

Similarly, we decline to hold that active efforts must always have been provided in relation to the child who is the subject of the current termination proceeding. Again, the question is whether the efforts made and the services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding. The evidence must satisfy the court "beyond a reasonable doubt" that the parent's continued custody of that child "is likely to result in serious emotional or physical damage to the child," as required by 25 USC 1912(f).

Some courts, including the Court of Appeals in *Roe*, have adopted a "futility test" to explain that the "active efforts" requirement may be met in certain cases with-

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[17] For example, in *CJ v Alaska Dep't of Health & Social Services*, 18 P3d 1214 (Alas, 2001), the father was unable, and perhaps unwilling, to care for his children at the time they were removed from their mother in 1998. He maintained only sporadic contact with them while they were in foster care. *Id*. at 1216. By the time termination was sought in 1999, however, the father's circumstances had changed. He presented unrebutted evidence that he wanted to care for his children and was able to do so. He testified that he had quit a job that required him to travel, was relocating, and was caring for his older child. The social services department presented virtually no evidence regarding the father's present circumstances. *Id*. at 1219. The Alaska Supreme Court concluded:

> ICWA requires that a court be able to determine beyond a reasonable doubt that placement of the children with the parent is likely to result in serious damage. The evidence in this case leaves so much uncertainty about [the father's] present circumstances that such a finding cannot be sustained. [*Id*. (citation omitted).]

out the provision of additional services. In *KD*, for example, the child had been removed from his parents in 2001 and 2004. Both times, the parents completed their treatment plans, and the child was returned to them. The termination petition at issue was filed after the respondent father was arrested in 2005 and the mother was incarcerated. *KD*, *supra* at 636. In affirming the trial court's decision to terminate the father's parental rights, the appellate court rejected his argument that the active efforts must be part of a treatment plan offered as part of the current "dependency proceedings." *Id*. at 637. It held that the "active efforts" requirement may be met by "formal or informal efforts to remedy a parent's deficiencies before the dependency proceedings begin":

> In other words, the court may terminate parental rights without offering additional services when a social services department has expended substantial, but unsuccessful, efforts over several years to prevent the breakup of the family, and there is no reason to believe additional treatment would prevent the termination of parental rights. [*Id*.]

The court noted that extensive services had been provided to the father during the two prior dependency cases and concluded that the record supported the trial court's findings that it would have been futile to offer additional services. *Id*. Citing *KD* and other sister-state authority, the Court of Appeals majority in *Roe* adopted a futility test. *Roe*, *supra* at 103-106.

We decline to adopt a futility test. In *KD*, the court concluded that additional services were not required because it saw no indication that additional services would prevent the need for termination. The ICWA obviously does not require the provision of *endless* active efforts, so there comes a time when the DHS or

the tribe may justifiably pursue termination without providing additional services. A futility test does not capture this concept. In addition, we share dissenting Judge GLEICHER's concern that, under a such a test, "the circuit court may altogether avoid applying [25 USC 1912(d)] by simply deciding that additional services would be 'futile.' " *Roe*, *supra* at 109 (GLEICHER, J., concurring in part and dissenting in part).[18]

We further note that the DHS's apparent policy of providing no services when a petition for termination of parental rights is based on a prior termination will not withstand the heightened standard of the ICWA.[19] When the proceedings involve an "Indian child" within the meaning of the ICWA, the DHS or the tribe must, even if services have been provided to the parent in the past, conduct a thorough and contemporaneous review of those services and the parent's progress or lack thereof in response to those services. Only if active efforts have been provided to prevent the breakup of the Indian family, and it does not appear that the provision of additional services is likely to prevent the need for termination, may the DHS or the tribe pursue termination without providing additional services.

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[18] We reject Justice WEAVER's contention that we need not decide whether to adopt a futility test. In this case, we address respondent's argument that the Court of Appeals erred in interpreting and applying the ICWA. In concluding that the "active efforts" requirement had been met, the Court of Appeals majority stated: "Because of the intractable nature of [respondent's] inability to learn appropriate parenting techniques, any additional efforts to rehabilitate [respondent] would have been largely futile." *Lee*, *supra*, slip op at 9.

[19] Frazier testified that she did not provide services to respondent in connection with this latest referral pertaining to JL because the referral was based on the termination of respondent's parental rights to her other three children. She testified that, under those circumstances, the state does not provide services.

C. APPLICATION

Although the trial court did not use the words "active efforts," it took into account the services that were provided to respondent. It noted, for example, that respondent had attended parenting classes and that "one of the workers . . . even provided latches for the doors to prevent the children from getting out into the street and playing unsupervised." The court also stated that the caseworkers' testimony concerning respondent's inability to benefit from services "was supported by specific examples of Respondent being unable to apply principles she was taught during those services." The evidence clearly and convincingly establishes that the DHS and the tribe made active efforts to provide services designed to prevent the breakup of respondent's family. Indeed, the evidence shows that services designed to preserve respondent's family were provided over a six-year period from JL's birth in 1999 through 2005, before the termination of her parental rights to SD and JD. Caseworkers Frazier, Clark, and Thompson and caseworker supervisor VanLuven testified in similar fashion about respondent's failure to improve her parenting skills.

Respondent received services from several different programs, many of which were tailored to her young age and particular needs. Various caseworkers who spent time in her home tried to teach her to become an adequate parent. Frazier testified that the wraparound program normally provides services for 6 to 12 months. Respondent, however, received wraparound services for three years, from 1999 to 2002, when respondent moved to a reservation and the tribe took jurisdiction. Frazier testified that "different methods" were used "in order to try to teach [respondent] . . . because of her age and . . . her development." Frazier said that "there was

[sic] a lot of different methods used to . . . adjust services in order to make them fit for her. But they just still were not successful." Frazier was at respondent's house every week to teach her parenting skills, but respondent did not seem to learn. In one incident, respondent screamed and cried because JL, who was sitting in a high chair, would not eat the solid food respondent had put in front of him. Respondent failed to understand that JL was too young to drink homogenized milk, let alone eat solid food. Frazier was at respondent's home every week teaching her "those kinds of things." "And then we'd come back the next week and the house would be filthy. . . . It just never, it never seemed to take."

Clark began working with respondent in 2002. Respondent received services under the wraparound program in an attempt to prevent the removal of SD, who was a few months old at the time, from respondent's home. After reports that respondent's children were found in the street, Clark went to respondent's house and put latches on the door so the children could not wander away. Clark also worked with respondent on budgeting, helped her apply for social security benefits, and arranged for someone to manage her finances once she obtained those benefits. When Clark closed respondent's case in 2005, she felt that she had provided all the services she could "without staying there 24/7," but respondent made no significant improvement. Clark testified that she provided every service she could think of and did not know what else could have been done.

Clark believed respondent's problems with parenting and her failure to benefit from services stemmed from a lack of ability, rather than from a lack of maturity. Clark testified that respondent loved her children very much and that, if it had been within her ability, she would

have put herself in a position to care for her children, but her impulsiveness caused difficulty. Although Clark acknowledged that she had not provided services to respondent in connection with the case involving JL, she said that she had seen and worked with respondent enough to understand her parenting ability. On the basis of her experience, she did not believe that respondent could effectively care for JL.

Thompson similarly testified that her job was to offer services so that respondent could show that she could be a good parent, but respondent had failed to do so. Despite the services and support respondent received, Thompson testified that respondent's parenting and personal management skills did not improve significantly while she worked with respondent. Given her past experiences with respondent, Thompson did not believe that respondent could appropriately care for a child.

Testifying as an Indian expert under 25 USC 1912(f), VanLuven was satisfied that active and reasonable efforts had been provided to prevent the termination of respondent's parental rights and that respondent's custody of JL would result in serious emotional or physical damage to JL. She testified that she believed the tribe had offered respondent every possible service. While she had never met respondent or been in her home, respondent's past behavior, including numerous instances of placing her children in unsafe situations and failing to supervise them appropriately, led to VanLuven's assessment that respondent was a "minimally adequate parent," but not on a consistent basis.

Although they were provided in connection with prior termination proceedings, the services offered to respondent were extensive, relatively recent, and tailored to meet her specific needs. Over several years,

caseworkers came to respondent's home. They tried to teach her parenting and financial skills, without success. The evidence demonstrates that these efforts are relevant to the respondent's current situation and abilities. The caseworkers unsuccessfully attempted to address both respondent's poor decision-making and the unsafe conditions her decisions created. As further explained below, respondent's own testimony showed that she continued to make the same poor choices that she made when she was receiving services. The ICWA's "active efforts" requirement has been met.

## VI. THE "BEYOND A REASONABLE DOUBT" STANDARD OF 25 USC 1912(f)

Relying on Judge GLEICHER's dissent, respondent next argues that the Court of Appeals majority and the trial court improperly applied a presumption of respondent's unfitness based on her past conduct. She argues that conclusions based on such a presumption fail to meet the heightened "beyond a reasonable doubt" standard of 25 USC 1912(f). We agree with Judge GLEICHER that termination based on "a presumption of unfitness predicated solely on past conduct" would be inconsistent with the "beyond a reasonable doubt" standard of the ICWA. *Lee*, *supra*, slip op at 8-9 (GLEICHER, J., concurring in part and dissenting in part). We also agree that invocation of the doctrine of anticipatory neglect to terminate parental rights solely on the basis of past behavior would be inconsistent with that standard.[20] Here, however, the evidence concerning respon-

[20] Judge GLEICHER took issue with the Court of Appeals majority's invocation of "the 'well-established doctrine of anticipatory neglect' " in affirming the trial court's decision to terminate respondent's parental rights. *Lee*, *supra*, slip op at 9 (GLEICHER, J., concurring in part and dissenting in part). The Court of Appeals majority stated that, under the doctrine, "how a parent treats one child is probative, though not

dent's past conduct established that she was an unfit parent in the past, and the current evidence revealed that she continued to make choices that demonstrated a lack of maturity and ability to care for a child.

Respondent admitted that she had been twice arrested and convicted of operating a motor vehicle while impaired, once in 2005 and again in 2006. She had also been convicted of aggravated assault in connection with her involvement in a bar fight in 2005. Matheny testified that respondent had been sober since he began working with her, and he considered his counseling with her a success. He also testified that respondent's problem was not habitual drunkenness, but drinking bouts "a couple, three times a year." Matheny treated her only one hour weekly for eight months. He had never met JL, nor had he been in respondent's home. Matheny testified that—*under the limited circumstances described by respondent's counsel*—at the home of JL's grandmother, in a public place, for a short number of hours, or for one day, or for an afternoon a week, respondent did not pose a risk of harm to JL. Nothing in the testimony of respondent or Matheny suggested that the evidence of unfitness—on which the caseworkers and Indian expert VanLuven based their opinion that respondent's custody of JL would result in serious emotional or physical damage to JL—was outdated or no longer relevant.

Indeed, respondent's own testimony established that she continued to make poor choices. She supported the caseworkers' assessment that she was unfit to parent JL. Respondent acknowledged that her only income was

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determinative, of how that parent will treat another, and past behavior is a strong indicator of future performance," *id*. at 9 (majority opinion) (citation omitted), but Judge GLEICHER believed that "respondent's past behavior did qualify as determinative," *id*. at 9 (GLEICHER, J., concurring in part and dissenting in part) (emphasis omitted).

social security disability benefits because she had been diagnosed with fetal alcohol syndrome. She did not believe she suffered from that disorder. She also believed that she was able to work, even though she had not worked or sought work in about four years. She lived with and depended financially on Michael Plank. Respondent acknowledged that allegations of Michael Plank's violence against his former partner resulted in an assault conviction. She also admitted that she left tribal housing because of an impending eviction for alleged marijuana use in her home. Michael Plank had admitted smoking marijuana in connection with that allegation.

Moreover, the DHS and the tribe explored alternatives to termination.[21] Thompson testified that the agency attempted to place JL in a guardianship or long-term care with a relative, Lois Plank. The tribal court released JL from its jurisdiction in 2002 upon agreement that JL's father, Tony Plank, would be granted full custody. Tony Plank was subsequently incarcerated. Thompson testified that she was afraid to make a similar mistake in the future by placing JL with Lois Plank and putting respondent in a position to become the child's sole and legal custodian. Thompson also testified that an earlier guardianship established with the paternal grandfather of SD and JD was terminated after only two months at the guardian's request. The guardian had allowed respondent and Justin DuFresne visitation, but they did not follow the rules. Respondent took the children to Indiana without permission, for example. After the guardianship was ter-

[21] During the parties' arguments, JL's guardian ad litem argued against termination of respondent's parental rights but did not advocate that respondent have full-time physical custody. Instead, he encouraged the court to "think outside the box" and consider alternatives such as long-term placements with relatives.

minated, the tribe petitioned to terminate respondent's parental rights to SD and JD. Thompson explained, "We had just gone into . . . another case where the children were out in the road a year later, so conditions hadn't changed. So it was time for termination if there was no other way."

In sum, the caseworkers' testimony established beyond a reasonable doubt that respondent failed to make progress despite the extensive services provided to her in the recent past. She continued to pose a risk of harm to her children. Respondent's testimony did not suggest that she had gained the capacity to take on the responsibilities of a full-time parent. On the contrary, her testimony indicated that she continued to make poor choices that did not suggest that she had the ability to provide a safe and stable home for a child. And although Matheny's testimony about respondent was positive, he had never met JL or been in respondent's home. Eight months of substance abuse counseling, even if beneficial, had not rendered respondent an adequate parent. Finally, the DHS demonstrated that respondent's continued legal custody of JL posed a risk, even if she were not the full-time physical custodian, because it left open the possibility that respondent might seek full-time custody. The lower courts did not err by concluding that the evidence established beyond a reasonable doubt that respondent's continued custody of JL was likely to result in serious emotional or physical damage to him. Respondent's continued custody would further subject JL to the consequences of respondent's poor choices, including her decision to live with and financially depend on a man who had been convicted of assault, and would put JL at risk of abuse and neglect.[22]

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[22] We cannot accept Justice CAVANAGH's suggestion that our analysis is inconsistent with this Court's decision in *In re Rood*, 483 Mich 73; 763

VII. CONCLUSION

We conclude that the evidence demonstrated beyond a reasonable doubt that respondent's continued custody of JL would be "likely to result in serious emotional or physical damage to the child." 25 USC 1912(f). We also conclude that the extensive services provided to respondent before the DHS filed this termination petition satisfied the "active efforts" requirement of the ICWA. 25 USC 1912(d). Accordingly, we affirm the judgment of the Court of Appeals upholding the trial court's order terminating respondent's parental rights.

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NW2d 587 (2009). In *Rood*, we affirmed the Court of Appeals decision reversing the trial court's termination of parental rights and directing the trial court to afford the respondent an opportunity to participate in the proceedings. We were skeptical about the trial court's determination that there was a "reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent." MCL 712A.19b(3)(j). In light of the testimony of the respondent and his girlfriend that the respondent "successfully cared for a young child . . . on a daily basis," we concluded that the state's failure to assess the respondent's household as an appropriate placement for the child "deprived the court of objective information on a disputed issue crucial to the outcome." *Id*. at 117.

In contrast to *Rood*, in which the state did not even consider placing the child with the respondent, the caseworkers here provided extensive services to respondent over several years in an effort to prevent removal and termination. And in *Rood*, the evidence suggested that the respondent had successfully cared for a child on a daily basis, while the evidence in this case showed that respondent persisted in making the same poor choices that have historically prevented her from being a safe and adequate parent on a consistent basis.

We also reject Justice CAVANAGH's suggestion that consideration of guideline D.3(c) of the Bureau of Indian Affairs guidelines, 44 Fed Reg 67584, 67593 (November 26, 1979), would yield the conclusion that the conditions that existed in respondent's home in the past are not "sufficiently 'serious' to satisfy 25 USC 1912(f)." *Post* at 343 n 9. Here, the evidence did not merely establish " 'poverty, crowded or inadequate housing, alcohol abuse, or non-conforming social behavior,' " see *post* at 343-344 n 9, but identified specific harms to respondent's children, including respondent's failure to appropriately supervise them.

YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with CORRIGAN, J.

WEAVER, J. (*concurring*). I concur in the majority opinion except for its discussion in part V(B) concerning the adoption of a "futility test." I do not believe it is necessary for the majority to decide whether this Court should adopt a "futility test" in this case, given that such a determination is not necessary for resolving the issues in front of us at this time.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in full with parts I through IV and parts V(A) and (B) of the majority opinion. I write separately to further clarify my view regarding the proper interpretation of 25 USC 1912(d) and to dissent from the majority's application of that statute in this case in part V(C). I further dissent from the majority's application of 25 USC 1912(f) in part VI. I would reverse the judgment of the Court of Appeals, vacate the order terminating respondent's parental rights to JL, and remand this case to the trial court for further proceedings.

## I. "ACTIVE EFFORTS" AND 25 USC 1912(d)

Under 25 USC 1912(d), the party seeking to terminate parental rights must satisfy the court, by clear and convincing evidence, that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." This Court asked the parties to address whether, in order to satisfy the statute, "active efforts" must be concurrent with the

instant proceeding and whether the efforts must be targeted at the child who is the subject of the proceeding.[1]

I fully concur with the majority's holding that the relevant inquiry for both of these issues is "whether the efforts made and the services provided . . . are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding." *Ante* at 325. I further agree that, although the text of 25 USC 1912(d) does not strictly require that efforts be made concurrently with the proceedings or be directed at the child who is the subject of the proceeding, the timing and the subject of the efforts are still relevant aspects in determining whether the requirements of 25 USC 1912(d) and (f) are met. *Ante* at 324. As stated by the majority, "[s]ervices provided too long ago to be relevant to a parent's current circumstances do not establish by clear and convincing evidence that 'active efforts' have been made . . . ." *Ante* at 324-325. Similarly, services presented in connection with one child will not always be relevant in determining a parent's abilities to care for a different child. I also concur with the majority's explanation of the qualitative requirements associated with providing active, as opposed to passive, efforts and its rejection of a "futility exception" to the "active efforts" requirement. *Ante* at 321-324, 326-327.

Although I agree with the majority's articulation of what 25 USC 1912(d) requires, I dissent from its application of 25 USC 1912(d) here because I would hold that, in order to meet this standard, the party seeking termination must present evidence of the par-

[1] There was no dispute that the efforts must, at a minimum, be targeted at the parent who is the subject of the proceeding.

ent's current circumstances and ability to parent the child who is the subject of the proceeding.[2] I would also hold that the party must assess and provide evidence of the relevancy of past efforts to the family's current circumstances and needs. Absent such evidence, I do not see how the party seeking termination could clearly and convincingly show that, as required by the majority, past efforts to prevent the breakup of the family "are relevant to the parent's current situation and abilities" and are sufficient to "permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding." *Ante* at 325.

In this case, the party seeking termination, the Department of Human Services (DHS), did not present evidence regarding respondent's current circumstances and did not assess the relevancy of its past efforts to respondent's current circumstances. As summarized by the majority opinion, the DHS did present ample evidence that there had been extensive past efforts by the DHS, and the tribe, that were designed to prevent the breakup of the family and evidence that those efforts had been largely unsuccessful. *Ante* at 328-331. The DHS did not, however, present evidence regarding whether these past efforts were relevant to respondent's and JL's current circumstances. The caseworkers who testified at trial admitted that, for a year and a half or longer before the termination proceeding, they had not observed or evaluated respondent, respondent's home situation, respondent's parenting ability, or respondent's interactions with JL.[3] Given that the DHS

[2] This would be true even if the parent presents no evidence that the parent's circumstances or parenting abilities have changed. It is the burden of the party seeking termination to show that past efforts are relevant to the parent's current situation.

[3] Regina Frazier, the DHS caseworker, testified that the DHS had not provided to respondent services targeting JL since 2004 and had not

did not evaluate respondent's current circumstances or current ability to parent JL, the agency also could not have evaluated whether the past efforts of the DHS and the tribe were relevant to her "current" circumstances and abilities, as the majority purports to require.[4]

Accordingly, in light of the DHS's failure to assess the relevancy of past services to respondent's current circumstances or ability to parent JL, I dissent from the majority's result. I would hold that it is not possible to determine whether the agencies' past efforts "are relevant to the parent's current situation and abilities" such that they are sufficient to "permit a current assessment of parental fitness" using the evidence presented by the DHS in this case.[5]

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provided services regarding any of her children for a year and a half before the termination hearing. Frazier agreed that there had been "no services to [respondent] regarding reunification of her child, no active efforts to reunite this family, particularly with" JL in that period and stated that she did not know how respondent would react to services at this time.

Penny Clark, the Anishinabek Community Family Services caseworker, testified that she had provided services to respondent that were targeted at managing a household with two young children. She testified that she had not provided respondent services since 2005, had never been to respondent's current home, and would not be able to determine respondent's current ability to parent.

Jill Thompson, a Binogii Placement Agency caseworker, testified that she had not provided services to respondent or visited respondent's home for more than two years before the termination hearing.

Thompson and Clark's supervisor, Melissa VanLuven, testified that the tribe had not provided respondent services since 2005 and had not provided her services specific to JL since 2002.

[4] Instead, according to the testimony of one caseworker, the agency moved directly to termination proceedings because, as a matter of policy, the DHS does not provide services when the grounds for termination under state law are "automatic." I agree with the majority's holding that this policy is inconsistent with the Indian Child Welfare Act. See *ante* at 327.

[5] It is conceivable that, if the DHS were to evaluate respondent's current circumstances and present evidence to the trial court that its past

II. "BEYOND A REASONABLE DOUBT" AND 25 USC 1912(f)

A parent's rights may not be terminated "in the absence of a determination, supported by evidence beyond a reasonable doubt, . . . that the continued custody of the child by the parent . . . is likely to result in serious emotional or physical damage to the child." 25 USC 1912(f). The burden of proof is on the party seeking termination. MCR 3.977(A)(1) and (3). I respectfully dissent from the majority's determination that the DHS met this very high standard here.

I would hold that contemporaneous evidence must be presented in order for a court to determine *beyond a reasonable doubt* that "serious emotional or physical damage to the child" is likely to result, as required by 25 USC 1912(f).[6] This holding is supported by the standards set forth in that statute and the Bureau of Indian Affairs' guidelines for state courts.

Under 25 USC 1912(f), there are stringent requirements that must be met before a parent's rights may be terminated under the Indian Child Welfare Act (ICWA). To begin with, it adopted the "beyond a reasonable doubt" standard. It is well established that the "beyond

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efforts were relevant to respondent's and JL's current circumstances, the trial court could validly determine that the requirements of 25 USC 1912(d) were met without the DHS providing any further services. But absent that evaluation and the resulting evidence, regardless of how extensive the agency's past efforts were, I cannot agree that the DHS has shown that active efforts were made to prevent the breakup of the family and that those efforts were unsuccessful.

[6] This is consistent with the majority's statement that "termination based on a presumption of unfitness predicated solely on past conduct would be inconsistent with the 'beyond a reasonable doubt' standard . . . ." *Ante* at 331 (quotation marks omitted). I also concur with the majority's holding that the anticipatory-neglect doctrine cannot serve as the sole basis for termination under 25 USC 1912(f). This construction of the statute is consistent with the purposes of the Indian Child Welfare Act outlined in part II of the majority opinion. *Ante* at 316.

a reasonable doubt" standard is the highest that may be imposed by a legislature. As stated by the United States Supreme Court, "Congress requires 'evidence beyond a reasonable doubt' for termination of Indian parental rights, reasoning that 'the removal of a child from the parents is a penalty as great [as], if not greater, than a criminal penalty . . . .' " *Santosky v Kramer*, 455 US 745, 769; 102 S Ct 1388; 71 L Ed 2d 599 (1982), quoting HR Rep No 95-1386, at 22 (1978). This is significant because it demonstrates that the "stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.' " *Santosky*, 455 US at 755 (internal citations omitted). Congress deliberately used the "beyond a reasonable doubt" standard in 25 USC 1912(f) as a reflection of the weight and gravity of the interest that is at stake. To hold that the standard could be met absent contemporaneous evidence would afford inadequate respect to this determination.

Further, the statute sets the high standard that the party seeking termination must present evidence that a parent's continued custody of the child is "likely to result in serious emotional or physical damage to the child." I would hold that under 25 USC 1912(f), consistently with the purposes of ICWA and the "beyond a reasonable doubt" standard, a determination that *serious* emotional or physical damage to the child is *likely* to result requires current, specific evidence. This evidence should be relevant to the child who is the subject of the proceeding and the circumstances that will cause the specific damage

that is likely to result.[7] This is consistent with the Bureau of Indian Affairs' guideline that states:

> [T]he evidence must show *the existence of particular conditions in the home* that are likely to result in serious emotional or physical damage *to the particular child who is the subject of the proceeding*. The evidence must show the causal relationship between the conditions that exist and the damage that is likely to result. [Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, D.3(c), 44 Fed Reg 67584, 67593 (November, 26, 1979) (BIA Guideline D.3[c]) (emphasis added).]

This guideline is not binding on this Court, but I find it instructive here. In order to show the existence of *particular* conditions in the home, and a causal relationship between those conditions and a serious harm that is likely to result, the party seeking termination must present contemporaneous evidence of the current conditions of the parent's home. Therefore, even if the "active efforts" requirements of 25 USC 1912(d) could be met without the DHS's presenting a current assessment of respondent's circumstances and ability to parent and the relevancy of past service efforts to those circumstances, I do not think that the standard in 25 USC 1912(f) requiring a determination beyond a reasonable doubt of the likelihood of serious emotional or physical damage could be met absent such contemporaneous evidence.

Despite holding that the "beyond a reasonable doubt" standard cannot be met with evidence only of a

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[7] Similarly, this Court recently expressed skepticism that, under MCL 712A.19b(3)(j), the DHS could present even clear and convincing evidence that there was a "reasonable likelihood" that a child would "be harmed" if returned to a parent's home when "no one had evaluated [the parent] and his lifestyle." *In re Rood*, 483 Mich 73, 117-118; 763 NW2d 587 (2009).

parent's past conduct, the majority opinion nonetheless concludes that there was sufficient contemporaneous evidence presented in this case to support terminating respondent's parental rights. The majority bases this conclusion on evidence of respondent's past conduct and current evidence that "revealed that [respondent] continued to make choices that demonstrated a lack of maturity and ability to care for a child."[8] *Ante* at 331-332. I do not think that contemporaneous evidence demonstrating "a lack of maturity" is sufficient to meet the "beyond a reasonable doubt" standard, particularly when considered in light of the stringent evidentiary requirements suggested by the BIA Guideline D.3(c).[9]

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[8] The majority relies heavily on the "current evidence" of respondent's 2005 and 2006 convictions for operating a motor vehicle while impaired, her 2005 conviction of aggravated assault for a bar fight, and respondent's boyfriend's past conviction of domestic assault. Strikingly, by comparison, in *In re Rood*, Justice CORRIGAN's lead opinion found it significant that none of the parent's past convictions involved violence against children. The parent had testified that he had reformed and was staying out of trouble, and the DHS had not evaluated the parent's current home situation, so "[*n*]*o one knew* whether [the parent] was likely to persist in criminal behavior because no one had evaluated him and his lifestyle." *In re Rood*, 483 Mich at 117-118 (emphasis in original). Similarly, in this case, respondent's and her significant other's convictions do not involve violence against children, respondent and her addictions counselor testified that she had made progress since those convictions, and the DHS had not evaluated respondent and her lifestyle since those convictions. Although the factual circumstances of the cases differ, I find this Court's skepticism that a parent's past convictions can provide *clear and convincing* evidence of a reasonable likelihood of *harm* to the child inconsistent with its finding in this case that similar convictions significantly contribute to establishing *beyond a reasonable doubt* that *serious harm* to the child is likely to result.

[9] BIA Guideline D.3(c) also suggests that even if the types of harm to which JL may have been subjected in respondent's home two years ago still existed in respondent's current home, those harms might not be sufficiently "serious" to satisfy 25 USC 1912(f). BIA Guideline D.3(c) states: "Evidence that only shows the existence of community or family poverty, crowded or inadequate housing, alcohol abuse, or non-

The DHS could not have presented evidence of particular conditions in respondent's home when it did not evaluate respondent's current home, the risks it would pose to an 8- to 10-year-old child, or respondent and JL's relationship. The DHS certainly could not have presented evidence showing a causal link between specific conditions in respondent's home and a likelihood of JL suffering any specific serious emotional or physical damage. Considering the dearth of contemporaneous evidence related to respondent's and JL's current circumstances, and the stringent standards of 25 USC 1912(f), I respectfully dissent from the majority's determination that the "beyond a reasonable doubt" standard of 25 USC 1912(f) was satisfied by the evidence presented in this case.

## III. CONCLUSION

I respectfully dissent from the majority's application of 25 USC 1912(d) and (f) in this case. I would reverse the judgment of the Court of Appeals, vacate the order terminating respondent's parental rights, and remand this case to the trial court for further proceedings.

KELLY, C.J., concurred with CAVANAGH, J.

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conforming social behavior does not constitute clear and convincing evidence that continued custody is likely to result in serious emotional or physical damage to the child."

I would urge lower courts to consider BIA Guideline D.3(c) when determining under 25 USC 1912(f) whether "serious" damage to the child is likely to occur.

SEYBURN, KAHN, GINN, BESS, DEITCH AND SERLIN, PC v BAKSHI

Docket No. 136436. Argued May 5, 2009 (Calendar No. 1). Decided July 17, 2009.

The law firm of Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, P.C., after successfully defending against a legal malpractice action by former client Kirit Bakshi, brought an action in the Oakland Circuit Court against Bakshi, alleging breach of contract and seeking payment of outstanding legal fees. The defendant moved for summary disposition, arguing that the claim was barred by the statute of limitations because it was brought more than six years after the defendant last paid for the plaintiff's legal services, while an appeal in which the plaintiff represented the defendant was pending in the Court of Appeals. The court, Gene Schnelz, J., granted the motion. The Court of Appeals, KELLY, P.J., and HOEKSTRA, J. (WHITE, J., concurring in part and dissenting in part), reversed, holding that the claim is timely because it was filed within six years of when it accrued, which was when the plaintiff, at the defendant's request, provided the defendant with copies of documents in his litigation file. Unpublished opinion per curiam of the Court of Appeals, issued March 13, 2003 (Docket No. 238697). The Supreme Court, in lieu of granting leave, vacated the Court of Appeals judgment and remanded the case to the trial court for further proceedings, including a determination whether there is a proper action on an open account. 469 Mich 958 (2003). On remand, the trial court entered a judgment for the plaintiff, agreeing that the plaintiff's claim accrued on the date the plaintiff provided the copies to the defendant. The defendant appealed. The Court of Appeals, SAAD, P.J. and BECKERING, J. (JANSEN, J., concurring), reversed, holding that the plaintiff's claim is time-barred because it accrued when the Court of Appeals allowed the plaintiff to withdraw as the defendant's counsel, and that the plaintiff's copying and returning of the defendant's litigation file did not extend the accrual date under MCL 600.5807(7), now MCL 600.5807(8). 278 Mich App 486 (2008). The majority held that the law governing mutual and open accounts, MCL 600.5831, did not govern the analysis because the more specific law governing the

termination of the attorney-client relationship took precedence. The Supreme Court granted the plaintiff's application for leave to appeal. 482 Mich 1077 (2008).

In a unanimous opinion by Justice WEAVER, the Supreme Court *held*:

The relationship between the plaintiff and the defendant is governed by the explicit terms of their contract and does not involve a mutual and open account current. The plaintiff's claim for breach of contract accrued when the Court of Appeals granted the motion to terminate the attorney-client relationship, not when the plaintiff later copied and returned the defendant's file. Accordingly, the claim for unpaid legal fees under the original contract is barred by the six-year limitations period in MCL 600.5807(8). However, the claim for the costs attributed to the file-review services effectively arose from a separate contract and therefore is not barred by the statute of limitations.

1. Under the legal definitions of an "open account" and a "mutual account" and the caselaw interpreting those terms, for a mutual and open account current to exist, there must be a reciprocal relationship between the parties in relation to an account that is left open for ongoing debit and credit entries until either party decides to settle and close the account. Furthermore, the existence of a contract rules out the existence of a mutual and open account current where the dealings of the parties relate entirely to and are governed by a special contract for the payment of money. In this case, the parties no longer have a reciprocal relationship, they had entered into a contract containing specific terms that defined the liabilities of both parties, and the plaintiff denied at trial that it had an open account with the defendant. Accordingly, the parties' obligations to one another are governed by the explicit terms of their contract and not by a mutual and open account current.

2. A claim for breach of contract generally accrues on the date the contract was breached. Thus, under general contract principles, an attorney's cause of action to recover attorney fees would accrue on the date the client breached the parties' agreement by failing to pay in accordance with its terms. However, in the context of litigation, the special features of the attorney-client relationship necessitate an exception to the general rule where the client breaches the agreement during the representation. Once litigation has commenced, an attorney's ability to terminate the representation is limited by his or her responsibilities to the client and, as a result, may require a court order before the attorney withdraws from representation, even if the client has ceased paying the

attorney. In such cases, a breach of contract claim does not accrue until the attorney-client relationship has been terminated by a court. In this case, because the plaintiff's obligations to the defendant continued until the Court of Appeals terminated the relationship, the plaintiff's cause of action to recover attorney fees accrued on the date the attorney-client relationship was terminated.

3. An attorney's performance of follow-up or ministerial services for a client does not change the date a claim for breach of contract accrues. Accordingly, the plaintiff's acts of reviewing, copying, and returning the defendant's file after the attorney-client relationship was terminated did not extend the date of accrual beyond September 30, 1993.

4. The defendant's request for a copy of his file occurred after the attorney-client relationship was terminated, which effectively gave rise to a new contract. The plaintiff complied with the defendant's request in October 1993 and billed the defendant $442 for these services on November 12, 1993, with payment due on November 23, 1993. The plaintiff filed its claim on October 8, 1999. Therefore, the plaintiff's claim to recover the fees associated with the file-review services is not barred by the statute of limitations. Because the defendant has not contested the reasonableness of the amount, on remand, the plaintiff is entitled to recover $442 from the defendant, with no interest to be assessed under the contract.

Affirmed in part, reversed in part, and remanded for entry of judgment in favor of the plaintiff.

1. CONTRACTS — WORDS AND PHRASES — MUTUAL AND OPEN ACCOUNTS CURRENT.

A mutual and open account current exists where there is a mutual, reciprocal relationship between the parties with respect to an account that is left open for ongoing debit and credit entries until either party decides to settle and close the account, and generally does not exist where the parties' dealings are entirely governed by a special contract for the payment of money (MCL 600.5831).

2. LIMITATION OF ACTIONS — ATTORNEY AND CLIENT — BREACH OF CONTRACT — ACCRUAL OF CONTRACT CLAIMS AGAINST ATTORNEYS.

A client's claim for a breach of contract against an attorney who moved to withdraw from representation accrues on the date that a court terminates the attorney-client relationship (MCL 600.5807[8]).

3. LIMITATION OF ACTIONS — ATTORNEY AND CLIENT — BREACH OF CONTRACT — ACCRUAL OF CONTRACT CLAIMS AGAINST ATTORNEYS — DATE OF ACCRUAL OF CONTRACT CLAIMS AGAINST ATTORNEYS.

An attorney's performance of follow-up or ministerial services for a client after the attorney-client relationship has been terminated does not change the date on which a claim for breach of contract accrues (MCL 600.5807[8]).

*Seyburn, Kahn, Ginn, Bess & Serlin, P.C.* (by *Barry R. Powers*), for the plaintiff.

Kirit Bakshi, *in propria persona*.

WEAVER, J. In this case we must decide the proper date of accrual in a breach of contract action for the recovery of unpaid legal fees. Specifically, this Court has been asked to consider whether the parties' obligations are governed by a contract or a mutual and open account current.[1] We also consider whether a claim by an attorney against a client for unpaid legal fees accrues on the date that the attorney-client relationship is terminated.

We conclude that the relationship between plaintiff and defendant is governed by the explicit terms of their contract and is not a mutual and open account current. We also hold that plaintiff's breach of contract claim to recover the unpaid legal fees under the original contract accrued on September 30, 1993, which is the date that the Court of Appeals granted the motion to terminate the attorney-client relationship. In addition, we conclude that plaintiff's acts of reviewing, copying, and returning defendant's file do not extend the accrual date beyond the date that the attorney-client relationship was terminated. Because plaintiff did not file this

[1] The term "mutual and open account current" comes directly from MCL 600.5831, which governs accrual for actions involving a mutual and open account.

claim until October 8, 1999,[2] we hold that, pursuant to MCL 600.5807(8), the breach of contract action to recover the unpaid legal fees under the original contract is barred by the six-year statute of limitations. Finally, we hold that the costs attributed to the file-review services effectively arose from a separate contract, and the claim for those costs was filed timely and is not outside the statute of limitations.

We therefore affirm the Court of Appeals in part, reverse in part, and remand to the trial court for entry of judgment in favor of plaintiff in the amount of $442, with no interest to be assessed under the contract.

## I. FACTS AND PROCEDURAL HISTORY

The facts and procedural history of this case are quite extensive and were well set forth by the Court of Appeals as follows:

> In 1989, [defendant] Bakshi retained [plaintiff] Seyburn to represent him and his two corporations in a legal action (underlying litigation) and other legal matters. Bakshi was unsuccessful in the underlying litigation: the trial court dismissed the action on October 17, 1991, and [the Court of Appeals] affirmed the trial court's judgment. *Interface Electronics v Minicomp Private Ltd*, unpublished opinion per curiam of the Court of Appeals, issued October 10, 1994 (Docket No. 146262). (Circuit court records indicate that Seyburn also represented Bakshi in at least one other lawsuit in the circuit court while the *Interface Electronics* appeal was pending.)
>
> Bakshi ceased paying Seyburn's legal bills in November 1992, while the appeal in the underlying litigation was pending. At that time, Bakshi had already paid $92,000, and his remaining balance was $50,603. Apparently, his

[2] The Court of Appeals opinion states that plaintiff filed this claim on October 9, 1999; however, the complaint in the Oakland Circuit Court file is date-stamped October 8, 1999.

refusal to pay initially arose from a dispute with Seyburn over an amount he believed should have been credited to the account. The parties continued to dispute this matter over the next several months. On March 3, 1993, Seyburn argued a motion in the trial court on Bakshi's behalf. This was the last date on which Seyburn performed a service for Bakshi that was not related to the dissolution of the attorney-client relationship. On April 27, 1993, Seyburn drafted a motion to withdraw as Bakshi's counsel and charged him for that task.

On June 8, 1993, Bakshi notified Seyburn that he believed that "our attorney client relationship must be terminated or substantially modified." He gave Seyburn two "options": Seyburn could refund the fees already paid and enable Bakshi to retain substitute counsel with the refunded money, or Seyburn could refund 75 percent of the fees paid, file an appeal, and withdraw. Bakshi also stated that he had no financial resources to pay for the litigation.

On July 30, 1993, Seyburn moved in [the Court of Appeals] to withdraw as Bakshi's counsel. It stated that Bakshi was "indebted to counsel for fees and costs incurred at the trial court level as well as fees associated with the appeal," and that he "has indicated that it [sic: he] is not willing to pay the outstanding fees or costs." Seyburn also alleged in the withdrawal motion that the attorney-client relationship between itself and Bakshi was "subject to irreconcilable differences and has broken down to such an extent that counsel can not effectively represent [Bakshi's] interest in this appeal." [The Court of Appeals] granted the motion to withdraw on September 30, 1993.

In October 1993, Bakshi requested his file from Seyburn. Seyburn's paralegal reviewed the file to determine which materials would be provided to Bakshi. On November 12, 1993, Seyburn sent Bakshi a bill, which included charges for those activities, as follows:

> 10/10/93 Review file to determine what to keep and what to return to client; draft memorandum regarding same;

> 10/11/93 Complete review of file to determine what to send back to client; copy pleading indexes and correspondence;
>
> 10/12/93 Review and revise memorandum regarding file . . . .

Seyburn charged Bakshi $182 [sic: $192][3] for these activities, plus $250 for photocopying. Bakshi did not pay this bill, and the unpaid balance on Bakshi's account was then $55,723.

In 1995, Bakshi brought a legal malpractice action against Seyburn, claiming, among other things, that he should be relieved of his obligation to pay Seyburn for negligently performed legal services in the prior unsuccessful litigation. In a motion for summary disposition, Seyburn argued that Bakshi's action was barred in part by the two-year statute of limitations for malpractice claims, MCL 600.5805(5) (now MCL 600.5805[6]). Contrary to the position that it takes in this litigation, Seyburn stated in an affidavit that it last performed legal services for Bakshi on March 3, 1993, and that it "discontinued" providing legal services to Bakshi on April 27, 1993 (the latter date refers to the date it drafted its motion to withdraw as counsel). The trial court commented in its opinion that "[Seyburn was] hired for the particular purpose of representing [Bakshi] and did not discontinue serving [Bakshi] with respect to those matters until October 1993 . . . ." The trial court dismissed the malpractice action in 1999, and [the Court of Appeals] affirmed the dismissal in *Bakshi v Gold*, unpublished opinion per curiam of the Court of Appeals, issued August 10, 2001 (Docket No. 220867). Our Supreme Court denied leave to appeal. *Bakshi v Gold*, 467 Mich 851 (2002).

Seyburn filed its complaint in the instant action for unpaid legal fees on October 9 [sic: 8], 1999, while Bakshi's malpractice action was pending. Bakshi moved for summary disposition pursuant to MCR 2.116(C)(7), arguing

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[3] The Court of Appeals opinion states that plaintiff charged defendant $182 for the file-review services; however, the charges on the actual invoice for the October 10-12, 1993, activities total $192.

that the six-year statute of limitations, MCL 600.5807(7) (now MCL 600.5807[8]), had expired. He maintained that Seyburn's claim accrued in November 1992, when he last paid for legal services. In response, again contrary to the position it took in the malpractice case, Seyburn argued that it last performed legal services on October 12, 1993, when it complied with Bakshi's request to be provided with a copy of his file. It asserted that the trial court in the malpractice action had already determined that its services ended in October 1993.

In 2001, the trial court granted Bakshi's motion for summary disposition based on the statute of limitations, and held that Seyburn's action accrued in 1992, when Bakshi stopped paying Seyburn's legal fees. Seyburn appealed that decision to [the Court of Appeals], which, in a split decision, reversed the trial court's decision. The majority agreed with Seyburn that its action was timely filed because its claim accrued on October 12, 1993, the last date it performed a properly billable service. *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, unpublished opinion per curiam of the Court of Appeals, issued March 13, 2003 (Docket No. 238697). One judge, however, issued a separate partially dissenting opinion, which agreed with the majority's conclusion that summary disposition was improperly granted to Bakshi. However, that judge wrote that the matter should be remanded to the trial court to determine whether "there was a proper action on an open account" and, if so, the date of the last proper billable entry. In this regard, the partially dissenting judge opined that the trial court should have considered whether Seyburn could ethically and legally charge Bakshi for the tasks it performed in October 1993 in relation to his request for a copy of his file. However, she also commented that the October dates were not necessarily dispositive of the question of when Seyburn's claim accrued. *Id*., slip op at 1-2 (WHITE, J., concurring in part and dissenting in part).

Bakshi thereafter filed an application for leave to appeal in the Michigan Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated [the Court of Appeals] judgment and remanded the case to the trial court for

> further proceedings for the reasons stated in the partially dissenting opinion. *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 469 Mich 958 (2003).
>
> On remand, the trial court held a hearing on the statute of limitations issue. It determined that Seyburn performed the additional work in October 1993, at Bakshi's request and for his benefit, and that Seyburn could ethically charge Bakshi for those services. From this, the court reasoned that the limitations period did not begin to run until October 12, 1993, and thus held that Seyburn's action, filed on October 9 [sic: 8], 1999, was timely filed within the six-year period of limitations. MCL 600.5807(8) (formerly MCL 600.5807[7]). Thus, the trial court determined that Bakshi was liable for legal fees of $62,763, and that Seyburn was entitled to interest of $510,405.07, as of August 16, 2006.[6] It issued judgment ordering Bakshi to pay Seyburn $573,168.07.
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> [6] Seyburn charged 18 percent annual interest on unpaid balances; thus, Bakshi's outstanding balance grew from $62,763 in 1993 to $573,168 in 2006.[4]

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Defendant appealed the trial court's decision. On April 1, 2008, the Court of Appeals majority, in a published opinion, reversed and remanded to the trial court to enter judgment in favor of defendant.[5] The majority held that plaintiff's claim accrued on September 30, 1993, which is the date that the Court of Appeals terminated the underlying attorney-client relationship. The majority also held that plaintiff's October 1993 acts of copying and returning defendant's file did not extend the accrual date under MCL 600.5807(8). In reversing the trial court, the majority articulated that in the context of litigation, where the attorney is no longer

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[4] *Seyburn, Kahn, Ginn, Bess, Seitch and Serlin, PC v Bakshi*, 278 Mich App 486, 489-493; 750 NW2d 633 (2008).

[5] *Id*. at 501.

providing services to the client but a dispute exists over legal fees, a claim for unpaid legal fees accrues on the date that the attorney-client relationship is terminated. In reaching its decision, the majority reasoned that the law governing a mutual and open account, MCL 600.5831, does not apply in this case because the law specifically governing the termination of the attorney-client relationship has precedence over a statute of general applicability.[6]

Judge JANSEN fully concurred in the result but would have decided the case more simply, specifically, by holding that the attorney-client relationship terminated on September 30, 1993, and that the subsequent acts of copying and returning defendant's file did not extend the relationship beyond the date of the court-granted termination. Therefore, the breach of contract action for the recovery of unpaid legal fees also accrued on the termination date. This Court granted leave to appeal.[7]

## II. STANDARD OF REVIEW

The question whether a cause of action is barred by the applicable statute of limitations is one of law,[8] which this Court reviews de novo. This Court also reviews de novo a trial court's decision regarding a summary disposition motion.[9]

## III. ANALYSIS

At issue in this case is the proper accrual date for a claim by an attorney against his client for unpaid legal fees. In order to address this question, we must first

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[6] *Id*. at 500 n 10.

[7] *Seyburn, Kahn, Ginn, Bess, Seitch and Serlin, PC v Bakshi*, 482 Mich 1077 (2008).

[8] *Moll v Abbott Laboratories*, 444 Mich 1, 26; 506 NW2d 816 (1993).

[9] *Mayberry v Gen Orthopedics, PC*, 474 Mich 1, 5; 704 NW2d 69 (2005).

discern whether this case is governed by contract theory or whether there was a mutual and open account between plaintiff and defendant.

A. BREACH OF CONTRACT CLAIM

Under the rules governing claims alleging breach of contract, the statute of limitations for bringing a cause of action is six years.[10] A claim accrues, and the limitations period begins to run, when the claim may be brought.[11] For a breach of contract action, the limitations period generally begins to run on the date that the breach occurs.[12]

Under a mutual and open account theory, the date of accrual is calculated differently than it is under a contract for services. The language of MCL 600.5831, which is the statutory provision governing a mutual and open account current, provides: "In actions brought to recover the balance due upon a mutual and open account current, the claim accrues at the time of the last item proved in the account."

A "mutual account" is defined as "[a]n account showing mutual transactions between parties, as by showing debits and credits on both sides of the account."[13] The definition of an "open account" is: "1. An unpaid or unsettled account. 2. An account that is left open for ongoing debit and credit entries and that has a fluctuating balance until either party finds it convenient to settle and close, at which time there is a single

[10] MCL 600.5807(8).

[11] MCL 600.5827.

[12] *AFSCME v Highland Park Bd of Ed*, 457 Mich 74, 90; 577 NW2d 79 (1998); *Harris v City of Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992).

[13] Black's Law Dictionary (7th ed).

liability."[14]

The definitions for a "mutual account" and an "open account" have been used together to classify certain accounts as mutual and open accounts current.[15] This Court has held that for an account to be considered a mutual and open account current, it is necessary for the account to be "mutual as well as open."[16] This "means a course of dealing where each party furnishes credit to the other on the reliance that upon settlement the accounts will be allowed, so that one will reduce the balance due on the other."[17]

Applying these principles to the facts of the present case, we conclude that the parties do not have a mutual and open account current because there was no longer a mutual relationship between the parties and also because plaintiff and defendant had an express contract with one another. For a mutual and open account current to exist, there must be a mutual relationship. We stated this exact principle in *Fuerbringer v Herman*:[18] "It is essential to a mutual account that there be reciprocity of dealing; the items must not be all on one side; there must be mutuality."[19] In the present case, defendant made his last payment to plaintiff in November 1992 and informed plaintiff that he would not make any further payments. Where there is no longer a reciprocal relationship, as is the case here, it would be contrary to hold that a mutual and open account current exists between the parties.

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[14] *Id*.

[15] See MCL 600.5831.

[16] *In re Hiscock's Estate*, 79 Mich 536, 538; 44 NW 947 (1890).

[17] *Id*.

[18] *Fuerbringer v Herman*, 225 Mich 76; 195 NW 693 (1923).

[19] *Id*. at 78.

Moreover, despite the lack of mutuality between the parties, there is additional authority to support our holding that a mutual and open account does not exist between the parties. This Court has previously recognized that the existence of a contract rules out the existence of a mutual and open account "where the dealings of the parties relate entirely to and are governed by a special contract for the payment of money . . . ."[20] Similarly, in *A Krolik & Co v Ossowski*,[21] this Court acknowledged a comparable proposition when defining an open account:

> "An open account is one which consists of a series of transactions and is continuous or current, and not closed or stated. However, all accounts which are not stated or reduced to writing are not necessarily open accounts. Thus, cases of bailment, or *express contract defining the liabilities of the parties*, whether evidenced by writings or not, *are not as a general rule open accounts* . . . ." 1 C.J. p. 601. [Emphasis added.][22]

In the present case, it is undisputed that plaintiff and defendant entered into a signed contract containing specific terms. The contract stated that plaintiff agreed to provide legal services to defendant and, in turn, defendant would make payments of money to plaintiff. Specifically, the contract provided for plaintiff to send a billing statement by the 20th of each month, using hourly billing at an established rate, and also required defendant to pay within 10 days of the date of the statement. In addition, the contract defined the liabilities of both parties. Because it is clear that a contract existed between the parties, we do not conclude that there is a mutual and open account in the present situation.

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[20] *Goodsole v Jeffery*, 202 Mich 201, 203; 168 NW 461 (1918).

[21] *A Krolik & Co v Ossowski*, 213 Mich 1; 180 NW 499 (1920).

[22] *Id*. at 7.

Furthermore, when the trial court inquired whether there was an open account between plaintiff and defendant, plaintiff's counsel answered that there was not: "I'm going to answer the Court's question no . . . . [T]here's one count in the complaint which is for breach of contract." In addition, plaintiff's complaint contained one count, labeled "Breach of Contract." The complaint neither cited the mutual and open account statute, MCL 600.5831, nor used the phrase "mutual and open account."

Accordingly, because there was no longer a mutual relationship between the parties and because plaintiff and defendant had an express contract with one another, we hold that the parties' obligations to one another are governed by the explicit terms of their contract and not a mutual and open account current.

### B. STATUTE OF LIMITATIONS

Because we conclude that the parties' obligations in the present case are governed by contract rather than a mutual and open account current, we must now consider the proper accrual date for purposes of the statute of limitations.[23] As we stated earlier, in a breach of contract action, the statutory period generally begins to run on the date that the breach occurs.[24] However, we conclude that a narrow exception exists in the litigation context where the client breaches the agreement during the course of the attorney's representation.

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[23] Although we conclude that the parties' obligations are governed by contract rather than a mutual and open account, we do not agree with the Court of Appeals opinion suggesting that there is an attorney-litigation exception to the mutual and open account statute.

[24] See *Highland Park Bd of Ed*, *supra* at 90; *Harris*, *supra* at 106.

A contract is breached when one party fails to perform its portion of the contract.[25] Thus, under general contract principles, an attorney's cause of action to recover attorney fees would accrue on the date the client breached the parties' agreement by failing to pay in accordance with its terms. We conclude that, in the context of litigation, the special features of the attorney-client relationship necessitate an exception to the general rule where the client breaches the agreement during the representation. Once litigation has commenced, an attorney cannot discontinue serving his or her client without an order of the court because an attorney's ability to terminate the representation may be limited by his or her responsibilities to the client.[26] Although the client may have ceased making payments to the attorney, the attorney's representation of the client continues until the court has permitted the termination.[27]

In the present case, defendant had stopped making payments to plaintiff in late 1992, but defendant never terminated the attorney-client relationship. It was plaintiff that filed a motion in the Court of Appeals seeking to withdraw from the case. Withdrawal was

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[25] *HJ Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 562; 595 NW2d 176 (1999).

[26] MRPC 1.16(b) and (c); also see *White v Sadler*, 350 Mich 511, 526; 87 NW2d 192 (1957), which stated:

> [W]hen an attorney once enters an appearance for a client and *for any reason* later finds he cannot or does not intend to continue to represent that client, he owes a clear duty to his client and opposing counsel and to the court to take timely affirmative steps in the pending case to be relieved of his retainer and have his appearance withdrawn. [Emphasis in the original.]

See also *Mitchell v Dougherty*, 249 Mich App 668, 683; 644 NW2d 391 (2002); *Stroud v Ward*, 169 Mich App 1, 6; 425 NW2d 490 (1988).

[27] See *Mitchell*, *supra* at 683.

finally granted on September 30, 1993, and the attorney-client relationship was then terminated.[28] Because plaintiff's obligations to defendant continued until the Court of Appeals terminated the relationship, we hold that plaintiff's cause of action to recover attorney fees accrued on the date that the attorney-client relationship was terminated: September 30, 1993.[29]

Finally, plaintiff contends that the accrual date can be extended beyond the termination of the attorney-client relationship if the attorney performs follow-up or ministerial services for the client, such as copying and returning the client's file. We hold that the tasks of reviewing, copying, and returning a client's file do not extend the date of accrual beyond the termination date of the attorney-client relationship.

The Court of Appeals has opined on this issue. In a case for legal malpractice, the Court of Appeals held: "In general, once an attorney has discontinued serving the plaintiff-client, additional acts by the attorney will not delay or postpone the accrual of a legal malpractice claim."[30] In another case, the Court of Appeals reasoned that to extend the date of accrual for follow-up activities to otherwise completed matters would give attorneys a powerful advantage over former clients.[31] Although this Court is not bound by the decisions of the Court of

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[28] *Maddox v Burlingame*, 205 Mich App 446, 450; 517 NW2d 816 (1994); *Stroud*, *supra* at 6.

[29] Where an attorney and a client have an agreement that requires the client to pay on a date *after* the termination of the attorney-client relationship, breach of contract rules apply and the cause of action for unpaid legal fees accrues on the date payment is due and the client fails to pay.

[30] *Kloian v Schwartz*, 272 Mich App 232, 238 n 2; 725 NW2d 671 (2006).

[31] See *Bauer v Ferriby & Houston, PC*, 235 Mich App 536, 539; 599 NW2d 493 (1999).

Appeals, we find the Court of Appeals' reasoning on this issue persuasive for our holding on this question. Thus, we hold that plaintiff's acts of reviewing, copying, and returning the file to defendant do not extend the accrual date in this matter past the termination date of the attorney-client relationship.

While the plaintiff's acts of reviewing, copying, and returning the file to defendant do not extend the accrual date of the claim regarding the earlier unpaid legal fees, we hold that the minimal costs associated with the file-review services are timely and must be paid. We reach this conclusion because the additional services rendered after the termination equate to a separate contract apart from the parties' original contract. This separate contract is not governed by the terms included in the original contract because the original contract was dissolved when the Court of Appeals granted the motion to terminate the attorney-client relationship. After the termination was granted, defendant requested a copy of his file from plaintiff. Plaintiff acquiesced to the request and then billed defendant on November 12, 1993, for the additional services performed in October 1993. According to plaintiff's invoice, payment for the October 1993 services was due on November 23, 1993. Plaintiff filed its claim on October 8, 1999. Thus, plaintiff's claim to recover the fees associated with the file-review services is timely and is not outside the statute of limitations.

Although the file-review services effectively constituted a separate contract, there were no specific contractual terms governing the costs and fees to review the file. Under MRPC 1.5(a), an attorney must charge a reasonable fee for services rendered to a client. In the current case, plaintiff charged $442 to review and copy the defendant's file. The reasonableness of the costs assessed for the file-review services were not contested.

Therefore, we conclude that the fees charged for the file-review services are a reasonable charge, and defendant must pay $442 to plaintiff.

To summarize, because we hold that the proper date of accrual in this case is September 30, 1993, the statute of limitations bars the plaintiff's claim for recovery of the earlier, unpaid legal fees. The plaintiff filed the present cause of action in the trial court on October 8, 1999, which is more than six years from the date that the claim accrued on the earlier fees. Moreover, plaintiff's acts of copying and returning defendant's file do not extend the accrual date beyond the date that the attorney-client relationship was terminated. However, we conclude that the minimal costs associated with the file-review services is a separate contract, and the claim to recover those fees is timely and is not barred by the statute of limitations.

### C. *In re DEI'S ESTATE*[32]

Plaintiff asserts that if this Court holds that there is not a mutual and open account in the present case, then we will have to overrule *In re Dei's Estate*. We disagree. In *Dei's Estate*, an attorney performed legal services for his client from early 1925 to May 1933. The client made only two payments on the account in 1925. In 1935 the client died; however, the attorney was not made aware of the death until 1938, at which time he filed suit to collect the unpaid legal fees. This Court held that the attorney's cause of action on the mutual and open account did not accrue until the date of the last item of services that the attorney had performed for the client.[33]

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[32] *In re Dei's Estate*, 293 Mich 651; 292 NW 513 (1940).

[33] *Id*. at 656-658.

The central issue in *Dei's Estate* was whether the attorney's claim was barred by the statute of limitations, which required this Court to first determine whether the account was a mutual and open account current. This Court determined that, pursuant to 1929 CL 13977 (now codified as MCL 600.5831), there was a mutual and open account. Therefore, the attorney's claim for unpaid legal fees accrued on the last date that services were rendered.

Contrary to plaintiff's contentions, we conclude that both the facts and the issues in *Dei's Estate* are distinguishable from those in the present case. In *Dei's Estate*, there was no contract between the attorney and the client, and there apparently was no agreement regarding the rate that the attorney would charge or when payment was due. Rather, the attorney would simply make entries in his day book after deciding on the value of his services. Furthermore, it was clear that the end of the attorney's services coincided with the termination of the attorney-client relationship. There was never a lack of mutuality between attorney and client, and the attorney-client relationship only terminated because the attorney's services ceased. Therefore, in *Dei's Estate*, this Court did not focus on the nature of the attorney-client relationship. Rather, it addressed the general issue whether the statute of limitations barred an attorney from recovering unpaid legal fees on what was clearly a mutual and open account. In contrast, it is apparent that the parties in the present case had a written agreement detailing rates and time for payment, and plaintiff brought this action to recover amounts it had charged defendant under the terms of that contract. Thus, it is apparent that *Dei's Estate* is distinguishable from the present case, and our decision today does not overrule settled precedent.

## IV. CONCLUSION

We hold that the parties' obligations to one another are governed by the explicit terms of their contract rather than by the laws governing mutual and open accounts current because the parties did not have a mutual relationship and because plaintiff and defendant had an express contract detailing the specific terms of their agreement. Moreover, we also hold that plaintiff's breach of contract claim to recover the unpaid legal fees under the original contract accrued on September 30, 1993, which is the date that the attorney-client relationship was terminated. Furthermore, we do not extend the accrual date beyond the date of the attorney-client termination for plaintiff's acts of reviewing, copying, and returning defendant's file. Because plaintiff did not file this claim until October 8, 1999, we hold that, pursuant to MCL 600.5807(8), the breach of contract action to recover the unpaid legal fees under the original contract is barred by the six-year statute of limitations. Finally, we hold that the costs and fees attributed to the file-review services effectively constituted a separate contract, which presents a timely and actionable claim.

We therefore affirm the Court of Appeals in part, reverse in part, and remand to the trial court for entry of judgment in favor of plaintiff in the amount of $442, with no interest to be assessed under the contract.

KELLY, C.J., and CAVANAGH, CORRIGAN, YOUNG, MARKMAN, and HATHAWAY, JJ., concurred with WEAVER, J.

# Actions on Applications

# ACTIONS ON APPLICATIONS FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

*Leave to Appeal Denied January 8, 2009:*

KRUG v VICTOR, No. 137920; Court of Appeals No. 289308.

*Summary Disposition January 9, 2009:*

PEOPLE v RONALD RUSSELL, No. 137330. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of that part of the defendant's application challenging the imposition of attorney fees in light of *People v Trapp (On Remand)*, 280 Mich App 598 (2008). On remand, the Court of Appeals shall also consider whether any recoupment of the costs of court-appointed counsel is permissible since the record suggests that the defendant was represented by retained counsel throughout most of the trial court proceedings. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 284777.

HATHAWAY, J., did not participate.

*Leave to Appeal Denied January 9, 2009:*

PEOPLE v MATTHEW BELL, No. 137305. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283337.

HATHAWAY, J., did not participate.

PEOPLE v WERNER, No. 137307. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284908.

HATHAWAY, J., did not participate.

PEOPLE v GOODE, No. 137318; Court of Appeals No. 286196.

HATHAWAY, J., did not participate.

PEOPLE v VANCE, No. 137320. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285357.

HATHAWAY, J., did not participate.

PEOPLE v BROOKS, No. 137323; Court of Appeals No. 271412.

HATHAWAY, J., did not participate.

PEOPLE v GARY FRANKLIN, No. 137338. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). To the extent that the defendant's motion involves a request for DNA testing under MCL 770.16, the defendant fails to establish an entitlement to DNA testing because he fails to satisfy the four conditions set forth in MCL 770.16(3). Court of Appeals No. 285845.

HATHAWAY, J., did not participate.

PEOPLE v DANIEL BAILEY, No. 137342; Court of Appeals No. 286165.

HATHAWAY, J., did not participate.

PEOPLE v DRAYTON WELLS, No. 137343; Court of Appeals No. 286942.

HATHAWAY, J., did not participate.

PEOPLE v ALFRED TAYLOR, No. 137345; Court of Appeals No. 285715.

HATHAWAY, J., did not participate.

PEOPLE v REGINALD MONTGOMERY, No. 137349. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283343.

HATHAWAY, J., did not participate.

CHOPIN v RIVERWOOD CENTER, No. 137356; Court of Appeals No. 285625.

HATHAWAY, J., did not participate.

PEOPLE v LALL, No. 137360; Court of Appeals No. 273165.

HATHAWAY, J., did not participate.

PEOPLE v LAMAR, No. 137372; Court of Appeals No. 286566.

HATHAWAY, J., did not participate.

PEOPLE v ROSS, No. 137375; Court of Appeals No. 278799.

HATHAWAY, J., did not participate.

PEOPLE v FORD, No. 137379; Court of Appeals No. 284055.

HATHAWAY, J., did not participate.

PEOPLE v MCCLINTON, No. 137384; Court of Appeals No. 286613.

HATHAWAY, J., did not participate.

PEOPLE v GILLESPIE, No. 137389; Court of Appeals No. 285947.

HATHAWAY, J., did not participate.

PEOPLE v DEKUBBER, No. 137397; Court of Appeals No. 278507.

HATHAWAY, J., did not participate.

BORRELL v MEIJER GREAT LAKES LIMITED PARTNERSHIP, No. 137399; Court of Appeals No. 284641.

HATHAWAY, J., did not participate.

OPPERMAN v GENERAL MOTORS CORPORATION, No. 137403; Court of Appeals No. 283992.

HATHAWAY, J., did not participate.

PEOPLE v QUILL, No. 137404; Court of Appeals No. 285406.
HATHAWAY, J., did not participate.

DOBKOWSKI v O'REILLY, No. 137408; Court of Appeals No. 278051.
HATHAWAY, J., did not participate.

PEOPLE v LITTERAL, No. 137417; Court of Appeals No. 285810.
HATHAWAY, J., did not participate.

PEOPLE v DUARTE, No. 137418; Court of Appeals No. 286515.
HATHAWAY, J., did not participate.

CHEESEBORO v KOEGEL MEATS, INC, No. 137422; Court of Appeals No. 284985.
HATHAWAY, J., did not participate.

PEOPLE v GLOVER, No. 137433; Court of Appeals No. 286507.
HATHAWAY, J., did not participate.

PEOPLE v SCOTT ROBERT LINCOLN, No. 137435; Court of Appeals No. 285453.
HATHAWAY, J., did not participate.

PEOPLE v LARON GREEN, No. 137436; Court of Appeals No. 286729.
HATHAWAY, J., did not participate.

RODRIGUEZ v ASE INDUSTRIES, INC, No. 137437; Court of Appeals No. 285437.
HATHAWAY, J., did not participate.

PEOPLE v RAMOS, No. 137441; Court of Appeals No. 278831.
HATHAWAY, J., did not participate.

PEOPLE v MELDMAN, No. 137445; Court of Appeals No. 276245.
HATHAWAY, J., did not participate.

PEOPLE v PRETTO, No. 137448; Court of Appeals No. 286218.
HATHAWAY, J., did not participate.

GRIEVANCE ADMINISTRATOR v SCHULTZ, No. 137449; ABD: 06-174-GA.
HATHAWAY, J., did not participate.

PEOPLE v BLAKES, No. 137457; Court of Appeals No. 278238.
HATHAWAY, J., did not participate.

PEOPLE v BOWENS, No. 137466; Court of Appeals No. 277387.
HATHAWAY, J., did not participate.

PEOPLE v KRIS ALDRICH, No. 137469. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284621.
HATHAWAY, J., did not participate.

PEOPLE v KYALL ALDRICH, No. 137471. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285294.

HATHAWAY, J., did not participate.

PEOPLE v THOMAS KERN, No. 137472; Court of Appeals No. 286837.

HATHAWAY, J., did not participate.

PEOPLE v BENAK, No. 137476; Court of Appeals No. 286480.

HATHAWAY, J., did not participate.

PAYNE v COUNTRYMARK COOPERATIVE, No. 137479; Court of Appeals No. 283948.

HATHAWAY, J., did not participate.

PEOPLE v BRYAN FRITZ, No. 137490; Court of Appeals No. 276686.

HATHAWAY, J., did not participate.

DEPARTMENT OF TRANSPORTATION v CBS OUTDOOR, INC, No. 137496; Court of Appeals No. 283733.

HATHAWAY, J., did not participate.

PEOPLE v SOLIVAN, No. 137498; Court of Appeals No. 277829.

HATHAWAY, J., did not participate.

PEOPLE v LEACHMAN, No. 137499; Court of Appeals No. 286347.

HATHAWAY, J., did not participate.

PEOPLE v DARRIN WILSON, No. 137503; Court of Appeals No. 278875.

HATHAWAY, J., did not participate.

PEOPLE v MARQUIS THOMAS, No. 137504; Court of Appeals No. 277256.

HATHAWAY, J., did not participate.

PEOPLE v DIONTA HILL, No. 137507; Court of Appeals No. 287211.

HATHAWAY, J., did not participate.

PEOPLE v LONNIE WARREN, No. 137514; Court of Appeals No. 278897.

HATHAWAY, J., did not participate.

PEOPLE v ATKINSON, No. 137515; Court of Appeals No. 286715.

HATHAWAY, J., did not participate.

BAUBLIS v STANFORD, No. 137530; Court of Appeals No. 282793.

HATHAWAY, J., did not participate.

PEOPLE v CLAUDE MORRIS, No. 137538; Court of Appeals No. 277148.

HATHAWAY, J., did not participate.

ALBRIGHT-WHITEHEAD v LEO'S CONEY ISLAND, No. 137541; Court of Appeals No. 284786.

HATHAWAY, J., did not participate.

MUNSTER v CITY OF BATTLE CREEK, No. 137542; Court of Appeals No. 284666.

HATHAWAY, J., did not participate.

PEOPLE v PERCY KERN, III, No. 137546; Court of Appeals No. 287029.

HATHAWAY, J., did not participate.

HUGHES v AMR CORPORATION, No. 137547; Court of Appeals No. 284895.

HATHAWAY, J., did not participate.

PEOPLE v REASTER, No. 137550; Court of Appeals No. 286928.

HATHAWAY, J., did not participate.

PEOPLE v VANGEISON, No. 137572. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285983.

HATHAWAY, J., did not participate.

PEOPLE v DALE MARTIN, No. 137585; Court of Appeals No. 287270.

HATHAWAY, J., did not participate.

PEOPLE v CHRISTOPHER WILLIAMS, No. 137586; Court of Appeals No. 278974.

HATHAWAY, J., did not participate.

PEOPLE v CHRISTOPHER CUSHMAN, No. 137600; Court of Appeals No. 279240.

HATHAWAY, J., did not participate.

PEOPLE v CALEB-REYNOLDS, No. 137614; Court of Appeals No. 285793.

HATHAWAY, J., did not participate.

PEOPLE v DANNER, No. 137628; Court of Appeals No. 286283.

HATHAWAY, J., did not participate.

PEOPLE v WILLETT, No. 137639; Court of Appeals No. 277738.

HATHAWAY, J., did not participate.

*Leave to Appeal Denied January 15, 2009:*

RAY v PERKINS, No. 136962; Court of Appeals No. 281591.

KELLY, C.J. (*dissenting*). I believe that the Court should remand this case to the Court of Appeals for consideration as on leave granted, pursuant to MCR 7.302(G)(1). I see no reason why plaintiff's appeal should not be heard on its merits. Plaintiff submitted a copy of the circuit court order as requested by the Court of Appeals. He paid the partial fee that the Court of Appeals required for proceeding with the claim. The Court of Appeals advised the Department of Corrections to remit the balance of the fee that plaintiff owed. Hence, all fees have been paid. Also, plaintiff did everything possible to timely file his claim, including submitting it to the prison mail system three days before it had to be filed with the Court of Appeals.

HATHAWAY, J. I join the statement of Chief Justice KELLY.

PEOPLE v BROWNELL, No. 137087; Court of Appeals No. 275943.

PEOPLE v FULTON, No. 137124. We are not persuaded that the questions presented should be reviewed by this Court. The issue that the defendant seeks to raise with regard to the denial of his successive motion for relief from judgment must first be presented in an application for leave to appeal in the Court of Appeals. Court of Appeals No. 284210.

PEOPLE v KENNETH HARRIS, No. 137385; Court of Appeals No. 281698.

KELLY, C.J. I would grant leave to appeal.

*Summary Disposition January 16, 2009:*

PEOPLE v FERGUSON, No. 136211. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of that part of the defendant's application challenging the imposition of attorney fees in light of *People v Trapp (On Remand)*, 280 Mich App 598 (2008), and the prosecution's concessions that the trial court failed to articulate that it considered the defendant's ability to pay the cost of his court-appointed attorney at the time of sentencing and that a remand is necessary to enable the court to do so. 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. Court of Appeals No. 283172.

CORRIGAN, J. (*concurring*). I concur in the order remanding to the Court of Appeals for reconsideration in light of *People v Trapp* (*On Remand*), 280 Mich App 598 (2008), only because the prosecution conceded in its brief before the Court of Appeals that defendant was entitled to a remand for the trial court to articulate that it considered defendant's ability to pay at the time of sentencing. Cf. *People v Trapp*, 482 Mich 1044 (2008).

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

*Leave to Appeal Denied January 16, 2009:*

PEOPLE v YOST, No. 136437; reported below: 278 Mich App 341.

MARKMAN, J. (*concurring*). Although defense counsel, in my judgment, committed several discovery violations, what I view as most significant about this case is the trial court's exclusion of the testimony of three key defense witnesses. I believe that the exclusion of this testimony constituted harmful error and deprived defendant of the ability to fully and fairly defend herself at trial. In light of Justice CORRIGAN's thoughtful dissent, I write separately to briefly explain why, in my view, the Court of Appeals analysis is correct.

First, I am concerned that the trial court's exclusion of the testimony of Dr. Firoza VanHorn, defendant's psychologist, deprived defendant of

her ability to present a meaningful defense as to why she had demonstrated no emotion in the wake of her daughter's death. Throughout the trial, the prosecutor invoked defendant's apparent lack of emotional response in the moments and days following her daughter's death as being indicative of her guilt. Dr. VanHorn's testimony was critical in attempting to explain that defendant's unusual emotional responses were not indicative of guilt, but rather were characteristic of defendant's general inability to properly express emotions when faced with difficult life situations. The prosecutor argued that Dr. VanHorn's testimony was being offered as proof of "diminished capacity," which this Court has held is no longer a viable defense. See *People v Carpenter*, 464 Mich 223, 226 (2001). However, this argument misunderstands the true purpose for which the testimony was offered, which was to explain that defendant does not display emotions in a normal manner. The prosecutor repeatedly referenced defendant's lack of emotional reactions in front of the jury, most notably during closing arguments. By depriving defendant of the principal means available to her to explain her inability to respond in a normal fashion to her daughter's death, defendant was seriously undermined in her ability to respond to the prosecutor and to present a meaningful defense.

Justice CORRIGAN argues in her dissent that the trial court properly limited the testimony of Dr. VanHorn, because it "could have properly excluded Dr. VanHorn from testifying at all" in light of the fact that defense counsel "sprung Dr. VanHorn [on the prosecutor] during trial on March 23, 2006, after the prosecution had already rested its case." However, because the prosecutor had actual notice of Dr. VanHorn, I respectfully disagree. On February 21, 2006, the trial court posed the following question to the prosecutor in regard to defendant's motion to add Dr. VanHorn: "So you're not objecting to . . . Dr. Firoza Vanhorn?" The prosecutor responded, "correct." Further, the prosecutor admitted that "as far as . . . VanHorn, Mr. Czuprynski [defense counsel] did provide an amended witness list, that's dated March 2nd of 2005; we received notice of that." In other words, the prosecutor admittedly had more than a year of actual notice that defense counsel intended to call Dr. VanHorn as a witness, and waived any objection to this.[1] Thus, I do not

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[1] Justice CORRIGAN also argues that defense counsel "failed to provide the prosecutor with any information whatsoever concerning expert reports prepared by [Dr. VanHorn] . . . [and] the prosecutor specifically objected to Dr. VanHorn's testimony on March 23, 2006, because defense counsel only informed the prosecutor that Dr. VanHorn would testify about defendant's diminished capacity, a defense explicitly precluded by an earlier ruling." *Post* at 862 n 3. I respectfully disagree with this assessment of the record. Significantly, it was the *prosecutor* who characterized Dr. VanHorn's testimony as pertaining to diminished capacity, not defense counsel. Additionally, the fact that the prosecutor was, in fact, able to object as it did to Dr. VanHorn's proposed testimony suggests, although the record is by no means dispositive, that defense counsel *did* provide the prosecutor with "a written description of the substance of the

believe that defendant's failure to formally request that Dr. VanHorn be added as a witness, which was required by court order, was indicative of bad faith.

Second, I also believe that the trial court erred by excluding significant portions of Roxanne Davis's testimony. Just as with Dr. VanHorn, Davis's excluded testimony was not offered to show defendant's intellectual limitations, but was offered, and should have been admitted, to show that defendant's emotional reactions to traumatic events were abnormal, including, implicitly, her reaction to her daughter's death. Although, as Justice CORRIGAN points out, defense counsel was allowed to reference defendant's limited intellectual abilities on several occasions, this is distinct from being allowed to present evidence of defendant's ability to display normal emotions. An individual with limited intellectual functions may have completely normal emotional reactions, while an individual with above-average intelligence may not have the ability to normally express emotions. Because Davis was prevented from testifying about defendant's inability to *express emotions* in a normal fashion, the trial court erred. Once again, because the prosecutor used this evidence extensively as an indicator of defendant's guilt, the defendant was undermined in her ability to respond to the prosecutor and to present a meaningful defense.

Third, I believe that the trial court erred by preventing Dr. Bernie Eisenga, a toxicologist, from testifying. Dr. Eisenga was the only expert who could have informed the jury that Monique had ingested as few as 30 pills of Imipramine as compared to the prosecutor's theory that she had taken as many as 120. Although I share Justice CORRIGAN's concern that defense counsel violated the trial court's order by failing to identify Dr. Eisenga at least 30 days before trial, I nevertheless believe that the trial court erred by preventing Dr. Eisenga from testifying. In determining whether a defendant's expert should be precluded from testifying, this Court has held that the sanction of preclusion is extreme and should be limited to only the most egregious cases. *People v Merritt*, 396 Mich 67, 82 (1976). In determining whether exclusion is proper, the trial court should examine whether the other party will be severely prejudiced by the untimely disclosure. *People v Burwick*, 450 Mich 281, 296 (1995).

In context, this discovery violation does not appear to be a most egregious case, given that defendant's original pathologist retired, thereby requiring that defense counsel obtain a new pathologist, Dr. Steven Cohle. Dr. Cohle then opined that defendant's daughter may have ingested *significantly* fewer pills of Imipramine than both the prosecutor's experts and defendant's prior pathologist had estimated. Indeed, Dr. Cohle stated that defendant's daughter could have taken as few as 30 pills, which may not have been fatal and would provide additional support that her death was not the result of a homicide, but was instead

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proposed testimony of the expert, the expert's opinion," and perhaps "the underlying basis of that opinion," which is an acceptable alternative, under MCR 6.201(A)(3), to "a report by the expert." Once again, I do not view a relatively minor evidentiary violation (i.e., failing to produce an actual report), as justifying the extreme remedy of exclusion.

due to a heart defect. In light of this conclusion, Dr. Cohle recommended that defendant obtain an expert toxicologist to testify about the number of pills in her daughter's system, which triggered defendant's request to add Dr. Eisenga relatively shortly before trial. Under these circumstances, I do not believe that defendant was attempting to ambush the prosecutor. Rather, it was not until the eve of trial that defense counsel realized that a toxicologist was needed to rebut the opinion of the prosecutor's experts that defendant's daughter had ingested up to 120 pills. Further, the prosecutor had already secured a toxicologist who could have been used to refute Dr. Eisenga's testimony. Thus, it is unclear how the prosecutor would have been prejudiced, much less "severely" so, by the introduction of Dr. Eisenga's testimony.

Further, other testimony indicating that defendant's daughter had probably taken fewer pills than the prosecutor's experts suggested does not render the trial court's exclusion of Dr. Eisenga's testimony harmless. Without expert testimony about the exact number of pills taken by the daughter, the jury had no way of determining the *extent* or *magnitude* by which the prosecutor's experts overestimated the amount of Imipramine in her system at the time of her death. A difference of as many as 90 pills constitutes a substantial overestimation, which may well have caused the jury to conclude that there was a reasonable doubt concerning whether this was actually a homicide. This error, too, was not harmless.

In sum, the trial court's exclusion of the testimony described above effectively prevented defendant from mounting *any* defense to the two most damaging pieces of evidence used by the prosecutor: defendant's apparent lack of concern after her daughter's death and the existence of 120 pills of Imipramine in her daughter's system. The effective operation of our criminal justice system depends on the discovery of the truth, and evidence is the lifeblood of this pursuit. I believe that the trial court erred in depriving the fact-finder of available evidence and, as a result, deprived defendant of a fair trial, and deprived the people of a criminal justice system in which the discovery of the truth was facilitated.

For these reasons, I agree with the Court of Appeals that defendant is entitled to a new trial.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying the prosecutor's application for leave to appeal. I would grant leave to appeal to consider whether the Court of Appeals erred when it determined that the trial court's alleged errors required reversal of defendant's first-degree murder conviction after a nearly seven week trial. *People v Yost*, 278 Mich App 341 (2008). I do not believe that the trial court abused its discretion in its various evidentiary rulings. Even if errors occurred, they were harmless, particularly in light of the gamesmanship displayed by the defense regarding violations of discovery orders.[1] Because the Court of Appeals manifestly erred, I would grant leave to appeal.

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[1] I cannot recall any murder case that involved such egregious gamesmanship as submitting seven amended witness lists identifying as many as 141 witnesses but ultimately calling only 14 witnesses. The defense

## I. BACKGROUND

Defendant was convicted of first-degree felony murder for the death of her seven-year-old daughter Monique. The prosecution's proofs showed that defendant caused Monique to overdose on Imipramine, a medication prescribed for bedwetting and anxiety. In contrast, defense counsel presented two theories of the case. First, defense counsel argued that Monique herself took the pills either to commit suicide or from ignorance of the consequences. Second, defense counsel contended that the levels of Imipramine found in Monique's body were not fatal and that a heart defect caused her death. Defendant appealed her convictions. The Court of Appeals reversed, concluding that the trial court abused its discretion by excluding defense evidence concerning her limited intellectual functioning, by excluding Dr. Bernie Eisenga as an expert toxicologist, and by permitting the prosecution to elicit testimony about defendant's involvement with Child Protective Services without limiting the nature of such testimony.

Specifically, the Court of Appeals ruled that two defense experts were crucial and the exclusion of their testimony deprived defendant of a fair trial: a psychologist, Dr. Firoza VanHorn, and a toxicologist, Dr. Eisenga. The Court of Appeals failed, however, to consider the trial court's rulings regarding these experts in light of a series of discovery abuses by the defense. The trial court's rulings fell within the range of principled outcomes and in accordance with established caselaw, court rules, and statutes governing discovery because of defense counsel's serious and persistent discovery abuses. Any remaining errors were harmless.

## II. ANALYSIS

### *A. The Trial Court's Exclusion of Evidence Concerning Defendant's Limited Intellectual Functioning*

The trial court excluded part of the testimony offered by defendant's daughter and the testimony of Dr. VanHorn concerning defendant's intellectual capacity. The prosecutor argued that, through this testimony, defendant improperly sought to establish "diminished capacity," a defense restricted by *People v Carpenter*, 464 Mich 223 (2001). In *Carpenter*, we explained that "the Legislature has signified its intent not to allow evidence of a defendant's lack of mental capacity short of legal insanity to avoid or reduce criminal responsibility by negating specific intent." *Id*. at 241. The Court of Appeals concluded that evidence regarding defendant's limited intellectual functioning was not "diminished capacity" evidence because it was not being offered to negate specific intent. Rather, the Court adopted the defense argument that it was offered to

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witness lists violated court orders intended to restrict these games. Defense counsel failed to furnish defense experts' reports, also contrary to court orders.

explain defendant's emotional responses and actions after Monique's death. The defense sought to introduce evidence of defendant's mental capabilities to refute the prosecution's charge that her emotional responses and other actions were signs of guilt. That is, the defense contended that defendant's limited mental capabilities, and not her guilt, made her respond in unusual ways. The prosecution has consistently asserted that this excluded evidence is diminished capacity evidence, however, and contends that allowing such evidence would essentially create a "non-intent exception" to the prohibition on diminished capacity evidence set forth in *Carpenter*. In any event, the trial court's decision to exclude part of the testimony offered by defendant's daughter and the testimony of Dr. VanHorn fell within the range of principled outcomes.

*1. Discovery Violations Involving Dr. VanHorn*

Although preliminary proceedings in this case began in 2000, nearly six years elapsed before jury selection began on February 22, 2006. Two years before trial, Dr. VanHorn, a psychologist and defense expert, administered tests to defendant at defense counsel's request. Defense counsel did not file a notice of intent to present an insanity defense or otherwise notify the prosecution about this witness. Personnel from the Center for Forensic Psychiatry thus never examined defendant in connection with any insanity or mental retardation claims.[2] Nor did any independent expert interview defendant in connection with defense counsel's purported theory about defendant's limited intellectual functioning. On February 4, 2005, defense counsel first listed Dr. VanHorn on his fifth amended witness list, calling her an "expert witness," without any further explanation. Counsel failed to file this witness list until after the court-ordered deadline had passed. Further, defense counsel never disclosed Dr. VanHorn's expert report, contrary to the court's order compelling production of reports by experts. Instead, defense counsel sprung Dr. VanHorn during trial on March 23, 2006, after the prosecution had already rested its case.[3]

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[2] The Center for Forensic Psychiatry examined defendant twice, but never in connection with defense claims of insanity or mental retardation. Defense counsel initially questioned defendant's competency during preliminary proceedings in 2000. On February 8, 2000, personnel at the Center for Forensic Psychiatry examined defendant and found her competent to stand trial. Years later, after a remand from this Court in April 2003, I note that Judge William J. Caprathe repeatedly attempted to schedule the trial. On September 16, 2005, less than one month before an October 11, 2005, trial date, counsel asserted that defendant was incompetent to assist in her defense. On September 27, 2005, she was sent to the Center for Forensic Psychiatry and subsequently found competent to stand trial.

[3] In his concurring statement, Justice MARKMAN notes that at a hearing on February 21, 2006, the prosecutor did not object to Dr. VanHorn's

Although counsel named Dr. VanHorn on defendant's fifth amended witness list, he buried Dr. VanHorn's name among 140 other defense witnesses. Indeed, defense counsel filed seven amended witness lists before trial and buried various experts in all these lists. His sixth and seventh amended witness lists each contained 101 potential defense witnesses. The last two witness lists, however, omitted any mention of Dr. VanHorn.[4]

Nonetheless, the court permitted the defense to call Dr. VanHorn to testify in a limited fashion so that defense counsel had an opportunity to make a special record. Significantly, the prosecution filed a motion in limine to bar the defense of diminished capacity on March 21, 2006, and the trial court granted this motion on March 23, 2006. The court expressed concern that this defense strategy was a back door attempt to assert a mental retardation defense under the guise of "limited emotional reactions" stemming from defendant's alleged limited intellectual ability. The trial court also was concerned that the prosecution had no opportunity to test defendant regarding her psychological make-up. Moreover, at the time defense counsel called Dr. VanHorn, he had not yet supplied the prosecutor with any information whatsoever concerning reports pre-

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testimony. *Ante* at 857. His observation, however, yields an incomplete picture of the record with regard to issue preservation. Defense counsel still failed to provide actual notice of Dr. VanHorn's testimony. The prosecutor maintained his objection to that failure. First, defense counsel admitted that Dr. VanHorn was one of several witnesses "disclosed to the prosecutor by a formal written list of witnesses about two weeks after the cutoff that this Court imposed" in violation of a court order. The prosecutor, during the same February 21, 2006, hearing, reiterated his concern regarding defense counsel's discovery violations, stating, "And I just want to place that on the record that, you know, if defense counsel is calling expert witnesses, that if these witnesses have reports that he needs to comply with what this Court has ordered previously by way of its orders." Moreover, when defense counsel called Dr. VanHorn to testify on March 23, 2006, he failed to provide the prosecutor with any information whatsoever concerning expert reports prepared by her, again in violation of the court order to do so. Therefore, while the prosecutor did not object to Dr. VanHorn's testimony on February 21, 2006, the prosecutor consistently objected to defendant's ongoing discovery violations. In addition, the prosecutor specifically objected to Dr. VanHorn's testimony on March 23, 2006, because defense counsel only informed the prosecutor that Dr. VanHorn would testify about defendant's diminished capacity, a defense explicitly precluded by an earlier ruling.

[4] According to the docket sheet, defense counsel filed his sixth amended witness list on February 15, 2006. He filed his seventh amended witness list two days later on February 17, 2006. Defense counsel filed his fifth amended witness list approximately one year earlier, on February 1, 2005.

pared or tests conducted by Dr. VanHorn with respect to defendant's mental limitations. The only information that defense counsel had given the prosecutor regarding Dr. VanHorn's proposed testimony indicated that Dr. VanHorn would testify about defendant's diminished capacity, which, as noted, is a defense restricted by *Carpenter*, *supra*. Under these circumstances, the trial court attempted to limit defense counsel's ambush.[5] Because the trial court could have properly precluded Dr. VanHorn from testifying at all,[6] its rulings regarding the scope of her testimony were harmless error.[7]

*2. Testimony of Defendant's Daughter Roxanne Davis*

The trial court excluded a portion of the testimony given by defendant's daughter Roxanne regarding defendant's intellectual capacity to plan the crime and defendant's communication skills. The trial court

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[5] Justice MARKMAN also argues that any "relatively minor evidentiary violation" committed by defense counsel does not justify "the extreme remedy of exclusion" regarding Dr. VanHorn's testimony. *Ante* at 858 n 1. I respectfully disagree that the egregious actions of defense counsel, including repeatedly violating court orders, can be described as "relatively minor." *Id*.

[6] I do not believe that Dr. Van Horn's testimony was proper, but that question need not be resolved because Judge Caprathe could have barred her testimony outright. Dr. VanHorn's testimony about defendant's limited mental capabilities was inadmissible under MRE 702 because "MRE 702 requires the trial court to ensure that each aspect of an expert witness's proffered testimony—including the data underlying the expert's theories and the methodology by which the expert draws conclusions from the data—is reliable." *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 779 (2004). Defense counsel provided no data underlying Dr. VanHorn's theories. Nor did he provide information regarding the methodology by which Dr. VanHorn drew her conclusions. Moreover, defense counsel did not fulfill the evidentiary requirement of MRE 703 that "[t]he facts or data in the particular case upon which an expert bases his opinion or inference shall be in evidence." Because all of defendant's statements to Dr. VanHorn constituted inadmissible hearsay, the trial court properly excluded her testimony. See Staff Comment to 2003 Amendment of MRE 703 ("The modification of MRE 703 corrects a common misreading of the rule by allowing an expert's opinion only if that opinion is based exclusively on evidence that has been introduced into evidence in some way other than through the expert's hearsay testimony.").

[7] The Court of Appeals *speculated* that Dr. VanHorn's testimony *might not* have been hearsay, but its speculation was not based on anything in an actual offer of proof. *Yost*, *supra* at 362-364.

expressed concern that such testimony represented impermissible diminished capacity evidence. In contrast, the Court of Appeals adopted the defense argument that Roxanne could "properly testify about defendant's poor communication skills and how defendant's behaviors might seem unusual because of her 'slowness' without running afoul of the rule stated in *Carpenter*." *Yost*, *supra* at 359. Even if the Court of Appeals is correct, however, defense counsel ultimately elicited testimony from Roxanne about her mother's limited intellectual functioning even though the trial court's ruling barred such testimony. Therefore, even assuming that Roxanne's testimony should have been admitted, the error was harmless.

Responding to a question from defense counsel, Roxanne stated, "My father doesn't have the mental limitations that she [defendant] did, so there was more reading and intellectual conversations." Defense counsel later asked Roxanne, "How were your mother's communication skills?" but the prosecutor objected. On appeal, the Court of Appeals reasoned that "the relevance of any testimony by Roxanne concerning whether her mother was intelligent enough to carry out the actions necessary to commit the crime was at best marginal." *Yost*, *supra* at 359. Nevertheless, the jury heard testimony from her concerning her mother's intelligence and mental limitations.

In addition to Roxanne testifying about her mother's limited intellectual functioning, other witnesses offered similar testimony in the jury's presence. In one such instance, defense counsel asked a social worker, Amy Martinez, whether defendant had difficulty filling out necessary forms, asking Martinez, "You said she would ask you to help her with filling out forms?" After Martinez asked defense counsel a question to clarify whether he meant her forms, defense counsel again asked, "Yes. Did she have difficulty filling out your forms?" Moreover, although counsel's statements are not evidence, defense counsel invoked defendant's mental limitations at least 11 times in his opening and closing arguments to the jury. Because witnesses other than Roxanne testified regarding defendant's limited intellectual capacity and the jury heard repeated statements concerning defendant's mental limitations in defense counsel's opening and closing arguments, any error made by the trial court in excluding this portion of Roxanne's testimony was harmless.

### *B. The Trial Court's Exclusion of Dr. Bernie Eisenga as an Expert Toxicologist and Limiting the Scope of Dr. Steven Cohle's Testimony as an Expert Pathologist*

#### *1. Discovery Violations Involving Dr. Eisenga and Dr. Cohle*

Defense counsel also engaged in discovery abuses with regard to Dr. Eisenga and Dr. Cohle. Before trial, the prosecutor filed two separate

motions to compel discovery.[8] At the hearing on the prosecutor's second motion to compel discovery, the prosecutor advised the court that he had not received amended witness lists that defense counsel claimed to have furnished. Moreover, the prosecutor challenged the propriety of defense counsel's amended witness list, which contained entries such as "all persons named or otherwise identified in the police reports related to this case" and "all persons named or otherwise identified in the FIA-DDS records and reports related to the agency's contact with Donna Yost or her family members." Defense counsel responded that he "threw those in, in case we—we need anyone during trial." At this same hearing, defense counsel advised the trial court that Dr. Laurence Simson, the defense's expert witness concerning forensic pathology, had moved to Arizona and that defense counsel was in the process of finding a substitute expert.

Even though the court had already set the case for trial approximately one month later on February 16, 2005, the trial court instead held hearings on that day regarding, in relevant part, defense counsel's filing of two additional amended witness lists containing at least 12 more witnesses and five more doctors. He filed both lists several days after the trial court's filing deadline had passed. The prosecutor objected because he had no idea who those five new doctors were or for what purpose the defense intended to call them. In an attempt to prevent further ambushes regarding the defense's evolving witness lists, the trial court held that before either side would be permitted to add any more witnesses, that side first must file a motion and obtain court approval at least 30 days before the trial. Defense counsel agreed that permitting additions to the witness lists only by motion was "appropriate." He further suggested, "How about if I submit a finalized witness list by Friday that eliminates those that you've ordered to be stricken and eliminates those doctors that I've indicated to Mr. Sheeran should be omitted. And we'll make Friday's list, the official list? Is that agreeable?" The prosecutor agreed with counsel's suggestion, and the trial court noted the agreement on its "Action in Court" document for February 16, 2005.

Over one year later, the day before trial was scheduled to begin on February 21, 2006, defense counsel moved to add a new expert pathologist and a new expert toxicologist. Counsel requested to have Dr. Cohle replace Dr. Simson as the defense expert pathologist. Like Dr. VanHorn, Dr. Cohle appeared on defendant's fifth amended witness list identified only as "expert witness," but counsel failed to include him on defendant's seventh and final witness list. Additionally, he sought to present Dr. Cohle, in direct violation of the trial court's previous order that all new witnesses be admitted only by formal motion at least 30 days before trial. Nevertheless, the trial court permitted Dr. Cohle to testify on defendant's behalf.

On February 21, 2006, defense counsel sought to add Dr. Eisenga as a new expert toxicologist. Dr. Eisenga did appear on defendant's seventh

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[8] The prosecution filed its first motion to compel discovery on July 23, 2004. Several months later, the prosecution filed its second motion to compel discovery on November 12, 2004.

amended witness list. But defense counsel failed to file a formal motion to present Dr. Eisenga as a witness until the day before trial, again in violation of the court's order. Defense counsel explained that he neglected to follow the order regarding the addition of new witnesses because "it completely slipped my mind." The prosecutor objected to defense counsel's "very very late amendment" to include Dr. Eisenga as an expert and requested that if the court allowed Dr. Eisenga to testify, defense counsel must at the very least comply with MCR 6.201(A)(3), which addresses expert witnesses and requires a party to provide all other parties with additional information about an expert witness and the basis for the witness's opinion. The prosecutor also noted, "I have requested, by way of discovery, reports from any experts. I've never received any reports from any of his experts." Defense counsel responded, "We have no written reports from any of these experts to provide to the prosecutor and that's why we haven't provided any." The trial court ordered that both parties comply with MCR 6.201 with respect to experts named by either side. It also declined to allow defense counsel to add Dr. Eisenga on the day before trial, in flat violation of the court's discovery order. This was a principled decision, in light of counsel's noncompliance with court orders.

Moreover, any error by the trial court in refusing defendant's request to add Dr. Eisenga as a witness was harmless because other witnesses testified regarding the same proofs that Dr. Eisenga would have addressed. Defense counsel wished to have Dr. Eisenga testify regarding (1) postmortem redistribution, (2) the standards and practices in obtaining samples to give accurate levels of Imipramine, and (3) the amount of Imipramine necessary to cause death. Both Dr. Cohle and Dr. Fleisher testified extensively on the same subject matter. Dr. Cohle testified about postmortem toxicology, including postmortem redistribution. Dr. Fleisher's recorded testimony also addressed the postmortem redistribution that would have occurred when blood was taken from Monique's heart approximately 20 hours after her death. Additionally, Dr. Cohle testified that the heart was a poor source of blood when conducting postmortem toxicology, and, as a result, the Imipramine level in Monique's blood likely was lower than the prosecutor's pathologist concluded. Similarly, Dr. Fleisher testified that approximately 10 percent of the Caucasian population does not metabolize Imipramine well and poor metabolization would cause elevated levels of the drug. Finally, Dr. Cohle testified that based on his 24 years of experience as a forensic pathologist, he would not have ruled this as a homicide. Therefore, even if the trial court erred by not permitting Dr. Eisenga to testify, its error was harmless because both Dr. Cohle and Dr. Fleisher testified regarding the same proofs.

*2. Limitations Placed on the Scope of Dr. Cohle's Testimony*

The Court of Appeals also erred when it concluded sua sponte that the trial court committed plain error regarding the limitations placed on the testimony of defendant's expert pathologist, Dr. Cohle. The Court of Appeals concluded that the trial court prevented Dr. Cohle from testifying about "the accuracy of the level of Imipramine in Monique's blood,

the accuracy of the calculation of the number of pills it would take to reach that level, and whether the Imipramine in Monique's blood was sufficient to cause her death" because the data upon which the opinion relied were inadmissible hearsay. This is not accurate. The trial court did note that the testimony was inadmissible hearsay, but the basis for the prosecutor's objection was the lack of reliable testimony or evidentiary support for Dr. Cohle's conclusions. The prosecution moved to exclude the testimony because Dr. Cohle had no support for his opinions relating to children. All Dr. Cohle's data involved adults, and he admitted that he had no authority pertaining to pediatric deaths from Imipramine. In fact, he did not know whether the age of a person would be a factor. He testified:

> I have not seen anything in the literature that would say, you know, a certain drug is more dangerous for a younger person, particularly. Although, there are certainly often differences in children, you know, and adults, and it's possible that a drug that is not toxic at a certain level in an adult, might be toxic to a younger person.

Therefore, the prosecutor reasonably argued that Dr. Cohle's testimony was insufficiently reliable, contrary to the requirement of MRE 702. Accordingly, the trial court acted within its discretion when limiting Dr. Cohle's testimony on this point.

### *C. The Trial Court Did Not Abuse its Discretion by Ruling that Defendant's Prior Acts of Physical Abuse Towards her Children were more Probative than Prejudicial*

Next, defendant sought to exclude evidence of her extensive history with Protective Services, including evidence of physical abuse, three prior incidents of drug overdoses involving her children, and allegations of sexual abuse. Because the trial court is in the best position to judge the prejudicial effect or evidentiary value of a given piece of evidence, "a defendant must meet a high burden to show that a trial court abused its discretion by declining to exclude relevant evidence under MRE 403." *People v Albers*, 258 Mich App 578, 588-589 (2003).

The Court of Appeals concluded that defendant's history with Protective Services was strong evidence of defendant's motive, but concluded that its prejudicial nature substantially outweighed its probative value. In contrast, it determined that evidence of the three prior drug overdoses involving defendant's children was relevant and not unfairly prejudicial. It further held that evidence of sexual abuse was relevant and that the probative value of this evidence outweighed its prejudicial nature.

The Court of Appeals only disagreed with the trial court's ruling pertaining to testimony about specific instances of defendant physically abusing her children. The trial court, after a hearing, concluded that all the prior acts were highly relevant and none of the evidence of prior acts was unfairly prejudicial. In contrast, the Court of Appeals concluded that

the trial court abused its discretion by allowing such prior acts evidence. In any event, the trial court allowed the prosecutor to present proofs that defendant characterized Monique as a liar for reporting defendant to Protective Services for specific acts of physical abuse in various statements to the police. As this evidence came in through defendant's own statements, I question the Court of Appeals' conclusion that the trial court abused its discretion by permitting evidence of prior acts of physical abuse. In concluding otherwise, the Court of Appeals simply substituted its opinion for that of the trial court. Again, the trial court acted within the range of principled outcomes when it admitted the prior acts evidence.

*D. The Trial Court Did Not Abuse its Discretion in Light of the Defense's Persistent Violation of Caselaw, Court Rules, and Statutes Regarding Discovery*

As illustrated by the above examples, defense counsel's actions displayed a degree of gamesmanship that violated well-established caselaw, court rules, and statutes governing discovery. "We have long entrusted the question of discovery in criminal cases to the discretion of the trial court." *People v Lemcool* (*After Remand*), 445 Mich 491, 497 (1994). Moreover, "Michigan recognizes the broad power of the trial court to prevent ambush and surprise through the use of discovery." *Id*. at 498 (quotation marks and citation omitted). In 1995, this Court adopted Subchapter 6.200 of the Michigan Court Rules, which provides a series of standards for discovery. Pursuant to MCR 6.201(A)(1), upon request, a party must provide all other parties with "the names and addresses of all lay and expert witnesses whom the party may call at trial." Additionally, as noted, upon request, a party must provide all other parties with "the curriculum vitae of an expert the party may call at trial and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion." MCR 6.201(A)(3).

After reviewing the voluminous record, I conclude that defense counsel violated MCR 6.201(A)(3). He failed to provide the curriculum vitae of many of his experts. And, as the prosecutor advised the trial court, counsel also failed to provide reports by the experts or written descriptions of the substance of their testimony. Faced with defendant's evolving witness lists, the trial court tried to prevent ambush trial tactics by ordering that either party attempting to add a new witness after February 16, 2005, must do so by a formal motion filed at least 30 days before trial. The trial began over one year later on February 22, 2006, yet defense counsel waited until February 21, 2006, to formally move to add his new expert toxicologist. Counsel attempted to justify his violation of the order by explaining that "[a]gain, though, I had forgotten that you required us to file a motion to seek permission to add anyone and that's why I'm doing it at this late date." Counsel also pleaded ignorance of MCR 6.201(A)(3), insisted that he had no reports, and failed to produce even written descriptions of the proffered testimony to give the prosecution, as the rule requires.

Defense counsel similarly violated well-established statutory requirements regarding the introduction of expert testimony. MCL 767.94a(1)(b) requires that a defendant disclose the nature of any defense that she intends to establish at trial by expert testimony. MCL 767.94a(2) requires that the disclosure must occur no later than 10 days before trial or at any other time as the court directs. A defendant may not "offer at trial any evidence required to be disclosed . . . unless permitted by the court upon motion for good cause shown." MCL 767.94a(3). In this case, defense counsel continually ignored these statutory requirements.

## III. CONCLUSION

In light of defense counsel's repeated discovery violations, I think that the Court of Appeals erred by ruling that the trial court abused its discretion or committed an error requiring reversal. Specifically, the trial court did not abuse its discretion when it opined that if defendant wished to offer expert testimony from Dr. VanHorn regarding defendant's mental limitations and psychological make-up, then the prosecutor was entitled to counter with expert evidence of her psychological make-up. In any event, defense counsel repeatedly injected statements or elicited testimony concerning defendant's mental limitations in the jury's presence. Nor is it clear how the trial court abused its discretion by refusing to allow defense counsel to add Dr. Eisenga as a witness the day before the trial, in direct violation of the court's order. I do not see how the trial court's decisions fell outside the range of principled outcomes, particularly in light of defense counsel's gamesmanship.

"The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion." *People v Katt,* 468 Mich 272, 278 (2003). When the trial court heard arguments regarding the prosecutor's motion in limine to bar the defense of diminished capacity, the prosecutor had already presented the entire case in chief. At that late stage of the trial, the trial court correctly assessed the impropriety of allowing defense counsel to provide lengthy testimony regarding defendant's psychological make-up without giving the trial court and the prosecutor adequate notice.

Moreover, as the United States Supreme Court has stated:

> Rules that provide for pretrial discovery of an opponent's witnesses serve the same high purpose [as rules enforcing the right to cross-examine]. Discovery, like cross-examination, minimizes the risk that a judgment will be predicated on incomplete, misleading, or even deliberately fabricated testimony. The "State's interest in protecting itself against an eleventh hour defense" is

> merely one component of the broader public interest in full and truthful disclosure of critical facts. [*Taylor v Illinois*, 484 US 400, 411-412 (1988).]

Here, defense counsel buried various experts in seven amended witness lists. Experts such as Dr. VanHorn and Dr. Cohle appeared on one list, only to be omitted from later lists. Defense counsel did not disclose his purpose for listing these experts, as required by court rules governing discovery. Nor did he furnish experts' reports, contrary to court order. The trial court had an interest in both protecting the prosecution from a defense ambush and facilitating the full and truthful disclosure of critical facts. *Id*. I believe that the trial court attempted to facilitate full disclosure as best it could despite the fact that defense counsel kept playing "hide the ball."

Therefore, the Court of Appeals manifestly erred by ignoring defense counsel's repeated discovery violations and by holding that the trial court abused its discretion in its attempts to prevent ambush trial tactics. In my view, the trial court did not abuse its discretion. Because the trial court reached the right result regarding its evidentiary rulings even if it arguably employed the wrong reasons at times, I would grant leave to appeal.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

PEOPLE V KNIGHT, No. 136716; Court of Appeals No. 275446.

KELLY, C.J. (*dissenting*). I would grant leave to appeal to consider whether the Court of Appeals opinion in *People v Filip*[1] misstates the law by concluding that MCL 769.11b does not apply to parole detainees. Its holding, which was relied on by the lower court in this case, does not seem to flow from the language of the statute. We denied leave to appeal in *Filip* because it was moot. But this case is not moot.

Although the Court has refused to address the parole sentencing issue presented in this case on numerous occasions,[2] the issue does not go away. The large number of applications for leave to appeal on this issue suggests that lower courts and litigants would profit from the clarification this Court could provide.

The Court should grant leave to appeal to consider this jurisprudentially significant issue.

CAVANAGH, J. I join the statement of Chief Justice KELLY.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

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[1] *People v Filip*, 278 Mich App 635 (2008).

[2] See, e.g., *People v Willavize*, 482 Mich 897 (2008)*; People v Patterson,* 482 Mich 895 (2008); *People v Rodgers,* 482 Mich 894 (2008).

PEOPLE v YOST, No. 136733; Court of Appeals No. 285649.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

CASTLE v CITY OF DETROIT, No. 136829; Court of Appeals No. 278075.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal to consider the significant constitutional issues presented by this case.

Plaintiff challenged the validity of inspections under a city of Detroit ordinance that required inspections of one- and two-family homes before the homes could be sold. The ordinance authorized the Buildings & Safety Engineering Department (BSED) to perform inspections pursuant to guidelines developed under the Detroit City Code:

> The department shall prepare a list of inspection guidelines to be used in inspection relating to the enforcements of this article. The guidelines shall constitute the complete scope of repairs required for issuance of the certificate or to be noted in an inspection report. *The guidelines shall not be effective until approved by city council.* [Detroit Ordinance 124-H, § 26-3-6 (emphasis added).]

Plaintiff asserted that the inspections performed were invalid, because the city council never approved any guidelines. Defendant, city of Detroit, argued that the provision regarding the city council's approval violated the city charter's separation of powers, and thus the inspections performed pursuant to guidelines promulgated by the BSED were proper.[1] After a lengthy procedural history in which this case was remanded by this Court to the Court of Appeals, and then remanded by the Court of Appeals to the trial court, various constitutional issues are now presented to this Court by plaintiff's application.

First, the Court of Appeals held that the approval provision "permits interference with delegated rulemaking authority short of ordinance or resolution by simply doing nothing." *Castle Investment Co v Detroit*, unpublished opinion per curiam of the Court of Appeals, issued March 15, 2005 (Docket No. 224411), at 3. I believe that this holding warrants further review. The city council expressly reserved its power to legislate by enacting an ordinance that relied on future legislative action. That is, without the city council's approval of the guidelines, inspections could not be performed at all pursuant to the ordinance. I would consider on appeal whether the approval provision affirmatively interfered with the *executive's* power to enforce the ordinance, or merely rendered the

[1] The Detroit City Charter states that the city council "is the city's legislative body," and the mayor is the "chief executive of the city." Detroit Charter, art IV, ch I, §§ 4-101, 5-101.

ordinance inoperative absent further *legislative* action. See *Blank v Dep't of Corrections*, 462 Mich 103, 130 (2000) (MARKMAN, J., concurring in result).

Second, the Court of Appeals cited *Blank* in holding that the approval provision violated the city charter by not *requiring* the city council to vote on any guidelines once proposed, asserting that this would allow the city council to legislate independently of the mayor's veto power. In *Blank*, this Court invalidated provisions in the Administrative Procedures Act (APA) that required the executive to submit administrative rules to a joint committee of the Legislature before adopting the rules. The joint committee could approve the rules, or it could reject the rules and refer the rules to the Legislature for a concurrent resolution adopting or rejecting the rules. This Court, in a divided opinion, concluded that the APA provisions violated the constitution's enactment and presentment clauses, *id.* at 122, because neither the joint committee's approval nor the Legislature's concurrent resolution would comply with the constitution's requirements that all laws be in the form of bills and all bills be presented to the executive. Const 1963, art 4, §§ 22, 33. I am not convinced that *Blank* compels the invalidation of the instant ordinance because the approval provision does not indicate that the city council's approval would *not* itself be submitted to the mayor, Detroit Charter, art IV, ch I, § 4-119 (requiring "[e]very ordinance or resolution of the city council" to be presented to the mayor). More fundamentally, however, I remain concerned that *Blank*, and the lower courts in this case, have turned traditional separation of powers concepts on their heads. See *Blank*, *supra* at 130-153 (MARKMAN, J., concurring in result).

Third, I believe that the Court of Appeals' severance of the approval provision from the ordinance should be reviewed. This action raises a significant question regarding the separation of powers. The city council exercised its legislative power by enacting an ordinance. This ordinance manifests clearly the extent to which the city council intended to delegate rulemaking authority to the executive branch. By severing a provision of the ordinance that reserved a residue of legislative power with the city council (the only institution of government that could properly exercise the legislative power, cf. Const 1963, art 4, § 1), the Court of Appeals may have transformed that which was delegated by the city council from proper rulemaking authority into improper legislative power. Cf. Const 1963, art 3, § 2.

Finally, assuming that the Court of Appeals correctly held that the approval provision violated the city charter's separation of powers, and properly severed this provision, I believe that the delegation of rulemaking authority under the ordinance should be examined to determine whether the delegation provided to the executive branch a sufficient standard by which to exercise this authority. Such a delegation must

> provide[] sufficient standards as reasonably precise as the subject matter requires or permits, so that the rulemaking authority can be construed as conferring administrative not legislative power

and as vesting discretionary, not arbitrary authority. [*Blank*, *supra* at 136 n 7 (MARKMAN, J., concurring in result) (citations and quotation marks omitted).]

The guidelines, as originally enacted, were "designed to cover minimum health and safety standards." Detroit City Council Minutes, 566-67 (March 19, 1976). Whether this sufficiently comports with constitutional standards also merits review, in my judgment.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

ANDERSON v HAYES, No. 137068; Court of Appeals No. 273914.

CORRIGAN, J. (*concurring*). I join the order denying leave to appeal. I write separately to express my respectful disagreement with Justice MARKMAN's interpretation of the trial court's comments in determining the value of defendant's company, Pyper Products. The trial court adopted the valuation of plaintiff's rebuttal expert, Christine Baker. Justice MARKMAN opines that the court made this decision "without any explanation, stating, 'I'm not going to go into the rationale.' "

I read the court's comments somewhat differently. The court stated: "The Court finds that the appropriate valuation of [Pyper] is pursuant to Ms. Baker's testimony, based on her—I'm not going to go into the rationale, but the Court does adopt her position with regard to the valuation of [Pyper]."

These comments reflect that the court adopted Baker's valuation. Because the court referred to Baker's testimony immediately before stating that the court would not "go into the rationale," it appears that the court was referring to *Baker's* rationale, which the court was adopting. I do not read the court's comments as a refusal to state the court's own rationale for its decision.[1]

Accordingly, I concur in the denial of leave to appeal.

MARKMAN, J. (*dissenting*). In this divorce action, the parties are disputing the valuation of one of the defendant's closely held companies, Pyper Products. This valuation was the principal issue at the five-day bench trial. The trial court heard the testimony of the parties' two principal valuation experts, as well as the testimony of plaintiff's rebuttal expert. Plaintiff's principal expert testified that Pyper's value is $4.5 million; defendant's principal expert testified that Pyper has a negative value; and plaintiff's rebuttal expert testified that Pyper's value is $3,269,000. The trial court adopted the rebuttal expert's valuation without any explanation, stating, "I'm not going to go into the rationale."

Our role as an appellate court is to determine whether the trial court clearly erred in concluding that Pyper's value is $3,269,000. However, this role cannot be carried out properly, and we cannot accord the

[1] Contrary to Justice MARKMAN's assertion, my interpretation does not amount to "speculation" or "conjecture." The court's comments fairly reflect the meaning I have suggested.

necessary deference to the trial court, if we do not know *why* the trial court has chosen this figure. That it may fall somewhere in the middle of the experts' valuations, or that it may be consonant with the valuation of one of these experts and therefore likely to be sustained if supported by a reasonable explanation, is not sufficient to sustain the trial court's determination. Rather, the judicial process is largely a process of analysis, not of results. Both the parties and reviewing judges in the appellate process are entitled to something more on the part of the trial court than a conclusory statement. Simply put, they are entitled to know why the trial court chose *this* valuation over alternative valuations.[1]

The valuation issues in this case are admittedly complex. However, it is this very complexity that imposes an obligation on the trial court to communicate to the parties that it has reasonably comprehended the issues and appreciated the nuances of their arguments. Although a trial court is, of course, not obligated to comment on every matter in evidence, it *is* obligated, I believe, to explain at least minimally its decisions on the principal issues before it. Here, the trial court's single sentence of non-explanation did not satisfy this obligation. For these reasons, I would remand this case to the trial court for it to explain the rationale for its decision.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

PEOPLE V SOARES, No. 137268; Court of Appeals No. 273333.

MARKMAN, J. (*dissenting*). Defendant disregarded a stop sign while legally intoxicated and killed the victim, in violation of MCL 257.625(4). The victim also had "any amount" of THC, the active ingredient in marijuana, in his blood, in violation of MCL 257.625(8). The trial court refused to allow any evidence showing the victim's THC level, and defendant was ultimately convicted of driving while intoxicated causing death, MCL 257.625(4). The Court of Appeals reversed this conviction and ordered a new trial, stating that defendant was entitled to introduce evidence concerning the victim's THC level. Although I agree that such evidence was admissible, because I am concerned that our caselaw now suggests that the presence of a controlled substance in the blood of a *victim* may require that a legally intoxicated *defendant* be acquitted as a matter of law, I would grant leave to appeal to review this caselaw.

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[1] Justice CORRIGAN supplies what is admittedly a conceivable rationale for the trial court's decision, although, of course, it is a rationale based exclusively on conjecture and speculation, given that the trial court *itself* said nothing as to this rationale. Although I do not suggest the following is true of the trial court in this case, a trial court that had utterly *no* knowledge of the issues, other than that someone named Ms. Baker had testified about valuation, could have made the exact same statement as the trial court in this case.

This Court has held that a defendant may use evidence of a victim's negligence to determine if defendant was the proximate cause of the victim's death. *People v Tims*, 449 Mich 83, 97 (1995). More specifically, if an "intervening act by the victim or a third party was not reasonably foreseeable—e.g., gross negligence or intentional misconduct[,]" then defendant generally is not considered to be the proximate cause of the victim's death. *People v Schaefer*, 473 Mich 418, 437-438 (2005). Additionally, the presence of THC in a victim's system at the time of the accident is a proper factor to consider in determining if the defendant caused the death. *People v Moore*, 246 Mich App 172, 179-180 (2001). However, in *People v Lardie*, 452 Mich 231 (1996), this Court examined a situation in which a driver drank alcohol and smoked marijuana before driving and, as a result, killed three passengers after crashing into a tree, in violation of MCL 257.625(1), (4), and (8). *Lardie* stated that "the Legislature essentially has presumed that driving while intoxicated is gross negligence as a matter of law." *Lardie*, *supra* at 251. If *Lardie*'s irrebuttable presumption of gross negligence applies to all drivers involved in a multiple vehicle accident, including victims who violate MCL 257.625, then a defendant would likely avoid a conviction for killing a victim who is also intoxicated, or who has "any amount" of a schedule 1 controlled substance in his system, because the defendant will not be the legal cause of death.

To more fully illustrate, consider the following: a victim, who is either intoxicated or has "any amount" of a schedule 1 controlled substance in his system, has properly stopped at a stop sign. While stopped, the defendant, an intoxicated driver, crashes into the stopped victim. Applying *Lardie*'s irrebuttable presumption of gross negligence to the *victim*, the defendant's actions will not be deemed the proximate cause of death and the defendant must be acquitted as a matter of law. This interpretation at least poses significant problems for prosecutions of operating a motor vehicle while under the influence of liquor or a controlled substance throughout this state by enabling intoxicated defendants who have caused death to avoid sanction under MCL 257.625(4) because the victim showed a similar disregard for the lives of others.

Because of these consequences, I would grant leave to appeal to consider whether *Lardie*'s irrebuttable presumption of gross negligence: (a) is limited to the driver causing death in violation of MCL 257.625(4) in a multiple driver situation; and (b) is limited to only "intoxicated" drivers as defined in MCL 257.625(1) or is also applicable to any driver who violates MCL 257.625(8) by operating a motor vehicle with "any amount" of a schedule 1 controlled substance in his system at the time of the accident.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

PEOPLE V JENKINS, No. 137355; Court of Appeals No. 276763.

MARKMAN, J. (*dissenting*). Defendant and the victim had a failed relationship. Soon after the relationship's tumultuous end, defendant waited for the victim to arrive at her car and then grabbed her, dragged

her backwards and tried to push her inside the vehicle. Defendant was charged and convicted of domestic violence and attempted unlawful imprisonment based on the predicate felony of aggravated stalking, and acquitted on the charge of aggravated stalking.

Although I would uphold the domestic violence conviction, because I believe it was *legally impossible* for defendant to have been convicted of the predicate felony, I would grant leave to appeal regarding the attempted unlawful imprisonment conviction, which requires that a person knowingly restrain a victim in order "to facilitate the commission of another felony." MCL 750.349b(1)(c). The predicate felony charged here, aggravated stalking, requires a "pattern of conduct composed of a series of 2 or more separate noncontinuous [and unconsented-to] acts[.]" MCL 750.411i(1)(a).

All parties agree that defendant engaged in an unconsented-to act. However, the parties also agree that this was defendant's *only* "unconsented-to act," which, it would seem, *cannot* amount to aggravated stalking. Thus, it is unclear how defendant could have been convicted of attempting to commit unlawful imprisonment in the absence of the underlying felony. Contrary to *People v Thousand*, 465 Mich 149 (2001), I believe that the instant case involves a legal, rather than a factual, impossibility, and that these concepts may have been mistakenly equated by the trial court.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

*Leave to Appeal Dismissed January 16, 2009:*

ANDERSON v AUTO CLUB INSURANCE ASSOCIATION, Nos. 137736, 137738, and 137740. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals Nos. 289006, 289007, and 289047.

HATHAWAY, J. (*not participating*). To avoid unnecessary delay to the parties in cases considered by this Court before I assumed office, I follow the practice of previous justices in transition and participate only in cases that need my vote to achieve a majority for a decision.

*Leave to Appeal Granted January 21, 2009:*

PEOPLE v MCGRAW, No. 132876. By order of October 31, 2007, the application for leave to appeal the November 16, 2006, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Sargent* (Docket No. 133474). On order of the Court, the case having been decided on June 18, 2008, 481 Mich 346 (2008), the application is again considered, and it is granted. The parties shall include among the issues to be briefed: (1) whether, absent an express indication to the contrary, the offense variables of the statutory sentencing guidelines, MCL 777.1 *et*

*seq*., are to be scored based on (a) the defendant's conduct in committing the specific offense for which those guidelines are being scored, (b) the defendant's conduct during the entire criminal transaction, or (c) the defendant's conduct during both the specific offense being scored and any offenses resulting in conviction that arise out of the same transaction and that are enumerated in MCL 791.233b (see MCL 769.31[d]); (2) when is an offense completed for purposes of scoring the offense variables; (3) whether an accomplice to the underlying crime can be considered a "victim" under MCL 777.39 (OV 9); and (4) whether, based on the foregoing, the defendant in this case was properly assessed 10 points for "2 to 9 victims" under MCL 777.39 (OV 9) where he broke into an unoccupied store but, in the course of driving away with two accomplices, led the police on a car chase ending in a collision.

We further order the Saginaw Circuit Court, in accordance with Administrative Order No. 2003-3, to determine no later than February 3, 2009, whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court. If the defendant is not indigent, he must retain his own counsel.

The Clerk of the Court is directed to place this case on the May 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than March 23, 2009, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than April 17, 2009.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys Association are invited to file briefs amicus curiae, to be filed no later than April 28, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 264052.

*Leave to Appeal Denied January 21, 2009:*

PEOPLE v BAUDER, No. 136597. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280758.

KELLY, C.J. I would grant leave to appeal.

MORALES v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 136823; reported below: 279 Mich App 720.

HOFF v SPOELSTRA, No. 137102, Court of Appeals No. 272898.

PEOPLE v NEU, No. 137215; Court of Appeals No. 285355.

HATHAWAY, J., did not participate because she was the trial judge.

DISHNO v STATE WIDE REAL ESTATE, No. 137395; Court of Appeals No. 285192.

PEOPLE v COPAS, No. 137411; Court of Appeals No. 277240.

VERBRUGGHE v SELECT SPECIALTY HOSPITAL-MACOMB COUNTY, INC, No. 137423; Court of Appeals No. 287888.

PEOPLE v YAKEL, No. 137501; Court of Appeals No. 286531.

PEOPLE v LAJUAN SMITH, No. 137525; Court of Appeals No. 278587.

PEOPLE v VARNER, No. 137534; Court of Appeals No. 287375.

PEOPLE v TACKETT, No. 137606; Court of Appeals No. 277549.

*Summary Dispositions January 23, 2009:*

PEOPLE v BISKNER, No. 137198. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Tuscola Circuit Court for a hearing under *People v Ginther*, 390 Mich 436 (1973), with respect to appellate counsel's claim that trial defense counsel was ineffective because of her "failure to request a jury instruction, commensurate with the evidence and the defense theory, on the lesser included offense of entering without breaking." We direct that court to commence the hearing within 35 days of the date of this order. We further order that court to decide the claim of ineffective assistance of counsel within 14 days of the completion of the hearing, and to file with the Clerk of the Supreme Court a transcript of the hearing and related documents, including any written decision, within 21 days of its ruling. We retain jurisdiction. Court of Appeals No. 278006.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order remanding this case for a *Ginther*[1] hearing on defendant's ineffective assistance of counsel claim. Defendant failed to raise the issue in the trial court or to move the Court of Appeals to remand for a *Ginther* hearing. The Court of Appeals thus appropriately confined its review to determining whether the record contained sufficient detail to support defendant's claim. See *People v Cox,* 268 Mich App 440, 453 (2005); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659 (2000).

The Court of Appeals did not clearly err by concluding that the existing record did not establish ineffective assistance of counsel. Defendant has not shown that counsel's declination to request an instruction on misdemeanor home invasion was anything but a reasonable trial strategy. Such an instruction could have reduced defendant's chance for an outright acquittal and would have contradicted the defense theory that defendant had permission to enter the building.

Thus, in light of defendant's failure to request a *Ginther* hearing, thereby confining appellate review to the existing record, the Court of Appeals properly concluded that it had no basis to second-guess counsel's trial strategy. *People v Stewart* (*On Remand*), 219 Mich App 38, 42 (1996).

Accordingly, I would deny leave to appeal.

YOUNG, J. I join the statement of Justice CORRIGAN.

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

PEOPLE v OLIVER, No. 137393. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentence of the Genesee Circuit Court, and remand this case to the trial court for resentencing. The trial judge failed to offer any valid explanation justifying why he chose to sentence the defendant to 63 months above the sentencing guidelines maximum of 57 months. *People v Smith*, 482 Mich 292 (2008). On remand, the trial court shall articulate on the record why this level of departure is warranted or resentence the defendant either within the appropriate sentencing guidelines range or articulate on the record why a different level of departure is warranted. Court of Appeals No. 286369.

WEAVER, J. (*dissenting*). I dissent from the order remanding this case to the trial court. Applying the analysis of my partial dissent and partial concurrence in *People v Babcock*, 469 Mich 247, 280-284 (2003), I would affirm the trial court's decision. The trial court satisfied the requirement for "a substantial and compelling reason" for its departure from the sentencing guidelines, and its decision did not venture beyond the range of principled outcomes under the circumstances. See also my dissent in *People v Smith*, 482 Mich 292, 325-329 (2008).

PEOPLE v WHITAKER, No. 137554. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a hearing at which Stephanie McClung may be examined and cross-examined to determine whether her testimony supports the defendant's alibi defense. The Wayne Circuit Court shall order a new trial unless it finds that McClung's absence from the first trial was harmless beyond a reasonable doubt. *People v Anderson*, 446 Mich 392, 405-406 (1994). The prosecuting attorney shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate, serve process upon, and compel the attendance of Stephanie McClung at the hearing. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 278828.

AMERICAN STATES INSURANCE COMPANY v HAMPTON, No. 137838. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the defendants' argument that the trial court erred in denying their motion for directed verdict, which issue was raised in the Court of Appeals, but was not decided by that court. In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The motion to stay the trial court proceedings is granted, and the proceedings in the Wayne Circuit Court are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction. Court of Appeals No. 279022.

KELLY, C.J. I would grant the application for leave to appeal and the cross-application for leave to appeal.

*Leave to Appeal denied January 23, 2009:*

*In re* WHEETLEY (BLOOM v WHEETLEY), No. 137941; Court of Appeals No. 285994.

CAMPO v GREENWICH INSURANCE COMPANY, No. 138050; Court of Appeals No. 288486.

*Motion for Clarification Granted January 27, 2009:*

YOUNG v NANDI, No. 134799. On order of the Court, the motion for clarification of this Court's October 3, 2008, order is considered, and it is granted. For the reasons stated in that order, the Court of Appeals erred in affirming the trial court's denial of the defendants' request for a hearing concerning attorney fees in the plaintiff's favor as case evaluation sanctions under MCR 2.403(O)(6)(b). "Under the facts of this case, such a hearing was necessary." In our October 3, 2008 order, we remanded this case to the Oakland Circuit Court "for a hearing on the subject of a reasonable attorney fee, consistent with *Smith v Khouri*, 481 Mich 519 (2008)." We clarify, however, that such a hearing shall occur only if the Oakland Circuit Court first determines, on remand, that the plaintiff is still entitled to case evaluation sanctions in light of the rulings made by the Court of Appeals. We do not retain jurisdiction. Court of Appeals No. 266261.

CAVANAGH and WEAVER, JJ. We would grant reconsideration and, on reconsideration, would grant leave to appeal.

*Leave to Appeal Denied January 27, 2009:*

PEOPLE v KENNEDY, No. 135570; Court of Appeals No. 271020.

PEOPLE v BRYANT WILEY, No. 136234. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282915.

PEOPLE v FAULK, No. 136326; Court of Appeals No. 273688.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY v PUBLIC SERVICE COMMISSION, No. 136504; reported below 279 Mich App 180.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 136506; Court of Appeals No. 275135.

PEOPLE v REID, No. 136533; Court of Appeals No. 284523.

LEAPHART v CITY OF DETROIT, Nos. 136662and 136663; Court of Appeals Nos. 285146 and 285147.

CHRISTOPOULOS v SOCALL, No. 136822; Court of Appeals No. 277611.

EBBERS v SECRETARY OF STATE, No. 137000; Court of Appeals No. 283782.

PEOPLE v KUNDRAT, No. 137007; Court of Appeals No. 276567.

BLUNDY v SECURA INSURANCE, No. 137060; Court of Appeals No. 275462.

MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP v DEPARTMENT OF ENVIRONMENTAL QUALITY, Nos. 137109 and 137110; Court of Appeals Nos. 282716 and 282729.

PEOPLE v TREADWELL, No. 137126; Court of Appeals No. 277363.

PEOPLE v VARNEY, No. 137156. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284050.

FIFTY EIGHT LIMITED LIABILITY COMPANY v LYON CHARTER TOWNSHIP, No. 137159; Court of Appeals No. 276574.

TERRELL v VAUGHN, No. 137175; Court of Appeals No. 283511.

PEOPLE v FICK, No. 137202; Court of Appeals No. 276770.

GRIEVANCE ADMINISTRATOR v KRAFT, No. 137203; ADB: 07-000037-GA.

PEOPLE v CHRISTIAN ANDERSON, No. 137235. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284347.

PEOPLE v HURSEY, No. 137243; Court of Appeals No. 279001.

PEOPLE v CHARLES WHITE, No. 137255; Court of Appeals No. 276707.

PEOPLE v JEROME YOUNG, No. 137276; Court of Appeals No. 278578.

PEOPLE v FERRELL, No. 137280. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284614.

PEOPLE v WILLIAM HUNTER, No. 137300. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282254.

PEOPLE v WHITT, No. 137306. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286559.

PEOPLE v KOZAK, No. 137313; Court of Appeals No. 272945.

LEONARD v WAYNE STATE UNIVERSITY, No. 137315; Court of Appeals No. 273129.

PEOPLE v MAKIDON, No. 137329. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283178.

PROTECTIVE PLANNING GROUP, LLC v LEONARD, No. 137352; Court of Appeals No. 283532.

PEOPLE v TYLER, No. 137363; Court of Appeals No. 276769.

PEOPLE v HARDIN, No. 137365. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285535.

HESTER v PAROLE BOARD, No. 137401; Court of Appeals No. 283475.

PEOPLE v HART, No. 137415; Court of Appeals No. 278709.

PEOPLE v GARY MORRIS, No. 137429. The defendant's motion to correct the presentence report was a successive motion for relief from judgment, which is prohibited by MCR 6.502(G). Court of Appeals No. 284140.

STATE v GETER, No. 137440; Court of Appeals No. 278795.

SETTECERRI v SETTECERRI, No. 137450; Court of Appeals No. 284162.

PEOPLE v BRADSHAW-LOVE, No. 137461; Court of Appeals No. 276399.

HERNANDEZ v FORD MOTOR COMPANY, No. 137481; Court of Appeals No. 277811.

KELLY, C.J. I would grant leave to appeal.

PEOPLE v KELLMAN, No. 137482; Court of Appeals No. 276454.

PEOPLE v ZINZO, No. 137509; Court of Appeals No. 287109.

PEOPLE v HAMMETT, No. 137510; Court of Appeals No. 278837.

GOLDEN v AMICA MUTUAL INSURANCE COMPANY, No. 137513; Court of Appeals No. 284515.

PEOPLE v MARVIN FRANKLIN, No. 137520; Court of Appeals No. 278269.

PEOPLE v BYRON WILLIAMS, No. 137540; Court of Appeals No. 278093.

PEOPLE v NEMETH, No. 137548; Court of Appeals No. 287038.

PEOPLE v DEANGELO WRIGHT, No. 137549; Court of Appeals No. 279239.

PEOPLE v RHYNDRESS, No. 137557; Court of Appeals No. 278811.

*In re* PIELACK (PIELACK v KOWALIK), No. 137558; Court of Appeals No. 277496.

PEOPLE v CORRION, No. 137564; Court of Appeals No. 278169.

INGERSOLL v TUESLEY, No. 137568; Court of Appeals No. 276828.

ZIEGLER v AUKERMAN, No. 137569; Court of Appeals No. 277602.

PEOPLE v CLERANCE CLARK, No. 137576; Court of Appeals No. 277097.

PEOPLE v HANSEN, No. 137596; Court of Appeals No. 287357.

PEOPLE v LEIGH, No. 137599; Court of Appeals No. 279202.

PEOPLE v TERRANCE RUSSELL, No. 137601; Court of Appeals No. 287046.

PEOPLE v WAGNER, No. 137602; Court of Appeals No. 287015.

PEOPLE v HOLBROOK, No. 137605; Court of Appeals No. 271562.

NATIONWIDE MUTUAL FIRE INSURANCE CO v KERSH, No. 137612; Court of Appeals No. 284903.

PEOPLE v TIMOTHY ANDREWS, No. 137613; Court of Appeals No. 277777.

PEOPLE v FITCHETT, No. 137617; Court of Appeals No. 277063.

SCHMITT v GILL INDUSTRIES, INC, No. 137622; Court of Appeals No. 284740.

PEOPLE v JENSEN, No. 137632; Court of Appeals No. 279437.

PEOPLE v TYMCZYN, No. 137638; Court of Appeals No. 280233.

PEOPLE v AARON FOX, No. 137645; Court of Appeals No. 287185.

PEOPLE v IRA MCCOY, No. 137654; Court of Appeals No. 277852.

RENUSCH v G & F PROTOTYPE PLASTER, INC, No. 137656; Court of Appeals No. 285872.

PEOPLE v LIDDELL, No. 137689; Court of Appeals No. 272777.

PEOPLE v ANTONIO REED, No. 137713; Court of Appeals No. 278567.

*Reconsideration Denied January 27, 2009:*

GATES v USA JET AIRLINES, INC, No. 136097. Summary disposition entered at 482 Mich 1005. Court of Appeals No. 272860.

PEOPLE v PEARSON, No. 136196. Leave to appeal denied at 482 Mich 988. Court of Appeals No. 279654.

PEOPLE v STROSS, No. 136235. Summary disposition entered at 482 Mich 979. Court of Appeals No. 271764.

KELLY, C.J. I would grant reconsideration and, on reconsideration, would deny leave to appeal.

ANDRES v BROWN, No. 136294. Summary disposition entered at 482 Mich 985. Court of Appeals No. 276473.

PEOPLE v GARDNER, No. 136378. Leave to appeal denied at 482 Mich 1030. Court of Appeals No. 283147.

PEOPLE v ROGER YOUNG, No. 136468. Leave to appeal denied at 482 Mich 1030. Court of Appeals No. 281435.

PEOPLE v SPARKS, No. 136519. Leave to appeal denied at 482 Mich 1031. Court of Appeals No. 283273.

ICHESCO v KIRCHER, No. 136683. Leave to appeal denied at 482 Mich 977. Court of Appeals No. 272905.

PEOPLE v HADRIAN, No. 136741. Leave to appeal denied at 482 Mich 1018. Court of Appeals No. 277880.

UNITY APOSTOLIC CATHEDRAL v WAYNE COUNTY TREASURER, No. 136908. Leave to appeal denied at 482 Mich 1035. Court of Appeals No. 263499.

PEOPLE v RONALD HARRIS, No. 136910. Leave to appeal denied at 482 Mich 1035. Court of Appeals No. 270621.

PEOPLE v SIMMONS, No. 136914. Leave to appeal denied at 482 Mich 1035. Court of Appeals No. 285409.

MENTOR TOWNSHIP v HOY, No. 136941. Leave to appeal denied at 482 Mich 992. Court of Appeals No. 283469.

PEOPLE v RUDDENE MILLER, No. 136944. Leave to appeal denied at 482 Mich 1035. Court of Appeals No. 276589.

*Leave to Appeal Granted January 28, 2009:*

PEOPLE v HARVEY JACKSON, No. 135888. The parties shall include among the issues to be briefed: (1) whether *People v Dunbar*, 264 Mich App 240 (2004), was correctly decided; (2) whether trial courts are required to consider a defendant's ability to repay attorney fees as articulated in *Dunbar* before ordering the defendant to commence reimbursement of attorney fees pursuant to MCL 769.1k; (3) whether *Dunbar* correctly held that a challenge to an order for repayment of attorney fees may be premature until collection efforts have begun; (4) what standards should govern a trial court's determination whether a defendant should be responsible for the repayment of attorney fees and when repayment should begin, including what consideration, if any, should be given to a defendant's other financial obligations (such as restitution or child support), or a defendant's incarceration; and (5) whether imposing a 20 percent late fee pursuant to MCL 600.4803(1) constitutes an impermissible collection effort or sanction for nonpayment or provides a means of enforcement that exposes a defendant to more severe collection practices than the ordinary civil debtor. See *Dunbar*, *supra* at 253.

The Clerk of the Court is directed to place this case on the April 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than March 2, 2009, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than March 27, 2009.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae, to be filed no later than April 2, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the

Court for permission to file briefs amicus curiae, to be filed no later than April 2, 2009. Court of Appeals No. 282579.

PEOPLE v IDZIAK, No. 137301. The parties shall include among the issues to be briefed: (1) whether the Parole Board is required to compute a new parole eligibility date for inmates who commit new criminal offenses while on parole, by exercising its discretion to determine what is the "remaining portion" of the sentence for the previous offense (see MCL 768.7a[2]; *Wayne Co Prosecutor v Department of Corrections,* 451 Mich 569 [1996]); (2) if so, whether this requirement is satisfied by a Michigan Department of Corrections (MDOC) policy to automatically begin the new sentence as of the date of the most recent sentencing, minus any days of jail credit awarded by the trial court; (3) whether (a) the judiciary is precluded from reviewing such a decision by the MDOC under *Warda v Flushing City Council*, 472 Mich 326, 333 (2005), or (b) the decision can constitute a violation of a defendant's right to due process or equal protection under the law; and (4) whether a trial court is authorized, required, or not authorized to award jail credit to parolees under MCL 769.11b.

The Clerk of the Court is directed to place this case on the April 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than March 2, 2009, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than March 27, 2009.

We invite the Attorney General to respond on behalf of the MDOC. The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae, to be filed no later than April 2, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than April 2, 2009. Court of Appeals No. 285975.

*Summary Disposition January 30, 2009:*

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, Nos. 136586 and 136588. On order of the Court, the motion for postponement of decision is denied as moot. The motion for sanctions is granted. The defendant is awarded costs and attorney fees pursuant to MCR 7.216(C)(1), as there was no reasonable basis for belief that there was a meritorious issue to be determined on appeal. We remand this case to the Washtenaw Circuit Court for a determination of actual damages. MCR 7.216(C)(2). Plaintiff Frank Jacobson is barred from submitting additional filings in this Court in non-criminal matters, aside from this case, until he offers proof that he has paid all outstanding court-imposed sanctions. Court of Appeals Nos. 281587 and 283361.

*Summary Disposition February 4, 2009:*

CHURCH & CHURCH INC v A-1 CARPENTRY, No. 137354. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm that part of the

judgment of the Court of Appeals that held that C & R Plumbing & Heating, Inc.'s (C & R), lien was extinguished because it did not name Sterling Bank as a defendant in its cross-complaint. We also affirm, but for a reason other than that stated by the Court of Appeals, that the circuit court correctly denied C & R's motion to amend to add the Homeowner Construction Lien Recovery Fund (the Fund) as a party because the amendment would have been futile. In reaching this conclusion, the Court of Appeals ruled that C & R had admittedly failed to name the Fund as a defendant, which MCL 570.1203, as amended in 2006, requires, within the one-year limitations period of MCL 570.1117. The Court of Appeals erred in doing so, because the pre-amendment version of MCL 570.1203 applies to this case, and that version of the statute does not mandate that the Fund be named as a defendant within MCL 570.1117's one-year period of limitations. Accordingly, we vacate that part of the Court of Appeals analysis. We note, however, that pursuant to MCL 570.1203(3)(a), to recover from the Fund on its lien, C & R must establish that it would be "entitled to a construction lien . . . except for the defense provided in subsection (1)." Because C & R did not name Sterling Bank, its lien is not enforceable, and C & R cannot satisfy MCL 570.1203(3)(a). For this reason, we agree with the Court of Appeals that C & R's motion to amend was futile. Court of Appeals No. 275823.

*Leave to Appeal Denied February 4, 2009:*

PEOPLE v JAMES SIMPSON, No. 135932. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280279.

HUGHES v WOOD, No. 136592; Court of Appeals No. 274487.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v SHREVE, No. 136675; Court of Appeals No. 280015.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

SILBERSTEIN v PRO GOLF OF AMERICA, INC, No. 136791; reported below: 278 Mich App 446.

PEOPLE v RICHARD THOMPSON, No. 136804; Court of Appeals No. 284581.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v KEVIN HALL, No. 136937; Court of Appeals No. 270842.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v CASSANDRA LEE, No. 136966; Court of Appeals No. 277882.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

SALEH v MICHIGAN ASSIGNED CLAIMS FACILITY, No. 137001; Court of Appeals No. 274634.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v CALVIN JOHNSON, No. 137005; Court of Appeals No. 285812.

PEOPLE v TORREZ, No. 137035; Court of Appeals No. 274582.

PEOPLE v CHAPMAN, No. 137054; Court of Appeals No. 285809.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

SCHORNAK v DAIMLERCHRYSLER CORPORATION, No. 137134; Court of Appeals No. 277024.

VERBRUGGHE v SELECT SPECIALTY HOSPITAL-MACOMB COUNTY, INC, No. 137212; reported below: 279 Mich App 741.

PEOPLE v CURRIE, No. 137220; Court of Appeals No. 278072.

CALLAWAY v GENERAL MOTORS CORPORATION, No. 137254; Court of Appeals No. 283320.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

PEOPLE v WALLACE, No. 137296. The motion to add issue is denied, without prejudice to the defendant raising the issue in a motion for relief from judgment under MCR subchapter 6.500. Court of Appeals No. 282681.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v CASHA, No. 137344; Court of Appeals No. 286260.

PEOPLE v EDENSTROM, No. 137390; reported below: 280 Mich App 75.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

GORDON v GENERAL MOTORS CORPORATION, No. 137420; Court of Appeals No. 284874.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

SUTKOWI v GENERAL MOTORS CORPORATION, No. 137421; Court of Appeals No. 283994.

CITY OF HUNTINGTON WOODS v CITY OF DETROIT, No. 137495; reported below: 279 Mich App 603.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

*Reconsideration Granted February 4, 2009:*

ANGLERS OF THE AUSABLE, INC v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 137725. We vacate our order dated December 11, 2008. On reconsideration, the application for leave to appeal the September 24, 2008, order of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Summary disposition entered at 482 Mich 1078. Court of Appeals No. 284315.

CORRIGAN, J. (*dissenting*). I dissent from the Court's order granting plaintiffs' motion for reconsideration, vacating our earlier remand order, *Anglers of the AuSable, Inc v Dep't of Environmental Quality*, 482 Mich 1078 (2008), and denying leave to appeal. I continue to believe that our order remanding to the Court of Appeals for consideration as on leave granted was correctly entered.

In 2004, defendant Merit Energy purchased a central production facility in Otsego County, Michigan, known as the Hayes 22 CPF, from Shell Oil & Gas Company. Several crude oil and brine spills over the past decades have contaminated the groundwater beneath the facility with hydrocarbons. The contamination now forms a large plume that has contaminated two residential drinking wells and continues to spread. As part of its purchase of the facility, Merit entered into a settlement agreement with the Michigan Department of Environmental Quality (MDEQ), under which Merit agreed to treat the contaminated groundwater. Merit then hired Gosling Czubak Engineering, which assessed the extent of the contamination and designed a remediation plan. Merit sought and obtained the permits necessary to carry out the remediation plan, including a certificate of coverage (COC) from the MDEQ, which permitted Merit to discharge the treated water into bodies of water connected to the AuSable River, as contemplated by the remediation plan. The MDEQ issued the COC under the auspices of a general permit, the "applicability" of which was "limited to discharges of wastewater contaminated by gasoline and/or related petroleum products" that met additional criteria specified in the general permit. On appeal from an administrative decision, the trial court reversed and effectively vacated the COC. It reasoned that the COC exceeded the scope of the general permit because it allowed Merit to discharge treated water containing chloride. The Court of Appeals denied Merit's delayed application for leave to appeal.

The trial court erred by vacating the COC on the ground that it exceeded the scope of the general permit. The hearing referee pointed out in his opinion and order, which decided plaintiffs' administrative challenge to the COC in favor of Merit and the MDEQ, that the amount of chloride discharged into the bodies of water would be significantly less than the amount of chloride in drinking water! Thus, the chloride is apparently not a "contaminant" requiring treatment under the applicable statutory standard. In addition, the trial court ruled in plaintiffs' favor in their separate civil action under the Michigan Environmental Protection Act (MEPA), MCL 324.1701 *et seq*. Appeals of that ruling are pending before the Court of Appeals, and it appears that the trial court relied to a significant extent on its findings in the MEPA action in deciding the administrative appeal. In order to ensure consistency in the outcomes of the administrative and civil actions, the trial court's rulings in both cases should be submitted to the same panel of the Court of Appeals.

Additionally, the trial court appears to have invalidated the COC without fully addressing the MEPA provision that allows a court to review an administrative action for a MEPA violation. This provision states:

> In administrative, licensing, or other proceedings, and in any judicial review of such a proceeding, the alleged pollution, impairment, or destruction of the air, water, or other natural resources, or the public trust in these resources, shall be determined, and conduct shall not be authorized or approved that has or is likely to have such an effect if there is a feasible and prudent alternative consistent with the reasonable requirements of the public health, safety, and welfare. [MCL 324.1705(2).]

The trial court thoroughly analyzed the "alleged pollution, impairment, or destruction" caused by the conduct authorized by the COC. Yet it failed to consider whether a "feasible and prudent alternative" existed. The hearing referee never reviewed the permit issuance under MCL 324.1705(2), so the court based its finding that the COC impermissibly conflicted with MEPA on evidence presented in the separate MEPA civil suit. The use of this evidence is troubling because no evidence regarding a "feasible and prudent alternative" (or lack thereof) was presented, or even relevant, in the civil suit. MCL 324.1701, under which plaintiffs brought the civil suit, does not condition relief upon a lack of alternatives. Thus, I do not believe the court's use of evidence from the civil trial provided it with a sufficient basis for reaching its decision under MCL 324.1705(2). The Court of Appeals should also address this issue to ensure that MCL 324.1705 is properly followed.

Accordingly, I continue to favor a remand to the Court of Appeals for considerations on leave granted. I would deny plaintiffs' motion for reconsideration.

YOUNG and MARKMAN, JJ. We join the statement of Justice CORRIGAN.

*Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal February 6, 2009:*

PEOPLE v LOWE, No. 137284. The Clerk of the Court is directed to place this case on the April 2009 session calendar for argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 35 days of the date of this order addressing: (1) whether, with respect to a defendant subject to sentence enhancement of "twice the term otherwise authorized" under MCL 333.7413(2), the minimum sentence range recommended by the sentencing guidelines may be doubled; (2) whether this question was correctly decided in *People v Williams*, 268 Mich App 416 (2005); and (3) what impact, if any, MCL 777.21(4) has on this question.

We further order the Hillsdale Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae, to be filed no later than April 1, 2009. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than April 1, 2009. Court of Appeals No. 286373.

PEOPLE v HOLDER, No. 137486. The Clerk of the Court is directed to place this case on the April 2009 session calendar for argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the judgment of sentence entered on March 22, 2007, was valid when imposed because defendant was not on parole at the time he committed the offenses in this case, despite the subsequent effort to cancel his parole discharge; and (2) whether the trial court lacked the authority to later modify the March 22, 2007, judgment of sentence. See MCR 6.429(A); *People v Miles*, 454 Mich 90, 96 (1997); and *People v Harris*, 482 Mich 986 (2008).

We further order the Genesee Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court.

We invite the Attorney General to respond on behalf of the Department of Corrections to explain under what authority, if any, the department may proceed ex parte to seek the amendment of an otherwise final order. Court of Appeals No. 286100.

PEOPLE v KIRCHER, No. 137652. The Clerk of the Court is directed to place this case on the April 2009 session calendar for argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 28 days of the date of this order addressing whether the plain language of MCL 324.3115(4) requires a determinate sentence of five years for posing a substantial endangerment to the public health, safety, or welfare, or whether the inclusion of that statute in MCL 777.13c, listing those felonies to which the guidelines for minimum sentences apply, requires the imposition of an indeterminate sentence. The parties should not submit mere restatements of their application papers.

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae, to be filed no later than March 25, 2009. Other persons or groups interested in determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than March 25, 2009. Court of Appeals No. 275215.

*Leave to Appeal Denied February 6, 2009:*

DEPARTMENT OF ENVIRONMENTAL QUALITY v WATEROUS COMPANY, No. 136520; reported below: 279 Mich App 346.

YOUNG, J. (*concurring*). The question whether the statute, MCL 324.20120a(6), requires the defendant to remediate the property to a level consistent with a higher use than the defendant's historical use of the property is troubling. I concur with this Court's denial order because the defendant did not preserve a constitutional taking argument.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether the Court of Appeals properly determined that a successor landowner can be required under the Natural Resources and Environmental Protection Act, MCL 324.20120a(6), to remediate property to its current residential zoning status even when that status is higher than

the industrial zoning status that existed when the pollution occurred, and, if so, whether such a determination implicates US Const, Am V; Const 1963, art 10, § 2; or any other federal or state constitutional provision.

CORRIGAN, J. I join the statement of Justice MARKMAN.

KLIDA v BRAMAN, No. 136535; reported 278 Mich App 60.

MARKMAN, J. (*concurring*). Because I believe that the Court of Appeals reached the right result, I concur in this Court's order denying leave to appeal. I write separately only to point out that the Court of Appeals, in my judgment, erroneously held that § 5851(1) of the Revised Judicature Act (RJA), MCL 600.5851(1), is "ambiguous." To the contrary, the RJA clearly states that a minor shall have one year after the disability is removed to "bring an action under this act," and a breach of contract action is clearly an action brought under the RJA. A statute is not "ambiguous" merely because a term or phrase therein is subject to multiple definitions or understandings. See *Lansing Mayor v Pub Service Comm*, 470 Mich 154, 164-166 (2004). A clear understanding of what is and what is not "ambiguous" is an element in minimizing the exercise of discretionary and standardless judicial power.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

*In re* BEAN (DEPARTMENT OF HUMAN SERVICES v HERRIN), No. 138102; Court of Appeals No. 285467.

*Summary Disposition February 6, 2009:*

PEOPLE v GRAYS, No. 137244. Pursuant to MCR 7.302(G)(1) and 7.316(A)(1), in lieu of granting leave to appeal, we vacate the defendant's conviction of second-degree murder. See *People v Clark*, 243 Mich App 424, 429 (2000), lv den 465 Mich 863 (2001). 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. Court of Appeals No. 277866.

KELLY, C.J. I would grant leave to appeal.

*Rehearing Denied February 10, 2009:*

TOMECEK v BAVAS, No. 134665; reported below: 276 Mich app 252.

YOUNG, J. (*dissenting*). I would grant the defendant-appellant's motion for rehearing.

This case came before us on cross-motions for summary disposition and involved discerning whether the grantors of the plaintiffs' "easement for driveway purposes" intended the plaintiffs to have access to utilities along that easement. The formulation of the issues in controversy has sharpened with each successive appeal, and the trial court did not properly have the issue of the grantors' intent before it. The ambulatory nature of this appeal thus prevented the parties from litigating at trial the precise questions that a finder of fact should have determined. For this reason, I believed, and continue to believe, that the majority was

premature in determining that the plaintiffs' middle ("driveway") easement should include utilities access. On no factually developed record, a majority of this Court concluded that an easement denominated for "driveway purposes" also included utilities access.

Understandably, because there has never been a trial on the very issue resolved by this Court, the motion for rehearing indicates that some of the critical evidence on which the majority relies in making its determination of grantor intent has not undergone the proper authentication that our rules of evidence require. Furthermore, the parties have not been permitted any discovery on the question of the grantors' intent. This is surely a question that is factual in nature, requiring resolution by a fact-finder, not an appellate court.

Accordingly, I would grant the motion for rehearing and, upon rehearing, remand this case to the trial court for a determination of the grantors' intent.

CORRIGAN and MARKMAN, JJ. We join the statement of Justice YOUNG.

*Order Granting Oral Argument in Case Pending On Application for Leave to Appeal February 20, 2009:*

*In re* MCBRIDE (DEPARTMENT OF HUMAN SERVICES V MCBRIDE), No. 136988. The Clerk of the Court is directed to place this case on the May 2009 session calendar for argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing: (1) whether the trial court violated MCL 712A.17c and MCR 3.915(B)(1) by denying the respondent-appellant father's request for the appointment of counsel to represent him at the trial on the supplemental petition requesting termination of his parental rights; (2) whether the trial court violated the respondent's due process rights under *Lassiter v Dep't of Social Services*, 452 US 18 (1981), by denying the request for counsel; (3) if the trial court violated MCL 712A.17c, MCR 3.915(B)(1), or the Due Process Clause, whether such an error may be harmless, *In re Clemons*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008 (Docket No. 281004); *Lassiter*, *supra*; (4) whether the Department of Human Services is asserting inconsistent positions regarding the harmlessness of the error in denying counsel in termination of parental rights cases, cf., e.g., *In re Clemons*, *supra*, and the instant case; (5) if a denial of a request for counsel can constitute harmless error, whether the existence of an alternative placement plan or guardianship option, such as those provided for in MCL 712A.19a(7) and MCL 700.5201 through 700.5219, can prevent a denial of a request for counsel from being harmless; and (6) if the existence of an alternative placement or guardianship option can prevent a denial of a request for counsel from being harmless, by what standards should a court evaluate feasibility of the alternative placement or guardianship option in determining whether the error was harmless. The Solicitor General is invited to file a brief addressing the foregoing issues and to participate in oral argument before this Court. Court of Appeals No. 282062.

*Summary Disposition February 24, 2009:*

PEOPLE v LOWN, No. 137844. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 287033.

*Leave to Appeal Denied February 24, 2009:*

PEOPLE v JOHN ADAMS, No. 136316; Court of Appeals No. 272751.

FARM BUREAU GENERAL INSURANCE COMPANY v HARLEYSVILLE LAKE STATES INSURANCE COMPANY, No. 136376; Court of Appeals No. 272930.

PEOPLE v HARRINGTON, No. 136419; Court of Appeals No. 272939.

PEOPLE v HANLEY, No. 136490; Court of Appeals No. 284421.

JOSEPH v SOUTHFIELD PUBLIC SCHOOLS, No. 136695; Court of Appeals No. 275869.

PEOPLE v STOUDMIRE, No. 136704; Court of Appeals No. 284584.

PEOPLE v CHAUNCEY JACKSON, No. 136817. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283873.

PEOPLE v BUYSSEE, Nos. 137123 and 137125; Court of Appeals Nos. 267469 and 274748.

PEOPLE v HATCHETT, No. 137148; Court of Appeals No. 282205.

HART v ANDERSON, No. 137180; Court of Appeals No. 284235.

PEOPLE v CUELLAR, No. 137181; Court of Appeals No. 283620.

PEOPLE v JODY WELLS, No. 137209. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285455.

PEOPLE v SMALLS, No. 137229. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283803.

PEOPLE v EMMETT JONES, No. 137233; Court of Appeals No. 273576.

PEOPLE v MYKOLAITIS, No. 137261; Court of Appeals No. 273578.

PEOPLE v BRUCE PEOPLES, No. 137285; Court of Appeals No. 286565.

YOUNG v OAKLAND COUNTY DRAIN COMMISSIONER'S OFFICE, No. 137311; Court of Appeals No. 277259.

PEOPLE v BABB, No. 137364; Court of Appeals No. 286303.

PEOPLE v TREVOR THOMPSON, 137367; Court of Appeals No. 276151.

PEOPLE v SALAMEY, No. 137370; Court of Appeals No. 275102.

TRANTHAM v TRANTHAM, No. 137405; Court of Appeals No. 283821.

PEOPLE v STREATER, No. 137427; Court of Appeals No. 285856.

PEOPLE v OSLEY, No. 137439; Court of Appeals No. 286486.

PEOPLE v HOWARD JOHNSON, No. 137497. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284213.

PEOPLE v SMIELEWSKI, No. 137505; Court of Appeals No. 278570.

PEOPLE v MAGNER, No. 137519. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284963.

PEOPLE v LONYE JONES, No. 137521. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286604.

PEOPLE v JESSE PEOPLES, No. 137522. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284840.

PEOPLE v POTTER, No. 137524. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284488.

PEOPLE v GREGORY WASHINGTON, No. 137529. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284965.

PEOPLE v THEODORE LEE, No. 137532. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286539.

PEOPLE v BARLOW, No. 137533. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284726.

GRAND TRUNK WESTERN RAILROAD, INC v 37TH CIRCUIT COURT JUDGE, No. 137536; Court of Appeals No. 273411.

KRONBERG v MATHEW, No. 137544; Court of Appeals No. 274867.

PEOPLE v JOSHUA LAWSON, No. 137559. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286656.

PEOPLE v BODRIE, No. 137566. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284198.

FIRST NATIONAL BANK OF CRYSTAL FALLS v KOSKI, No. 137579; Court of Appeals No. 285187.

DOBBYN v PROGRESSIVE MICHIGAN INSURANCE COMPANY, No. 137591; Court of Appeals No. 278661.

PEOPLE v WINDMON, No. 137593; Court of Appeals No. 287120.

PEOPLE v EUGENE BROWN, No. 137597; Court of Appeals No. 286754.

QUACKENBUSH v SIMS TOWNSHIP ZONING BOARD OF APPEALS, No. 137598; Court of Appeals No. 283278.

PEOPLE v MIMS, No. 137615; Court of Appeals No. 287349.

PEOPLE v NINER, No. 137618; Court of Appeals No. 287081.

PEOPLE v CROAD, No. 137619; Court of Appeals No. 287106.

PEOPLE v TRAMBLE, No. 137620; Court of Appeals No. 276083.

NORWOOD TWP CITIZENS FOR HEALTH AND SAFETY v WYNKOOP, No. 137626; Court of Appeals No. 284494.

PEOPLE v BOUDREAUX, No. 137636; Court of Appeals No. 285837.

PEOPLE v ANDREW HILL, No. 137640; Court of Appeals No. 278239.

PEOPLE v BUSS, No. 137641; Court of Appeals No. 278279.

PEOPLE v LINDSEY, No. 137642; Court of Appeals No. 279128.

PEOPLE v FANN, No. 137644; Court of Appeals No. 287393.

PEOPLE v BROCKMAN, No. 137648; Court of Appeals No. 278616.

PEOPLE v ELIJAH JACKSON, No. 137662; Court of Appeals No. 288152.

PEOPLE v HUDSON, No. 137663; Court of Appeals No. 278400.

BUSSELLE v COLONIAL CONDOMINIUM ASSOCIATION, No. 137671; Court of Appeals No. 285841.

SPILLMAN v DEPARTMENT OF CORRECTIONS, No. 137679; Court of Appeals No. 284589.

PEOPLE v CAMERON, No. 137682; Court of Appeals No. 287061.

METTLER WALLOOM, LLC v MELROSE TOWNSHIP, No. 137684; reported below: 281 Mich App 184.

PEOPLE v CARPENTER, No. 137687; Court of Appeals No. 277861.

PEOPLE v JEREMY WILLIS, No. 137695; Court of Appeals No. 287341.

PEOPLE v WATSON, No. 137702; Court of Appeals No. 266832.

PEOPLE v PAUL WILLIAMS, No. 137703; Court of Appeals No. 287355.

FISK v D&T TOOL & MACHINES, INC, No. 137707; Court of Appeals No. 286470.

PEOPLE v TELLIS, No. 137717; Court of Appeals No. 287764.

CREDIGY RECEIVABLES, INC v TOWNSLEY, No. 137726; Court of Appeals No. 280027.

PEOPLE v KARES, No. 137729; Court of Appeals No. 287525.

JAMISON v WILLIAMS, No. 137743; Court of Appeals No. 285061.

PEOPLE v DUNIGAN-SNELL, No. 137745; Court of Appeals No. 280522.

PEOPLE v BRACK RUCKER, No. 137747; Court of Appeals No. 287715.

PEOPLE v YONKEY, No. 137748; Court of Appeals No. 287539.

EDEN v JP MORGAN CHASE BANK, No. 137750; Court of Appeals No. 285225.

PEOPLE v COCHRANE, No. 137752; Court of Appeals No. 275321.

PEOPLE v DEPUTY, No. 137753; Court of Appeals No. 280258.

GONZALES v GENERAL MOTORS CORPORATION, No. 137759; Court of Appeals No. 286328.

PEOPLE v ETHERTON, No. 137762; Court of Appeals No. 277459.

PEOPLE v GOODSPEED, No. 137764; Court of Appeals No. 287376.

PEOPLE v HALLIBURTON, No. 137767; Court of Appeals No. 287946.

PEOPLE v ABBEY, No. 137771; Court of Appeals No. 287611.

PEOPLE v LARRY JONES, No. 137773; Court of Appeals No. 287373.

BURNETT v GENERAL MOTORS CORPORATION, No. 137780; Court of Appeals No. 288091.

DORSEY v DELPHI CORPORATION, No. 137781; Court of Appeals No. 286199.

PEOPLE v WEAVER, No. 137784; Court of Appeals No. 287596.

PEOPLE v CHAABAN, No. 137785; Court of Appeals No. 274509.

PEOPLE v MOSCOW, No. 137786; Court of Appeals No. 287795.

PEOPLE v CRAIG WILEY, No. 137790; Court of Appeals No. 287555.

PEOPLE v GRISHAM, No. 137797; Court of Appeals No. 276414.

PEOPLE v ORLANDO EDWARDS, No. 137801; Court of Appeals No. 287796.

PEOPLE v ELICE ARNOLD, No. 137802; Court of Appeals No. 286736.

PEOPLE v RHODES, No. 137803; Court of Appeals No. 287612.

PEOPLE v KENT WELLS, No. 137804; Court of Appeals No. 287617.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial court judge. See MCR 2.003(B).

COLEMAN v DEPARTMENT OF CORRECTIONS, No. 137829; Court of Appeals No. 284071.

PEOPLE v HANNAH, No. 137837; Court of Appeals No. 287894.

PEOPLE v STUTZ, No. 137843; Court of Appeals No. 287725.

PEOPLE v ANDRE BELL, No. 137883; Court of Appeals No. 279183.

*Reconsideration Denied February 24, 2009:*

PEOPLE v HELLSTROM, No. 135382. Leave to appeal denied at 482 Mich 1078. Court of Appeals No. 269980.

KELLY, C.J. I would grant the motion for reconsideration.

PEOPLE v BUTLER, No. 136498. Leave to appeal denied at 482 Mich 1031. Court of Appeals No. 283134.

PEOPLE v BEASLEY, No. 136985. Leave to appeal denied at 482 Mich 1066. Court of Appeals No. 283970.

PEOPLE v SCHURTZ, Nos. 136996 and 136997. Leave to appeal denied at 482 Mich 1078. Court of Appeals Nos. 278056 and 278057.

PEOPLE v MESSENGER, No. 137031. Leave to appeal denied at 482 Mich 1067. Court of Appeals No. 284408.

PEOPLE v LANE, No. 137056. Leave to appeal denied at 482 Mich 1067. Court of Appeals No. 285688.

SPENCER v DEPARTMENT OF CORRECTIONS, No. 137117. Leave to appeal denied at 482 Mich 1068. Court of Appeals No. 284370.

SHOPE v AD TRANSPORT EXPRESS, INC, No. 137247. Leave to appeal denied at 482 Mich 1070. Court of Appeals No. 284276.

MCMILLIAN v DTE ENERGY, No. 137378. Leave to appeal denied at 482 Mich 1071. Court of Appeals No. 286371.

KENDALL v STATE BAR OF MICHIGAN, No. 137442; Leave to appeal denied at 482 Mich 1072. Court of Appeals No. 277330.

*Summary Disposition March 6, 2009:*

PEOPLE v NAYVON HILL, No. 137018. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals and direct that court to decide whether to grant, deny, or order other relief in accordance with MCR 7.205(D)(2). Defendant filed an application for appointed counsel within the one-year period following his guilty plea before his conviction became final. Before defendant filed this

application, the United States Supreme Court decided *Halbert v Michigan*, 545 US 605 (2005), in which the Court held that defendants who pleaded guilty have the right to appointed counsel. Therefore, the trial court here erred in denying defendant's request for appointed counsel, but corrected this error by granting defendant's renewed request for counsel. However, pursuant to *People v Thomas*, 480 Mich 1158 (2008), defendant's period for filing a late appeal should have been restarted on the date he was appointed counsel. Our decision in *People v Maxson*, 482 Mich 385 (2008), does not alter the outcome here. In *Maxson*, this Court held that *Halbert* does not apply retroactively to cases in which a defendant's conviction had become final before *Halbert* was decided, but here defendant's conviction was not final when *Halbert* was decided. We do not retain jurisdiction. Court of Appeals No. 284188.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE V DERRIK MCCOY, No. 137238. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals and reinstate the Kent Circuit Court's order denying defendant's untimely request for appointed appellate counsel, for the reasons stated in the Court of Appeals dissent. In a case involving a conviction following a guilty plea, the denial of appointed appellate counsel on the basis of the defendant's failure to comply with the 42-day deadline for requesting counsel in MCR 6.425(G)(1)(c) does not violate *Halbert v Michigan*, 545 US 605 (2005). Court of Appeals No. 283953.

KELLY, C.J. (*dissenting*). I dissent from this Court's decision to peremptorily reverse the Court of Appeals decision. I also disagree with the majority's hasty determination that *Halbert v Michigan*[1] is not violated in this case. Rather than summarily reversing the Court of Appeals, I would grant the application for leave to appeal. This application raises jurisprudentially significant issues. One concerns the authority of courts to grant untimely requests for appellate counsel. Another concerns the conflicting treatment these requests receive depending on whether the defendant was convicted by trial or by plea agreement. MCR 6.425(G)(1)(b); MCR 6.425(G)(1)(c).

FACTS AND PROCEDURAL HISTORY

Defendant pleaded guilty of second-degree murder and possessing a firearm during the commission of a felony under a plea agreement. At sentencing, he was advised that he had 42 days to request appointed counsel. He filed a standard form requesting counsel on the 68th day after his sentencing, which the circuit court denied as untimely. Acting pro se, defendant filed an application in the Court of Appeals. Citing *Halbert,* the Court of Appeals majority remanded the case to the circuit court to determine whether defendant was indigent and, if so, to appoint

[1] *Halbert v Michigan*, 545 US 605 (2005).

counsel in light of *Halbert*. Judge HOEKSTRA dissented and opined that the case was not controlled by *Halbert*; therefore, the circuit court had not erred in denying defendant's motion for appointed counsel. The prosecutor appealed.

*HALBERT* AND MCR 6.425(G)(1)

In *Halbert*, the United States Supreme Court held that indigent defendants have a constitutional right to appointed counsel to assist them in the first-tier appellate reviews of their guilty-plea convictions. The *Halbert* decision effectively overruled this Court's decision in *People v Bulger*,[2] in which a majority of this Court held that no such right existed under either the federal or the state constitution.

Currently, under MCR 6.425(G)(1)(b) and (c), indigent defendants convicted either by trial or plea agreement are entitled to the appointment of appellate counsel if they request counsel within 42 days of sentencing. MCR 6.425(G)(1)(b), which governs only requests for counsel by indigent defendants convicted at trial, states that "[t]he court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal." By contrast, MCR 6.425(G)(1)(c), which controls requests for counsel by indigent defendants convicted by plea agreement, contains no such provision and is entirely silent on the issue of untimely requests for counsel.

CONCLUSION

The central holding of *Halbert* is not directly implicated here. However, this case raises lingering issues unresolved by *Halbert* and implicates similar concerns about the disparate treatment of criminal defendants convicted by plea rather than a trial. Therefore, I would grant leave to appeal to consider: (1) whether circuit courts have the authority to grant indigent, plea-convicted defendants' delayed requests for appellate counsel under MCR 6.425(G)(1)(c) where the rule is entirely silent on the issue; (2) if so, what standards or criteria should be considered in granting such requests; (3) if not, whether *Halbert* requires more protection for plea-convicted defendants than the court rules currently provide; and (4) whether the disparity in treatment between tardy requests for appellate counsel made by indigent defendants convicted by trial and those convicted by plea is sustainable under the Equal Protection Clause.

I would not peremptorily reverse the Court of Appeals decision but would grant the application for leave to appeal.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v RAYMOND JONES, No. 137298. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals clearly erred by holding that the

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[2] *People v Bulger*, 462 Mich 495 (2000).

defendant was entitled to a new trial as a result of the ineffective assistance of trial counsel for the reasons stated by Judge WILDER in his partial concurrence. *People v Jones*, unpublished opinion per curiam of the Court of Appeals, issued August 12, 2008 (Docket No. 276690), at 2 (WILDER, J., concurring in part and concurring in the judgment). We remand this case to the Court of Appeals for consideration of whether the midtrial amendment of the information entitles defendant to a new trial. We do not retain jurisdiction. Court of Appeals No. 276690.

KELLY, C.J., and CAVANAGH, J. We would deny leave to appeal.

*Leave to Appeal Denied March 6, 2009:*

WILSON V KEIM, Nos. 137221, 137222, and 137223; Court of Appeals Nos. 275998, 276022, and 276446.

MARKMAN, J. (*concurring*). I write separately because I believe, contrary to the Court of Appeals, plaintiff's notice of intent is insufficient under MCL 600.2912b. Plaintiff's statement regarding proximate cause simply stated that "[h]ad [defendants] followed the standard of care . . . [plaintiff's decedent] would not have sustained the cardiac arrest" that caused his death. This statement is similar to the one that this Court found deficient in *Boodt v Borgess Med Ctr*, 481 Mich 558, 560 (2008). " '[I]t is not sufficient under [§ 2912b(4)(e)] to merely state that defendants' alleged negligence caused an injury.' " *Id*. Rather, MCL 600.2912b(4)(e) requires the notice to state the "manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice."

Nonetheless, I concur in the result here because I believe defendant waived any objection to the notice by not raising an objection until the middle of trial. In *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 67 (2002), this Court held that a defendant could effectively waive an objection to a deficient notice by failing to "invoke the pertinent statute of limitations after a plaintiff files suit." MCR 2.111(F)(3) requires a party to "state the facts constituting" a statute of limitations defense in its answer or response to the plaintiff's complaint. By failing to properly invoke the statute of limitations until the middle of trial, I believe defendant has waived any objection.

ROMERO V BURT MOEKE HARDWOODS, INC, No. 137262; Court of Appeals No. 271122.

WEAVER, J. (*concurring*). I concur in the order denying leave to appeal. As stated in my concurring statement in *Cain v Waste Management, Inc (After Remand)*, 472 Mich 236, 262 (2005), the word "loss" "includes not only amputation but also those situations in which there is a loss of the usefulness of the limb or member."

KELLY, C.J. I join the statement of Justice WEAVER.

MALONE V AETNA INDUSTRIES, No. 137718; Court of Appeals No. 285651.

MARKMAN, J. (*dissenting*). I would remand this case to the Court of Appeals for consideration as on leave granted. In this case, the workers' compensation magistrate determined that plaintiff had suffered a partial

disability, and both parties appealed. The Workers' Compensation Appellate Commission (WCAC) then remanded the matter to the magistrate for additional findings, and a second opinion was issued and it reiterated that plaintiff was only partially disabled. The WCAC majority then rejected this conclusion and determined at one point that plaintiff was "totally disabled." Yet, at another point, the same majority contradictorily indicated that plaintiff was entitled to a benefit rate as if he were totally disabled, "although partially disabled." Defendant then unsuccessfully sought leave to appeal in the Court of Appeals. I would remand this case to the Court of Appeals for consideration as on leave granted with instructions to determine: (1) whether the WCAC misapprehended its administrative appellate role in reviewing the decision of the magistrate, *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 732 (2000); (2) whether the WCAC opinion is inconsistent in its analysis; and (3) whether defendant is entitled to relief where the WCAC improperly equated wage-earning capacity with wages actually earned. MCL 418.361(1). The defendant, in my judgment, is entitled to a more coherent legal process than that which it has thus far received.

CORRIGAN, J. I join the statement of Justice MARKMAN.

*In re* FARQUHARSON (PEOPLE v CIRCUIT JUDGE), No. 137723; Court of Appeals No. 288558.

YOUNG, J. (*concurring*). I concur in this Court's order denying leave to appeal. I write separately to address the prosecutor's sanctionable behavior. The Court of Appeals was generous not to sanction the prosecutor for filing a frivolous complaint for superintending control, and, but for the fact that the people of Genesee County would have to pay for his actions, I would not continue that generosity.

The seed for these proceedings was planted when the trial court granted defendant Kerrick Farquharson's motion to use testimony of an unavailable witness at his trial. The prosecutor appealed, and the Court of Appeals reversed and remanded for a hearing.[1] On remand, the trial court again ruled that the testimony was admissible and scheduled trial for January 29, 2008. The prosecutor again sought leave to appeal in the Court of Appeals, but the Court denied leave to appeal for failure to persuade it of the need for immediate appellate review.[2] On January 31, 2008, the prosecutor filed an application for leave to appeal in this Court and sought immediate consideration. Rather than wait for this Court to act, however, the prosecutor voluntarily dismissed without prejudice all charges against defendant that same day. Accordingly, this Court dis-

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[1] *People v Farquharson*, 274 Mich App 268, 279 (2007). The prosecutor sought leave to appeal in this Court, but we denied leave "because we [were] not persuaded that the question presented should be reviewed by this Court prior to the completion of the proceedings ordered by the Court of Appeals." 732 NW2d 901 (2007).

[2] Unpublished order of the Court of Appeals, issued January 30, 2008 (Docket No. 283300).

missed the prosecutor's application for leave to appeal because it sought to appeal a ruling in a case that had been dismissed.[3]

The prosecutor immediately re-filed the charges against defendant. It is not clear whether the parties again raised the admissibility of the unavailable witness's statement in the trial court, but the prosecutor did not file an appeal after he re-filed charges. Instead, the prosecutor filed a complaint for superintending control in the Court of Appeals seeking "reversal" of the trial court's ruling *in the case that the prosecutor dismissed*. The Court of Appeals dismissed the prosecutor's complaint because the prosecutor had other adequate legal remedies available.[4]

Defendant's trial was rescheduled to begin on December 5, 2008. The prosecutor sought leave to appeal in this Court and we have denied leave.[5]

Pursuant to MCR 7.316(D)(1)(a), "[t]he Court may, on its own initiative . . . assess actual and punitive damages . . . when it determines that an appeal or any of the proceedings in an appeal was vexatious because . . . the appeal was taken . . . without any reasonable basis for belief that there was a meritorious issue to be determined on appeal."

Assistant Prosecuting Attorney Donald A. Kuebler is an experienced appellate practitioner. Unfortunately, Mr. Kuebler is not a stranger to frivolous appellate arguments in this Court.[6] In this case, Mr. Kuebler attempted an end-run around a ruling in a case he appealed but then dismissed. And he did so on a basis that was clearly without merit. In addition, I wish to note that, due in part to the prosecutor's dissatisfaction with the prior proceedings, defendant was imprisoned without a trial for over three years.

I am not certain whether Mr. Kuebler thought that he was being "clever," but I want to assure him that he was not. MCR 3.302(B) provides: "If another adequate remedy is available to the party seeking the order, a complaint for superintending control may not be filed." And MCR 3.302(D)(2) reinforces: "When an appeal in the Supreme Court, the Court of Appeals, the circuit court, or the recorder's court is available, that method of review must be used. If superintending control is sought and an appeal is available, the complaint for superintending control must

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[3] Unpublished order of the Supreme Court, entered March 24, 2008 (Docket No. 135744).

[4] Unpublished order of the Court of Appeals, issued November 14, 2008 (Docket No. 288558), citing MCR 3.302(B), (D)(2).

[5] While the prosecutor's application for leave to appeal was pending, defendant's trial commenced and he was convicted on December 29, 2008, of second-degree murder, MCL 750.317, assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b.

[6] See, e.g., *People v Frazier*, 478 Mich 231, 240-241 (2007), where Mr. Kuebler urged this Court to ignore an unappealed federal district court's habeas corpus order despite conceding that this Court is "bound by the unchallenged federal court determination."

be dismissed." Before the prosecutor dismissed the charges, an application for leave to appeal was pending in this Court. Thus, an appeal to the Supreme Court was available. Unsatisfied with that remedy, the prosecutor abandoned it by dismissing the charges.

In the instant proceedings, an adequate remedy remained available. The prosecutor could have sought to exclude the unavailable witness's testimony and pursued an interlocutory appeal in the Court of Appeals if his motion were once again denied. Of course, that remedy was unappealing to Mr. Kuebler because it did not previously provide the remedy that he believed he was entitled to within the time frame that he desired. Nonetheless, an adequate remedy remained available and Mr. Kuebler was expressly prohibited from circumventing our rules of appellate procedure.

Accordingly, I concur in this Court's order denying leave to appeal and, but for the fact that the people of Genesee County would incur the cost, I would impose sanctions pursuant to MCR 7.316(D)(1)(a).

HANNAFORD v MORRISON, No. 138219; Court of Appeals No. 289977.

BEYKO v BERNITSAS, No. 138220; Court of Appeals No. 289528.

TACCO FALCON POINT, INC v CLAPPER, No. 138253; Court of Appeals No. 290313.

*In re* AUSTIN (DEPARTMENT OF HUMAN SERVICES v AUSTIN), No. 138268; Court of Appeals No. 285208.

*Leave to Appeal Denied March 13, 2009:*

SELFLUBE, INC v JJMT, INC, No. 136377; reported below 278 Mich App 298.

KYSER v KASSON TOWNSHIP, No. 136680; reported below: 278 Mich App 743.

WEAVER, J., did not participate in this case because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family.

CORRIGAN, J. (*dissenting*). Today's decision denies this Court the opportunity to inquire about the justification for past decisions of this Court that have read into the law provisions that were never placed there by the Legislature itself. As a consequence, the general rule of judicial deference to the decisions of local zoning authorities has been altered with regard to the extraction of natural resources, and the judiciary has been afforded a considerably greater role in questioning the judgments of such authorities and effectively acting as a super zoning commission.

I respectfully dissent from the order denying defendant's application for leave to appeal. I would grant leave to appeal because I believe that this Court should examine the unconstitutional implications of the "very serious consequences" rule first adopted in *Silva v Ada Twp*, 416 Mich 153 (1982).

Defendant Kasson Township denied plaintiff Edith Kyser's application to rezone her property for gravel mining. Defendant asserted that granting plaintiff's application would undermine its comprehensive zoning scheme and engender applications from numerous other property owners for a similar rezoning of their properties. Plaintiff filed suit, contending that defendant's refusal violated her substantive due process rights because gravel mining on her property would cause no "very serious consequences" under *Silva*. After a bench trial, the Leelanau Circuit Court held that because plaintiff's request for rezoning would not result in very serious consequences, plaintiff could mine gravel on her property. The Court of Appeals affirmed in a divided decision. *Kyser v Kasson Twp*, 278 Mich App 743 (2008). Defendant now seeks leave to appeal to this Court.

In *Silva*, the Court held that "zoning regulations which prevent the extraction of natural resources are invalid unless 'very serious consequences' will result from the proposed extraction." *Silva, supra* at 156. The *Silva* Court characterized its holding as "reaffirming" the rule of *Certain-teed Products Corp v Paris Twp*, 351 Mich 434 (1958). *Id*. As Justice RYAN noted in his partial concurrence and dissent in *Silva*, however, "the supposed 'rule' favoring the removal of natural resources unless 'very serious consequences' would result was merely obiter dictum" in *Certain-teed Products* and an earlier case on which the *Silva* majority also relied, *City of North Muskegon v Miller*, 249 Mich 52 (1929). *Silva*, *supra* at 165. Therefore, although ostensibly reaffirming the rule of *Certain-teed Products*, the *Silva* Court adopted the "very serious consequences" rule for the first time. In so doing, *Silva* created a new rule without fully grappling with the unconstitutional implications of that rule.

In my view, this Court should reexamine the "very serious consequences" rule for myriad reasons. First, the rule upsets the traditional separation of powers because it compels courts to engage in an expansive review that essentially crafts state and local zoning and environmental policy. This Court "does not sit as a superzoning commission"; instead, "[t]he people of the community, through their appropriate legislative body, and not the courts, govern its growth and its life." *Robinson v Bloomfield Hills*, 350 Mich 425, 430-431 (1957). In contrast, the "very serious consequences" rule violates this Court's well-established principle of not substituting "our judgment for that of the legislative body charged with the duty and responsibility in the premises." *Id*. at 431. If a reviewing court wishes to follow the *Silva* rule, the court must, in effect, substitute its opinion regarding the appropriateness of the designation at issue for the opinion of the local zoning authority, thereby exercising a legislative function.

Moreover, the rule stands in stark contrast to the traditional rules under which plaintiff may challenge the validity of a zoning ordinance. According to the traditional rules, plaintiff has the burden of proving, "first, that there is no reasonable governmental interest being advanced by the present zoning classification itself . . . or secondly, that an ordinance may be unreasonable because of the purely arbitrary, capricious and unfounded exclusion of other types of legitimate land use from the

area in question." *Kropf v Sterling Hts*, 391 Mich 139, 158 (1974). Under the "very serious consequences" rule, however, the burden shifts from the plaintiff to the municipality. Plaintiff no longer must "prove affirmatively that the ordinance is an arbitrary and unreasonable restriction upon the owner's use of his property." *Id*. at 162 (quotation marks and citation omitted). Instead, the municipality must convince the trial court that because the anticipated consequences of allowing mining cannot be otherwise mitigated, it has a compelling interest in preventing "very serious consequences" by denying a rezoning application.

The amici curiae briefs of the State Bar's Public Corporation Law Section (PCLS), the American Planning Association (APA), and the Michigan Association of Planning (MAP) underscore the jurisprudential significance of the "very serious consequences" rule. The PCLS argues that the subsequent enactment of MCL 125.3207, which prohibits townships from excluding lawful land uses, has superseded the *Silva* Court's "very serious consequences" rule. The APA and the MAP also challenge two faulty justifications often cited to support the *Silva* rule. They argue that the mere presence of minerals on property is not so unusual that courts should elevate it above general land use regulations. Moreover, the APA and the MAP note that the appropriate forum in which to establish statewide natural resource management policies is the Legislature, not the courts. Because our Legislature has yet to adopt any policy establishing mining or extraction as a preferred land use, the *Silva* Court erred when it legislated that policy by judicial decree.

Accordingly, I would grant leave to appeal to examine the unconstitutional implications of the "very serious consequences" rule.

YOUNG, J. I join the statement of Justice CORRIGAN.

PEOPLE v KEITH TAYLOR, No. 138188; Court of Appeals No. 284331.

*Summary Disposition March 18, 2009:*

PEOPLE v ROBERT BAILEY, No. 137688. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the Court of Appeals' double jeopardy analysis and remand this case to that court for reconsideration, under the five-factor test recognized by this Court in *People v Mezy*, 453 Mich 269, 285 (1996), of the defendant's argument that his two convictions of conspiracy to deliver less than 50 grams of cocaine violate double jeopardy principles. We note that *People v Manning*, 163 Mich App 641 (1987), which the Court of Appeals cited in its judgment, is no longer controlling to the extent it is inconsistent with *Mezy*, *supra*. In all other respects, the application for leave to appeal is denied because we are not persuaded that the questions presented should be reviewed by this Court. We do not retain jurisdiction. Court of Appeals No. 278047.

EWIE COMPANY, INC v MAHAR TOOL SUPPLY, INC, No. 137710. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The Court of Appeals erred in ruling that, because Mahar/EWIE, LLC's (the LLC) operating agree-

ment is ambiguous regarding whether the members of the LLC must agree to dissolution notwithstanding a termination date listed in the articles of organization, the Washtenaw Circuit Court's grant of summary disposition to the plaintiffs on their claim for judicial dissolution of the LLC must be reversed. MCL 450.4801 provides that "[a] limited liability company is dissolved and its affairs shall be wound up when the first of the following occurs: (1) automatically at the time specified in the articles of organization." Accordingly, any ambiguity in the operating agreement is irrelevant, given the termination date specified in the articles of organization. We remand this case to the Washtenaw Circuit Court for reconsideration of the plaintiffs' motion for summary disposition on their claim for judicial dissolution, in light of MCL 450.4515(1)(b), which provides that if a member of a limited liability company establishes that the acts of managers or members in control of a limited liability company are illegal or fraudulent or constitute willfully unfair and oppressive conduct toward the limited liability company or the member, "the circuit court may issue an order or grant relief as it considers appropriate, including . . . the cancellation or alteration of a provision in the articles of organization." We do not disturb the Court of Appeals' reversal of the circuit court's grant of summary disposition to the plaintiffs on the defendant's counterclaim and third-party complaint. 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. Court of Appeals No. 276646.

*Leave to Appeal Denied March 18, 2008:*

PEOPLE v RIDDLE-BEY, No. 136239. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 279507.

RABOCZKAY v CITY OF TAYLOR, No. 137027; Court of Appeals No. 277772.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

SIMON v WIDRIG, No. 137161; Court of Appeals No. 277070.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

NOE v CITY OF DETROIT, No. 137392; Court of Appeals No. 278727.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

PEOPLE v DAVENPORT, No. 137419. A presumption of prejudice exists when a defendant's former defense counsel joins the prosecutor's office that is pursuing the case against the defendant. MRPC 1.9(b), 1.10(b). Such a presumption may be overcome, however, if the prosecutor shows that the attorney who has a conflict of interest was properly screened out from "any participation in the matter." MRPC 1.10(b)(1). *State v McClel-*

*lan*, 179 P3d 825 (Utah App, 2008), on which the Court of Appeals therefore unnecessarily relied, is fully consistent with these principles. Reported below: 280 Mich App 464.

PEOPLE v MEXICO, No. 137709; Court of Appeals No. 287052.

ADAIR v UTICA COMMUNITY SCHOOLS, No. 138115. This denial is without prejudice to the defendant's ability to file a motion requesting that the Macomb Circuit Court set the dollar amount of a stay bond in an amount adequate to protect the opposite party, pursuant to MCR 7.209(B)(1). Court of Appeals No. 288286.

*Leave to Appeal Denied March 20, 2009:*

TAYLOR v CURRIE, No. 135728; reported below: 277 Mich App 85.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

HATHAWAY, J. I would grant leave to appeal to address the issue whether a city, township, or village clerk is authorized under Michigan election law, specifically, MCL 168.759(5), to mass-mail unsolicited absentee voter ballot applications to qualified voters.

HOWE v BOUCREE, No. 136926. Leave to appeal is denied in relation to the judgment of the Court of Appeals ordering a new trial because of misconduct by the plaintiff's attorney. As stated by the panel, the resolution of this issue renders the other appellate issues moot. Accordingly, we vacate the remainder of the Court of Appeals judgment. The application for leave to appeal as cross-appellants is denied. Court of Appeals No. 273949.

KELLY, C.J. I would grant leave to appeal.

GENESEE FOODS SERVICES, INC v MEADOWBROOK, INC, No. 137526; reported below: 279 Mich App 649.

KELLY, C.J. (*concurring*). Defendant, an independent insurance agency, had an agreement with nonparty Citizens Insurance Company of America (Citizens), whereby defendant wrote and sold insurance contracts for Citizens. Defendant sold a Citizens insurance policy to plaintiff that was in effect when a fire destroyed plaintiff's business facility. Plaintiff made and settled an insurance claim against Citizens and released Citizens and its "agents" from any actions relating to events that occurred before the execution of the release. Later, plaintiff sued defendant, claiming that the coverage that defendant had advised it to obtain was inadequate. Defendant moved for summary disposition, arguing that the language of the release unambiguously barred plaintiff's claim. The trial court denied the motion, and the Court of Appeals affirmed.

On appeal to this Court, defendant asserts that the lower courts erred. The release in question states, in pertinent part:

> In consideration of . . . payment . . . the Undersigned do hereby release and forever discharge Citizens . . . and each of its servants, *agents*, adjusters, employees, attorneys, *related companies*, parent

> companies and subsidiaries of and from any and all claims, debts, dues, actions, causes of action, and demands which the Undersigned now have or may have against the . . . Releasees for or on account of any matter or thing that has at any time heretofore occurred . . . . [Emphasis added.]

The trial court concluded that a factual issue exists about whether defendant was an agent of Citizens, of plaintiff, or of both, and whether the release extinguished defendant's liability to plaintiff. The trial court also noted that it was "impressed that [plaintiff] had no knowledge of the written agency agreement [between Citizens and defendant] when it signed the release."

The Court of Appeals agreed with the trial court. It held that, when an independent insurance agent facilitates the sale of an insurance policy, it is considered an agent of the insured; it is not an agent of the broker.[1] Accordingly, defendant had a primary fiduciary duty of loyalty to plaintiff. On that basis, the Court of Appeals affirmed the trial court and held that a factual question exists regarding whether the release exempted defendant from liability.

I agree with the trial court and the Court of Appeals. *West American Ins Co* is persuasive in that, because defendant was acting as an independent insurance agent when it assisted plaintiff, its primary fiduciary duty of loyalty was owed to plaintiff. Plaintiff could therefore depend on this duty of loyalty to ensure that defendant was acting in its best interest. This included finding an insurer that could provide plaintiff with comprehensive coverage and ensuring that the insurance contract properly addressed plaintiff's needs. Thus, because defendant was an agent of plaintiff, not Citizens, the release did not free defendant from liability. As the Court of Appeals aptly pointed out:

> Were we to hold otherwise, we would have to conclude that plaintiff[], in signing the release of Citizens and its agents, intentionally released their own agents (defendants) regarding the very transaction for which defendants owed plaintiffs the primary duty of loyalty and expertise. Such a conclusion would violate reason and common sense.[2]

I believe that the Court of Appeals correctly held that whether defendant is a "related company" of Citizens within the meaning of the release is a question of fact. The term "related company" is not defined in the release. It could have several meanings. Thus, a factual determination is necessary to resolve whether the parties intended defendant to be released from liability as a "related company."

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[1] *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 659 (2008), citing *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310 (1998).

[2] *Id.* at 657.

Finally, I believe it is appropriate to deny leave to appeal in this case because plaintiff was unaware of the relationship between defendant and Citizens. It makes no sense to construe the release as extinguishing defendant's liability when plaintiff was unaware of the underlying relationship.

For these reasons stated, I believe that the Court of Appeals analysis is correct. The trier of fact could ultimately determine that the release covered defendant. However, I do not believe that the Court should substitute its judgment for that of the trial court or play the role of fact-finder. The case should proceed to trial. Accordingly, I concur in the Court's decision to deny leave to appeal.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. While I generally concur with Justice MARKMAN's analysis, I write separately to underscore the errors in the Court of Appeals published decision. I would either peremptorily reverse or grant leave to appeal in this action involving claims of negligence, breach of fiduciary duty, and breach of contract because the Court of Appeals erroneously affirmed the order denying defendant's motion for summary disposition under MCR 2.116(C)(7) (settlement and release). The unambiguous language of the compromise settlement release and hold-harmless agreement precluded plaintiff's cause of action. In my view, Judge KIRSTEN FRANK KELLY's dissent correctly states the governing legal principles. *Genesee Foods Services, Inc v Meadowbrook, Inc*, 279 Mich App 649, 658-661 (2008).

Defendant Meadowbrook, an independent insurance agency, executed an agreement with Citizens Insurance licensing it to sell, accept, and bind Citizens to insurance contracts. The 1988 agreement between Meadowbrook and Citizens specifically provided, "[b]y signing this agreement you become an agent for the companies indicated above." Accordingly, Meadowbrook became Citizens' agent. In March 2001, defendant arranged for plaintiff Genesee Foods to purchase commercial general liability and property insurance through Citizens. After a fire destroyed almost all of plaintiff's property in August 2003, plaintiff's business became inoperable.

Plaintiff submitted a claim to Citizens for property damage and business interruption loss because of the fire. In November 2003, plaintiff and Citizens settled their claims and executed a release that provides in relevant part:

> The Undersigned do hereby release and forever discharge the Citizens Insurance Company of America and each of its servants, agents, adjusters, employees, attorneys, related companies, parent companies and subsidiaries (hereinafter "Citizens Releasees") of and from any and all claims, debts, dues, actions, causes of action and demands, whatsoever, which the Undersigned now have or may have against Citizens Releasees for or on account of any matter or thing that has any time heretofore occurred, particularly, but without limiting the generality hereof, all claims and demands arising out of its policy number . . . .

Citizens issued its final check to plaintiff on November 23, 2005. Soon thereafter, plaintiff filed suit against defendant, alleging that defendant had not procured sufficient insurance coverage for plaintiff and that defendant Meadowbrook was its agent, not the agent of Citizens.

Defendant moved for summary disposition under MCR 2.116(C)(7) (settlement and release). Defendant argued that the unambiguous language of the release precluded plaintiff's cause of action because plaintiff's suit fell within "any and all claims, debts, dues, actions, causes of actions and demands, whatsoever." The trial court denied the motion. In a divided published opinion, Judge OWENS and Chief Judge SAAD affirmed the trial court. Judge KELLY dissented because she concluded that the terms of the release were unambiguous and should be enforced as written.

I agree with Judge KELLY. Unambiguous contracts are enforced as written unless a contractual provision violates law or public policy. *Rory v Continental Ins Co*, 473 Mich 457, 491 (2005). Moreover, a release must be fairly and knowingly made to be valid. *Batshon v Mar-Que Gen Contractors, Inc*, 463 Mich 646, 649 n 4 (2001). If the language of a release is clear and unambiguous, the intent of the parties is ascertained from the plain and ordinary meaning of the language. *Id*.

Here, the unambiguous language of the release uses the unmodified term "agents." The release does not restrict or otherwise limit the class of agents to be released. The 1988 agency agreement explicitly stated, "[b]y signing this agreement you become an agent of the companies listed above." Neither party disputes the existence of this agency agreement. Defendant acted within the scope of its agency agreement when it arranged for plaintiff to purchase insurance through Citizens. I do not think that cases stating that an independent agent is ordinarily an agent for the insured are pertinent when the defendant establishes its agency agreement and the release squarely absolves agents from all claims and demands. As Judge KELLY concluded, the language of the release is expansive and all-inclusive. Because defendant is an undisputed agent of Citizens, defendant falls within the broad scope of the release between Citizens and plaintiff. The plain language of the release permits no other result. Accordingly, I would grant leave to appeal or peremptorily reverse and order summary disposition for defendant.

YOUNG and MARKMAN, JJ. We join the statement of Justice CORRIGAN.

MARKMAN, J. (*dissenting*). It is well established that " 'competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.' " *Terrien v Zwit,* 467 Mich 56, 71 (2002), quoting *Twin City Pipeline v Harding Glass* 283 US 353, 356 (1931); see also *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 319 (discussing the " 'fundamental policy of freedom of contract,' " under which " 'parties are generally free to agree to whatever specific rules they like' ") (citation omitted). By denying leave to appeal in this case, the majority disregards this principle.

Meadowbrook wrote and sold insurance policies for Citizens. Genesee Foods Services, Inc. (GFS), bought one of these policies from Meadowbrook. GFS's facility was destroyed in a fire. GFS settled its claim against

Citizens, and signed a release in favor of Citizens and all its agents. GFS then brought this action against Meadowbrook, and the trial court denied Meadowbrook's motion for summary disposition. In a published and split decision, the Court of Appeals affirmed. *Genesee Foods Services, Inc v Meadowbrook, Inc,* 279 Mich App 649 (2008).

(A) The release pertains to "each of [Citizens'] . . . agents"; (B) Meadowbrook is one of these agents as evinced by the fact that it had entered into an agreement with Citizens stating, "By signing this agreement you become an agent for the companies indicated above," and "Citizens" is one of the companies indicated above; and (C) therefore, the release pertains to Meadowbrook.

The Court of Appeals held that although Meadowbrook "signed an agreement to become an agent for Citizens," *id.* at 650, Meadowbrook's "primary fiduciary duty of loyalty rested with [GFS]." *Id.* at 656. However, the release here applies to "each" of Citizens' agents. Thus, the pertinent question is not to whom does Meadowbrook owe a greater or lesser fiduciary duty, but only whether Meadowbrook is Citizens' "agent." Because Meadowbrook indisputably is Citizens' agent, the release applies to Meadowbrook. The contract here could not be more clear. Furthermore, I am not aware of any authority, and the concurring justice cites none, that supports the proposition that the party signing a release must *know* who all of the other party's agents are in order to release all those agents from liability.

While the instant contract in dispute may not seem to be of great consequence beyond the parties, it is entirely typical of thousands of such contracts freely entered into by "competent persons" throughout this state each day. And it is essential to the rule of law that these contracts be respected and that this Court provide the leadership and direction to ensure that this occurs. Although it is well established that "courts cannot rewrite the parties' contracts," *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197 (2008), the majority today allows the Court of Appeals to do just that. Accordingly, I would reverse the Court of Appeals judgment.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

HENRY v HENRY, No. 138185; Court of Appeals No. 288803.

*Summary Disposition March 23, 2009:*

PEOPLE v DULEY, No. 137194. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Wayne Circuit Court, and we remand this case to the trial court for resentencing. The trial court erred in assessing 25 points under prior record variable 1, MCL 777.51, because the defendant did not have any prior high severity felony convictions. 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. Court of Appeals No. 284737.

*Leave to Appeal Denied March 23, 2009:*

WISE v MASTROMARCO, No. 136284; Court of Appeals No. 280254.

HATHAWAY, J. (*not participating*). I recuse myself and will not be participating in this case because my law clerk was a witness in this case. See MCR 2.003(B); Code of Judicial Conduct, Canon 2 (stating that "[a] judge must avoid all impropriety and appearance of impropriety").

BUTLER v FARM BUREAU MUTUAL INSURANCE COMPANY OF MICHIGAN, No. 136521; Court of Appeals No. 275679.

PEOPLE v WOODS, No. 136768. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282365.

PEOPLE v JAKAJ, No. 136821. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284418.

PEOPLE v ANTOINE JACKSON, No. 136837; Court of Appeals No. 272776.

MAMOU v CUTLIP, No. 136927; Court of Appeals No. 275862.

PEOPLE v JAMES BRIDGES, JR, No. 136952; Court of Appeals No. 275300.

PEOPLE v PHILLIP BROWN, II, No. 137072. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 283419.

PEOPLE v LANDRUM, No. 137084; Court of Appeals No. 282403.

LAZECHKO v AUTO OWNERS INSURANCE COMPANY, No. 137113; Court of Appeals No. 276111.

PEOPLE v EARL JONES, No. 137217. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282850.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Scott*, 480 Mich 1019 (2008).

ZAREMBA EQUIPMENT, INC v HARCO NATIONAL INSURANCE COMPANY, No. 137263; reported below: 280 Mich App 16.

PEOPLE v ANNE BROWN, No. 137266. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285537.

PEOPLE v JAMARR JOHNSON, No. 137324; Court of Appeals No. 286169.

PEOPLE v ANTHONY JONES, No. 137346; Court of Appeals No. 286560.

PEOPLE v SONDEY, No. 137382. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285340.

PEOPLE v GRANT, No. 137383; Court of Appeals No. 286315.

PEOPLE v JAMES MARTIN, No. 137386. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285311.

SHAWL v SPENCE BROTHERS, INC, No. 137388; reported below: 280 Mich App 213.

PEOPLE v COY, No. 137391. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284870.

PEOPLE v YOWELL, No. 137398. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284907.

PEOPLE v MOSES WILLIAMS, No. 137406. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282947.

PEOPLE v ANTONIO HUNTER, No. 137416. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285529.

PEOPLE v NIXON, No. 137434. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286317.

PEOPLE v EADY, No. 137452. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284560.

PEOPLE v HARVEY DURR, No. 137460. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286838.

PEOPLE v MURPHY, No. 137462. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284698.

PEOPLE v CANNON, No. 137463. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285785.

PEOPLE v DERRY THOMAS, No. 137470. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 285996.

PEOPLE v WHITMAN, No. 137517. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283917.

PEOPLE v DUVALL, No. 137555. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285013.

BASKERVILLE v RIVER ROUGE PUBLIC SCHOOLS BOARD OF EDUCATION, No. 137556; Court of Appeals No. 285291.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v JUNCO, No. 137565; Court of Appeals No. 279731.

PEOPLE v TERENCE PEOPLES, No. 137567; Court of Appeals No. 285415.

PEOPLE v MEEK, No. 137570. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285533.

PEOPLE v HUMBERT, No. 137571. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283942.

CHABIAA v CHABIAA, No. 137575; Court of Appeals No. 279419.

PEOPLE v HENDLEY, No. 137578. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284940.

PEOPLE v CLINTON, No. 137580; Court of Appeals No. 287036.

PEOPLE v BURSLER, No. 137592; Court of Appeals No. 277473.

PEOPLE v PERRIN, No. 137616. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284105.

STATE AUTO PROPERTY & CASUALTY INSURANCE COMPANY v A-3, INC, No. 137625; Court of Appeals No. 276535.

PEOPLE v MARSHALL, No. 137634; Court of Appeals No. 287108.

PEOPLE v GOOSBY, No. 137647; Court of Appeals No. 278796.

PEOPLE v PARIS, No. 137649; Court of Appeals No. 278571.

BUCKLEY v PROFESSIONAL PLAZA CLINIC CORPORATION, No. 137670; reported below: 281 Mich App 224.

CHAMPION v SECRETARY OF STATE, No. 137690; reported below: 281 Mich App 307.

WAR-AG FARMS, LLC v FRANKLIN TOWNSHIP, No. 137692; Court of Appeals No. 270242.

PEOPLE v GEISE, No. 137696; Court of Appeals No. 280814.

PEOPLE v REDDRICK, No. 137700; Court of Appeals No. 287610.

PEOPLE v TRIPLETT, No. 137721; Court of Appeals No. 279969.

PEOPLE v MCHENRY, No. 137728; Court of Appeals No. 279071.

PEOPLE v GORECKI, No. 137739; Court of Appeals No.277448.

KELLY, C.J. I would grant leave to appeal to reconsider *People v Taylor*, 482 Mich 368 (2008).

PEOPLE v FLETCHER, No. 137775; Court of Appeals No. 274069.

PEOPLE v HOWARD, No. 137778; Court of Appeals No. 287609.

LEE v LEE, No. 137779; Court of Appeals No. 283685.

PEOPLE v CUMPER, No. 137811; Court of Appeals No. 274068.

PEOPLE v MARIO MARTINEZ, No. 137813; Court of Appeals No. 278588.

DUVALL v BRONSON METHODIST HOSPITAL, Nos. 137814 and 137827; Court of Appeals No. 277767.

PEOPLE v BYRON MOORE, No. 137816; Court of Appeals No. 276519.

PEOPLE v STEVEN THOMAS, No. 137822; Court of Appeals No. 278956.

DOWE v DEPARTMENT OF CORRECTIONS, No. 137824; Court of Appeals No. 286447.

PEOPLE v DIING, No. 137826; Court of Appeals No. 288003.

PEOPLE v MARTINEZ-MURO, No. 137832; Court of Appeals No. 288220.

PEOPLE v BANKS, No. 137834; Court of Appeals No. 278800.

PEOPLE v JACQUES, No. 137839; Court of Appeals No. 287698.

PEOPLE v STEVE SMITH, No. 137840; Court of Appeals No. 287971.

PEOPLE v JEREMY RUCKER, No. 137851; Court of Appeals No. 280082.

PEOPLE v GOBEL, No. 137855; Court of Appeals No. 278585.

PEOPLE v DENNIS HALL, No. 137860; Court of Appeals No. 273908.

PEOPLE v PERRUZZI, No. 137882; Court of Appeals No. 280703.

PEOPLE v COWANS, No. 137891; Court of Appeals No. 279247.

PEOPLE v DABABNEH, No. 137903; Court of Appeals No. 278537.

PEOPLE v STEVEN RODRIGUEZ, No. 137904; Court of Appeals No. 281133.

PEOPLE v TONEY, No. 137910; Court of Appeals No. 274752.

PEOPLE v PEREZ, No. 137918; Court of Appeals No. 288121.

PEOPLE v SHANKLIN, No. 137925; Court of Appeals No. 288385.

BUREAU OF HEALTH PROFESSIONS v TOTIN, No. 137926; Court of Appeals No. 285656.

SPARAPANI v IRON COUNTY COMMUNITY HOSPITALS, INC, No. 137927; Court of Appeals No. 286611.

PEOPLE v MEYERS, No. 137928; Court of Appeals No. 285206.

PEOPLE v JAMES DARYL WILLIAMS, No. 137929; Court of Appeals No. 287861.

MAYES v LIVINGSTON, No. 137930; Court of Appeals No. 288148.

PEOPLE v SETTLES, No. 137931; Court of Appeals No. 278704.

KELLY, C.J. I would grant leave to appeal to reconsider *People v Maxson,* 482 Mich 385 (2008).

CAVANAGH, J. I would grant leave to appeal.

LIVINGSTON V WASHTENAW CIRCUIT JUDGE, No. 137932; Court of Appeals No. 288273.

PEOPLE V ROGERS, No. 137939; Court of Appeals No. 279521.

PEOPLE V PAIGE, No. 137945; Court of Appeals No. 288049.

PEOPLE V MARCUS HUNTER, No. 137947; Court of Appeals No. 280677.

KRUSE V CORT FURNITURE RENTAL, No. 137952; Court of Appeals No. 286375.

PEOPLE V BRICKER, No. 137956; Court of Appeals No. 277716.

WILLIAMS V FRANKENMUTH BAVARIAN INN, INC, No. 137958; Court of Appeals No. 283898.

PEOPLE V BARRY ADAMS, No. 137959; Court of Appeals No. 276845.

PEOPLE V JERRY ANDERSON, No. 137961; Court of Appeals No. 287881.

PEOPLE V WELCH, No. 137962; Court of Appeals No. 288426.

THE BEHLER-YOUNG COMPANY V AC BEAUDRY, INC, No. 137966; Court of Appeals No. 277775.

PEOPLE V BOND, No. 137975; Court of Appeals No. 280616.

ANGLIN V DELPHI AUTOMOTIVE SYSTEMS, INC, No. 137976; Court of Appeals No. 287097.

BANKS V GENERAL MOTORS CORPORATION, No. 137977; Court of Appeals No. 287096.

PEOPLE V SHAMBLEN, No. 137981; Court of Appeals No. 288085.

PEOPLE V WERTH, No. 137985; Court of Appeals No. 288151.

SCOTTI V SCOTTI, No. 137991; Court of Appeals No. 279672.

PEOPLE V JOHNNY ADAMS, No. 138005; Court of Appeals No. 276204.

PEOPLE V TAMIKA WILLIAMS, No. 138008; Court of Appeals No. 279631.

PEOPLE V MCCRARY, No. 138014; Court of Appeals No. 280085.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

PEOPLE V MACCORMICK, No. 138022; Court of Appeals No. 288448.

MCCARTHY V SCOFIELD, No. 138034; Court of Appeals No. 284129.

PEOPLE V STEUDLE, No. 138035; Court of Appeals No. 288078.

PEOPLE v HEADD, No. 138037; Court of Appeals No. 279740.

PEOPLE v WELLINGTON, No. 138043; Court of Appeals No. 281529.

PEOPLE v DARNELL WATKINS, No. 138059; Court of Appeals No. 278953.

PEOPLE v KEALOHAPAUOLE, No. 138061; Court of Appeals No. 279238.

BLUE HARVEST, INC v DEPARTMENT OF TRANSPORTATION, No. 138065; Court of Appeals No. 281595.

*Reconsideration Denied March 23, 2009:*

PEOPLE v JENDRZEJEWSKI, No. 136585. Leave to appeal denied at 482 Mich 1032. Court of Appeals No. 280066.

PEOPLE v DIAZ, No. 136755. Leave to appeal denied at 482 Mich 1064. Court of Appeals No. 282121.

PEOPLE v PETRI, No. 136775. Leave to appeal denied at 482 Mich 1186. Court of Appeals No. 275019.

KIM v KIM, No. 136797. Leave to appeal denied at 482 Mich 1033. Court of Appeals No. 277362.

MINGO v BRUSH PARK CITIZENS DISTRICT COUNCIL, No. 136982. Leave to appeal denied at 482 Mich 1066. Court of Appeals No. 277403.

CARR v FORD MOTOR COMPANY, Nos. 137025 and 137026. Leave to appeal denied at 482 Mich 1186. Court of Appeals No. 273675 and 274251.

SHORTER v GARNER, No. 137122. Leave to appeal denied at 482 Mich 1068. Court of Appeals No. 275149.

PEOPLE v LAWTON, No. 137127. Leave to appeal denied at 482 Mich 1186. Court of Appeals No. 285705.

LANE v MAGNUM CORPORATION, No. 137152. Leave to appeal denied at 482 Mich 1069. Court of Appeals No. 275939.

PEOPLE v VARNEY, No. 137156. Leave to appeal denied at 483 Mich 881. Court of Appeals No. 284050.

PEOPLE v OETMAN, No. 137257. Leave to appeal denied at 482 Mich 1119. Court of Appeals No. 283574.

KELLY, C.J. I would grant reconsideration and, on reconsideration, would reverse the Court of Appeals and reinstate the trial court's order.

WALGREEN COMPANY v MACOMB TOWNSHIP, No. 137269. Leave to appeal denied at 482 Mich 1187. Court of Appeals No. 276829.

PEOPLE v PLAIR, No. 137394. Leave to appeal denied at 482 Mich 1071. Court of Appeals No. 274575.

PEOPLE v MARQUIS THOMAS, No. 137504. Leave to appeal denied at 483 Mich 854. Court of Appeals No. 277256.

INGERSOLL v TUESLEY, No. 137568. Leave to appeal denied at 483 Mich 882. Court of Appeals No. 276828.

PEOPLE v CUSHMAN, No. 137600. Leave to appeal denied at 483 Mich 855. Court of Appeals No. 279240.

*Superintending Control Denied March 23, 2009:*

LAWRENCE v BOARD OF LAW EXAMINERS, No. 138077.

*Summary Disposition March 25, 2009:*

PEOPLE v GONZALES, No. 137299. In lieu of granting leave, we reverse the Saginaw Circuit Court's order denying defendant's request for the production of his trial records, and we remand this case to the circuit court for production of the requested records under MCR 6.433(C). The circuit court did not err in applying the court rules to deny defendant's requests. However, the court's order merely delayed defendant's inevitable, meritorious request for the records under MCR 6.433(C). Court of Appeals No. 283798.

*Leave to Appeal Denied March 25, 2009:*

SIMPSON v DEPARTMENT OF CORRECTIONS, No. 137273; Court of Appeals No. 275554.

KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

LLAMAS GROUP v HURON VALLEY SCHOOLS, No. 137357; Court of Appeals No. 275933.

NORTH POINT-PIONEER INC INC v RUBENFAER, No. 137657; Court of Appeals No. 279840.

*Rehearing Granted March 27, 2009:*

UNITED STATES FIDELITY INSURANCE & GUARANTY COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION and HARTFORD INSURANCE COMPANY OF THE MIDWEST v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, Nos. 133466 and 133468. In this case, motions for rehearing of this Court's December 29, 2008, opinion are considered and, on order of the Court, they are granted. The case is hereby resubmitted for decision without further briefing or oral argument. Court of Appeals Nos. 260604 and 271199.

CORRIGAN and YOUNG, JJ. We would deny rehearing.

*Leave to Appeal Denied March 27, 2009:*

HARDACRE v SAGINAW VASCULAR SERVICES, PC, No. 135706; Court of Appeals No. 276934.

CORRIGAN, J. (*dissenting*). I would reverse. The circuit court incorrectly concluded that the plaintiff's notice of intent comported with the statutory presuit notice requirements for medical malpractice actions. In particular, the notice failed to state "[t]he manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice," as required by MCL 600.2912b(4)(e).

Plaintiff's claim originated from alleged improper medical and surgical care provided in connection with bypass surgeries on her left leg. In the presuit notice, she stated that, during the first surgery, "grafts were placed in a way so as not to adequately bypass the occluded segments of the vessel . . . ." About two weeks after the first surgery, defendants performed a second surgery on the same leg. Plaintiff alleged that the "graft was sewn too short." She stated that, two days after surgery, "while walking in the hallway of the hospital, [she] experienced a tearing sensation in her left calf due to tearing of the graft." She returned to surgery that day for repair. Plaintiff further alleged that defendants knew about her history of vascular disease and hematologic history—a history consistent with a clotting disorder. She asserted that, after both admissions, defendants failed to discharge her with necessary anticoagulants.

Within a week of her second discharge, plaintiff was readmitted for "failure of the left bypass procedures." She consulted with an orthopedic surgeon and the decision was made to amputate her left leg above the knee. Plaintiff claims that defendants committed malpractice that resulted in the need for amputation. But the notice fails to explain how defendants' acts were the proximate cause of the orthopedic surgeon's decision to amputate.

The proximate cause section of the notice merely states that "[t]imely and proper compliance with the Standard of Care would have prevented the need for repeat surgery and need for amputation of the leg." The standard of care section, however, merely repeats plaintiff's malpractice allegations by listing several potential methods of injury prevention; it states that defendants should have recognized the significance of plaintiff's clotting disorder, administered anticoagulant medication after surgery, placed bypass grafts to reestablish blood flow to the lower extremity, and used an appropriately sized graft. The notice fails to state how defendants' surgical care or failure to provide an anticoagulant *proximately caused* an injury that resulted in the need for amputation. Thus, the notice was insufficient as a matter of law. It failed to allege any causative link between the claimed malpractice and the ultimate injury, which could have been the result of many things, presumably including plaintiff's underlying poor vascular condition or an infectious process unrelated to the alleged acts of malpractice.

Accordingly, plaintiff's purported statement of proximate cause is *at least* as deficient as the statement we found lacking in *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008). There, the statement of proximate cause similarly alleged: "If the standard of care had been followed, [the decedent] would not have died . . . ." *Id.* at 560. But, as here, the

standard of care section simply listed several alleged acts of malpractice, such as the defendant's negligent perforation of an artery during surgery and failure to perform a timely pericardiocentesis. *Id.* Thus, as here, the notice did not "describe the manner in which these actions or the lack thereof caused [the decedent's] death." *Id.* As we stated in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699-700 n 16 (2004), "it is not sufficient . . . to merely state that defendants' alleged negligence caused an injury. Rather, § 2912b(4)(e) requires that a notice of intent more precisely contain a statement as to the *manner* in which it is alleged that the breach was a proximate cause of the injury." (Emphasis in original.)

For these reasons, I dissent from the order denying leave. At a minimum, I would remand this case for the Court of Appeals to consider defendants' challenges to the notice.

MARKMAN, J. I join the statement of Justice CORRIGAN.

CRYSTAL LAKE PROPERTY RIGHTS ASSOCIATION v BENZIE COUNTY, Nos. 137528 and 137539; reported below: 280 Mich App 603.

MARKMAN, J. (*concurring*). For the reasons set forth by the concurring judge in the Court of Appeals, I concur in this order. In particular, I agree with him that "after reading the entire plan, it seems clear to me that the [Department of Natural Resources] is violating the spirit, intent, and purpose of the plan, albeit not the plain language." More should be expected of a public agency, in my judgment, when it negotiates with private parties than the kind of "sharp dealing" reflected in this case. However, any remedy, if there is to be one, must come from the political process, rather than from this Court reading an agreement in a manner contrary to its language.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v JOHNNY BROWN, No. 137960; Court of Appeals No. 287608.

KELLY, C.J. (*concurring*). I concur in the order denying leave to appeal. I write separately only to note that this Court has not addressed defendant's argument regarding the imposition of costs and fees because it is not properly before the Court. However, defendant may raise the issue in a motion for relief from judgment under MCR 6.508.

*In re* ALLISH (DEPARTMENT OF HUMAN SERVICES v ALLISH), No. 138304; Court of Appeals No. 286354.

*In re* WILBOURN (DEPARTMENT OF HUMAN SERVICES v BOYD), No. 138363; Court of Appeals No. 287173.

*Summary Disposition April 1, 2009:*

FROHRIEP v FLANAGAN, No. 136636. By order of October 27, 2008, the application for leave to appeal the April 29, 2008, judgment of the Court of Appeals was held in abeyance pending the decision in *Odom v Wayne Co* (Docket No. 133433). On order of the Court, the case having been decided on December 30, 2008, 482 Mich 459 (2008), the application is again considered and, pursuant to MCR 7.302(G)(1), in

lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, and we remand this case to the Ingham Circuit Court for further proceedings in light of the *Odom* decision. We agree with the Court of Appeals that the plaintiffs failed to state a claim for intentional infliction of emotional distress, but do not agree that the plaintiffs failed to state claims for the remaining intentional torts. The Court of Appeals erred in concluding that the burden of proof with regard to the qualified governmental immunity applicable to the defendants Hughes and Ciloski under *Ross v Consumers Power (On Rehearing)*, 420 Mich 567 (1984), lay with the plaintiffs, rather than with the defendants. See *Odom, supra*. Reported below: 278 Mich App 665.

PEOPLE v WEBBER, No. 137144. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Isabella Circuit Court. At sentencing, the defendant requested a number of corrections to the presentence investigation report, and the court indicated that several of the changes would be made. The copy of the report in the record does not reflect those changes. On remand, the circuit court shall assure that a corrected copy of the report is prepared and transmitted to the Department of Corrections pursuant to MCR 6.425. 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. Court of Appeals No. 276350.

PEOPLE v HERNANDEZ, No. 137563. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the sentence of the Saginaw Circuit Court, and we remand this case to the trial court for resentencing. Under MCL 769.1(3), the trial court must conduct a hearing at a juvenile's sentencing to determine whether to impose a sentence that commits the juvenile to an institution or agency described in the Youth Rehabilitation Services Act, 1974 PA 150, MCL 803.301 *et seq*., or to impose an adult sentence. If the prosecutor and the defendant agree, the sentencing court may waive the hearing requirements of MCL 769.1(3). If the hearing is waived, the court may place the juvenile on probation and commit the juvenile to an institution or agency described in the Youth Rehabilitation Services Act, but the court is barred from imposing any other sentence provided by law for an adult offender. MCL 769.1(4). Here, the hearing required by MCL 769.1(3) was waived, but an adult sentence was imposed, contrary to the provisions of MCL 769.1(4). We do not retain jurisdiction. Court of Appeals No. 287028.

PEOPLE v GEORGE, No. 137708. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 288032.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would deny leave to appeal.

*Leave to Appeal Denied April 1, 2009:*

PEOPLE v WENMAN, No. 136525; Court of Appeals No. 269838.

PEOPLE v UDDIN, No. 137545. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285114.

SWINTON v MICHIGAN STATE UNIVERSITY, No. 137686; Court of Appeals No. 280135.

BREWSTER-AZARD v GENERAL MOTORS CORPORATION, No. 137699; Court of Appeals No. 286021.

KELLY, C.J. I would grant leave to appeal.

NEILL v STEEL MASTER TRANSFER, INC, No. 137727; Court of Appeals No. 279122.

KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

TEMPLETON v MICHIGAN STATE UNIVERSITY, No. 137757; Court of Appeals No. 286198.

TRANDELL v THE VILLAGE CLUB, No. 137951; Court of Appeals No. 286429.

KELLY, C.J., did not participate due to her relationship with the defendant, The Village Club.

*Denial of Leave Vacated April 3, 2009:*

KYSER v KASSON TOWNSHIP, No. 136680. We vacate our order dated March 13, 2009. The application for leave to appeal the May 6, 2008, judgment of the Court of Appeals remains pending.

WEAVER, J., did not participate in this case because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family.

*Supplemental Briefing Ordered April 3, 2009:*

POTTER v MCLEARY, No. 136336. Oral argument having been heard on March 4, 2009, the parties are directed to submit supplemental briefs addressing the issue whether, if a defendant professional corporation is not an entity to whom notice is required to be provided under MCL 600.2912b, the applicable statute of limitations, MCL 600.5805(6), was nonetheless subject to statutory tolling provided in former MCL 600.5856(d). Plaintiff's supplemental brief is due April 17, 2009. The defense brief is due April 24, 2009. Court of Appeals No. 262529.

*Leave to Appeal Granted April 3, 2009:*

ADAIR v STATE OF MICHIGAN, Nos. 137424 and 137453. The applications for leave to appeal the July 3, 2008, judgment of the Court of Appeals are considered, and they are granted, limited to the issues: (1) whether the prohibition of unfunded mandates in Const 1963, art 9, § 29, requires the plaintiffs to prove specific costs, either through the reallocation of funds or out-of-pocket expenses, in order to establish their entitlement to a declaratory judgment; and (2) whether plaintiffs are entitled to recover the "costs

incurred in maintaining" this suit pursuant to Const 1963, art 9, § 32. Reported below: 279 Mich App 507.

PEOPLE v WILDER, No. 137562. On order of the Court, the application for leave to appeal the October 21, 2008, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether third-degree home invasion, MCL 750.110a(4), is a necessarily included lesser offense of first-degree home invasion, MCL 750.110a(2).

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 issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 278737.

*Leave to Appeal Denied April 3, 2009:*

STOUT v WITHROW, No. 136442; Court of Appeals No. 271632.

MARKMAN, J. (*dissenting*). I dissent and would grant leave to appeal. Plaintiff offered to purchase a farmhouse after receiving a copy of the seller's disclosure statement, which advised plaintiff to obtain an inspection of the property. The offer was accepted, and plaintiff signed a purchase agreement wherein she agreed to purchase the property "as is" with no warranties, express or implied, from the seller or the real estate agent. Plaintiff also expressly waived a home inspection, and at the closing signed a "Purchaser's Satisfaction," in which she stated that she had examined the property, accepted it in its present condition, would hold harmless the realtor and its agents for any structural defects, "including sewer, septic, well, etc," and that there were no other agreements, "oral or otherwise," beyond those set forth in the purchase agreement.

Soon after moving in, plaintiff discovered several structural problems with the sewer, septic system, and well. She sued the seller, the real estate firm, and its agent, settling only with the seller. The real estate firm and its agent filed a motion for summary disposition based on the release. Plaintiff opposed this motion, asserting that the agent had orally stated that it was unnecessary to obtain an inspection because the house was in "top-notch" condition. The trial court denied defendants' motion, and a jury verdict was rendered in plaintiff's favor. The Court of Appeals affirmed, holding that the agent's oral misrepresentations regarding the condition of the property amounted to "fraudulent or overreaching conduct" in procuring the release such that there was a question of fact whether the release was enforceable. Unpublished opinion per curiam, issued February 14, 2008 (Docket No. 271632), p 4.

What is significant here is that plaintiff: (a) expressly waived a home inspection, (b) agreed she was purchasing the property "as is," (c) agreed there were no express or implied warranties from the real estate firm or its agent, (d) agreed to hold defendants "harmless" for any structural defects, and (e) agreed there were "no other agreements." Nevertheless, it now appears that a disappointed purchaser of property can avoid the consequences of such written agreements, by merely asserting that allegedly "fraudulent" oral representations were made by an agent, and thereby require defendant to proceed to trial.

The majority's failure to grant leave to appeal to review the implications of this decision are troublesome and should be of concern, not only to real estate firms and their agents, but to any party entering into a contract or who benefits from a release. Unfortunately, this case appears to be part of an emerging trend by the majority of this Court of failing to enforce contracts as written and is inviting uncertainty and unnecessary litigation by eroding established principles of contract law. See, e.g., this Court's order in *Genesee Co Foods Services, Inc v Meadowbrook*, 483 Mich 907 (2009); *Zahn v Kroger Co*, 483 Mich 34, 44-46 (2009) (MARKMAN, J., concurring).

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

SAZIMA v SHEPHERD BAR & RESTAURANT, No. 136940. By order dated December 17, 2008, this Court peremptorily reversed the ruling of the Workers' Compensation Appellate Commission, which had found that the plaintiff's injury occurred in the course of her employment. 482 Mich 1110 (2008). On order of the Court, the plaintiff-appellee's motion for reconsideration is granted. We vacate our order of December 17, 2008. The application for leave to appeal the June 17, 2008, order of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 281855.

MARKMAN, J. (*dissenting*). I dissent from the majority's decision to vacate this Court's previous order, 482 Mich 1110 (2008), and to deny leave to appeal, effectively reversing our previous decision. The Workers' Compensation Appellate Commission (WCAC) erred, in my judgment, by awarding plaintiff benefits for an injury that did not occur "in the course of employment." MCL 418.301(1). Rather, plaintiff was injured while walking from her car parked along a public street to her place of employment. Because the Worker's Disability Compensation Act does not extend to an injury occurring under such circumstances, I would reverse this decision.

Generally, "injuries that occur while traveling to or coming from work are not compensable." *Camburn v Northwest School Dist*, 459 Mich 471, 478 (1999) (quotation marks and citation omitted); see also *Simkins v Gen Motors Corp (After Remand)*, 453 Mich 703, 723 (1996). Known as the "coming and going" rule, this protects employers from incurring liability for injuries occurring in areas over which they have no control. An employee can avoid this rule only by establishing one of several established exceptions, *Camburn*, *supra* at 478, none of which is applicable here.

For the "special benefit" exception to apply, the "special benefit" must be the result of the "activity at the time of the injury." *Id*. at 478 (quotation marks and citation omitted). Plaintiff's activity at the time of injury was walking to work, which provided no special benefit to defendant. *Bowman v RL Coolsaet Construction Co (On Remand)*, 275 Mich App 188, 191 (2007). Instead, plaintiff was "master of [her] own movements upon the street and encountered there a risk incident to any user of the street." *Dent v Ford Motor Co*, 275 Mich 39, 42 (1936).

For the "excessive risk" exception to apply, "travel itself [must be] the employment." *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606, 609 (1940). "[N]ormal traffic hazards encountered while traveling to and from the place of work are deemed to be risks common to all . . . ." *Id.* The plaintiff in *Chrysler* drove a truck for the employer. The Court emphasized that his injury was compensable because the additional risk that caused the injury was created by the inherent purpose of the

employment. *Id.* Here, plaintiff's case arises only from the normal hazards all employees encounter while traveling to work.

Established law simply does not support the majority's decision to reverse our previous order. The only basis for this reversal is supplied in previous statements by justices in the majority: "There is but one answer, the makeup of the Court. The law has not changed. Only the individuals wearing the robes have changed." *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 256 (2007) (KELLY, J., dissenting in part); "The only change has been the composition of this Court." *Paige v City of Sterling Hts*, 476 Mich 495, 532-533 (2006) (CAVANAGH, J., dissenting in part). In the context of a motion for reconsideration, and without the benefit of an opinion, the majority effectively reverses precedent. I dissent.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

PEOPLE v PATILLO, No. 137531; Court of Appeals No. 287523.

PEOPLE v GIBBS, No. 137609; Court of Appeals No. 274003.

KELLY, C.J. (*dissenting*). I would grant leave to appeal. This may be a case where the erroneous admission of evidence and the misuse of evidence were so offensive to sound judicial process that they cannot be regarded as harmless.

Admittedly, the appearance of defendant's guilt was strong, and the jury found him guilty of first-degree premeditated murder.[1] However, in the course of the trial, the court improperly admitted at least five hearsay statements damaging to defendant. Included was the statement that, before her death, the victim believed that defendant had attempted to kill her.[2]

The trial court also improperly allowed the prosecution to introduce, over defendant's objection, a video recording in which a witness recounted that defendant had told her that the victim was dead. The witness claimed that defendant had predicted that he would get "pinned" for her death.[3] The trial court then allowed the witness to testify directly about the conversation, erroneously ruling that the conversation constituted a prior inconsistent statement.[4]

Not only did the judge allow this considerable, inadmissible evidence, the prosecutor intentionally used it extensively. The Court of Appeals concluded that there was prosecutorial misconduct. It stated:

> [D]espite . . . clear evidence establishing that the prosecution knew of the limited use of [Louella] Bibbins's prior inconsistent statements, the prosecution repeatedly argued the inconsistent statements as substantive evidence of defendant's guilt. In its closing statement, the prosecution made the following comments:

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[1] MCL 750.316(1)(a).

[2] *People v Gibbs*, unpublished opinion per curiam of the Court of Appeals, issued September 9, 2008 (Docket No. 274003), at 2.

[3] *Gibbs*, *supra* at 3.

[4] *Id.*

> ". . . And, Paul Gibbs told Louella Bibbins, Tammie is dead, and they're going to pin it on me; six hours, five hours before her body was found. . . .
>
> * * *
>
> ". . . No one else knew she was dead before her body was found. . . .
>
> * * *
>
> "At about 1:00 o'clock eastern time the cellphone he's using hits a cell tower in South Bend, Indiana [with the call to Louella Bibbins]; 6:35, 6:40 p.m. that same day, Mr. Moseng and Ms. Stornello call the police [to report finding a body]. He knew she was dead before she was found. It's that important. It's important enough that he calls Louella Bibbins to lie about it. That's how important it is.
>
> * * *
>
> "Another quick example, the East Lansing interview with Louella and Donald Gibbs, when she was explaining the details of that call to Officer [Scott] Despins, he made a note it's on the tape. This was just prior to 5:55 p.m., a full 40 to 45 minutes before Mr. Moseng and Ms. Stornello had even called the police yet. So, at the time she was talking, she didn't know how important it was, so she told the truth."

In its rebuttal closing argument, the prosecution again stated that defendant "knew she was dead before she was found."[5] The prosecutor made these statements, knowing that the evidence had been improperly admitted.[6] The Court of Appeals determined the errors "extremely significant," but affirmed the conviction because it concluded that, more probably than not, the errors were not outcome determinative.[7]

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[5] *Id.* at 4-5.

[6] After the court improperly overruled defendant's objection to the telephone call, it stated the jury likely needed a cautionary instruction that a prior inconsistent statement is not substantive evidence. The prosecutor responded that the court was " 'absolutely correct.' " *Id.* at 4. Then, when the court made it clear that the videotape was for impeachment purposes only, the prosecutor replied, " 'That's true your honor.' " *Id.*

[7] *Id.* at 7. Under the harmless error analysis, a trial court's nonconstitutional error in admitting evidence is not grounds for reversal. An exception exists if, after an examination of the entire cause, it affirma-

When the error and misconduct are so many and great as here, it is difficult for an appellate court to presume what a jury would have done had the errors not occurred. It also raises serious questions about the point at which it can no longer be said that a defendant was afforded a fair trial. This presents problems for appellate courts that seek not to second-guess jury verdicts. The Court in *People v Robinson* attempted to provide guidance when it stated: "Where it is claimed that error is harmless, two inquires are pertinent. First, is the error so offensive to the maintenance of a sound judicial process that it never can be regarded as harmless? Second, if not so basic, can we declare a belief that the error was harmless beyond a reasonable doubt?"[8] The purpose of the first inquiry "is to deter prosecutorial misconduct and to safeguard those individual rights which are so fundamental that the impact of their violation cannot be fully assessed."[9]

In *Robinson*, this Court found that the prosecutor's deliberate injection of "improper evidence and the trial court's acquiescence in it are such affront to the integrity of the trial process that we will not countenance it."[10] In so ruling, this Court quoted *People v Bigge*:

> "That statutory provision is not a cure-all for it must serve within constitutional limitations or else be declared void. Minor errors which clearly can be held not to have affected the result may be mollified by this statutory provision, but errors which deprive an accused of the right of due process of law cannot be composed thereby to the detriment of an accused. The responsibility of maintaining the right of fair trial and due process of law is placed with the judicial branch and cannot be otherwise by legislative permission. *We are not concerned with the guilt or innocence of the accused, for we are not triers of the facts and must apply the law to the case as tried.* The statement was inexcusable, wholly without warrant of law, planted irremovable impression and rendered defendant a victim of the error. The prosecutor, by such statement of intended proof of defendant's guilt, brought an effect so probable, so inadmissible, and so prejudicial as to constitute irreparable error."[11]

The tainted evidence improperly admitted in this case was very powerful. Moreover, the use of nonsubstantive evidence as substantive evidence ensured defendant's conviction. It appears that the prosecutor

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tively appears more probable that not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496 (1999). An error is outcome determinative if it undermines the reliability of the verdict. *People v Whittaker*, 465 Mich 422, 427 (2001).

[8] *People v Robinson*, 386 Mich 551, 563 (1972) (citations omitted).

[9] *People v Christensen*, 64 Mich App 23, 33 (1975).

[10] *Robinson*, 386 Mich at 563.

[11] *Id*., quoting *People v Bigge*, 288 Mich 417, 421 (1939) (emphasis added in *Robinson*).

introduced the inadmissible hearsay to show that defendant was a brutish, controlling man who, by virtue of his bad character, was likely the murderer. There was no reason to introduce the prior statements about the telephone conversation except to use them substantively to show defendant's guilt. The prosecutor repeatedly used these statements as substantive evidence knowing it was improper to do so.

Where the evidence of guilt is strong, this Court should not allow a prosecutor to succeed in abusing the justice system by hiding behind a shield emblazoned with the words "Harmless Error." I would grant leave to consider whether, in this case, this Court, should condone as harmless error the prosecutor's deliberate injection of inadmissible evidence and misuse of nonsubstantive prejudicial evidence.

PEOPLE v LABRECK, No. 138476; Court of Appeals No. 288731.

*In re* HAYES (LADD v SUNDERMAN), No. 138506; Court of Appeals No. 290931.

*Rehearing Denied April 3, 2009:*

MOORE v SECURA INSURANCE, No. 135028; Court of Appeals No. 267191.

KELLY, C.J., and WEAVER and HATHAWAY, JJ. We would grant rehearing.

CAVANAGH, J. did not participate due to a familial relationship with counsel of record.

*Appeal Dismissed April 3, 2009:*

LEWIS v BRIDGMAN PUBLIC SCHOOLS, No. 137069. On order of the Chief Justice, a stipulation signed by counsel for the parties agreeing to the dismissal of this application for leave to appeal is considered, and the application for leave to appeal is dismissed with prejudice and without costs. Court of Appeals No. 261349.

*Order Entered April 8, 2009:*

*In re* HUDSON (DEPARTMENT OF HUMAN SERVICES v MORGAN), No. 137362. On order of the Court, leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we hereby affirm the judgment of the Court of Appeals. For the reasons stated in the Court of Appeals judgment, the trial court committed clear error in finding that the Department of Human Services presented clear and convincing evidence in support of the statutory grounds for terminating the respondent-mother's parental rights. The trial court also committed plain error, *People v Carines*, 460 Mich 750, 763 (1999), in failing to adequately advise the respondent of her right to counsel throughout the proceedings, in failing to timely appoint counsel in violation of MCL 712A.17c(4) and (5), MCR 3.915(B)(1), MCR 3.965(B)(5), and MCR 3.974(B)(3)(a)(i), and in failing to advise the respondent that her plea could later be used in a proceeding to terminate parental rights in violation of MCR 3.917(B)(4). These statutory and

court rule violations compounded the errors committed by the trial court in terminating the respondent's parental rights under the factors of MCL 712A.19b(3). Accordingly, we remand this case to the trial court for proceedings not inconsistent with this order. Court of Appeals No. 282765.

WEAVER, J. (*concurring in part*). I concur in the order affirming the judgment of the Court of Appeals. I write separately, as I did in *In re Rood*, 483 Mich 73, 125 (2009) (WEAVER, J., concurring in part) because I agree with Justice YOUNG, *post* at 940, that as there were numerous state law violations requiring reversal of the termination order, this Court should not consider additional constitutional issues.

CORRIGAN, J. (*concurring*). I concur in the Court's order affirming the judgment of the Court of Appeals. I write separately to address the due process problems that pervaded these proceedings because the trial court did not advise respondent of the consequences of her plea of admission, contrary to MCR 3.971(B)(4). Also contrary to MCL 712A.17c, the court did not appoint counsel at respondent's first appearance. Instead, the court waited until two weeks before the termination of parental rights trial to appoint counsel. Without counsel to assist her, respondent never offered evidence in her own behalf during 10 hearings over two years. In addition, respondent's plea of admission enabled the subsequent admission of hearsay evidence at the termination hearing. Because the underlying plea was invalid, the state's termination case, which relied heavily on hearsay, was also tainted. The combination of these errors deprived respondent of due process and affected her substantial rights.

## I. BASIC FACTS AND PROCEDURAL HISTORY

These proceedings ultimately resulted in the termination of respondent's parental rights to her three children. They were set in motion when the trial court took jurisdiction of the children after a September 2005 emergency preliminary hearing. The court exercised jurisdiction on the basis of partial admissions by respondent and her husband, Michael Morgan (Morgan), of the allegations in a petition filed by the Department of Human Services (DHS).[1] The allegations included a prior adjudication for neglect, deplorable housing conditions, failure to pick up the children from school, and drug use in the home. After the court took jurisdiction of the children, it ordered respondent and Morgan to participate in DHS services and to comply with a court approved service plan by submitting to drug testing and psychological evaluations, among other things.

During the next two years, the trial court held 10 dispositional and permanency planning hearings, including a January 2006 dispositional hearing, after which the court ordered the children removed from the home of respondent and Morgan pursuant to a DHS petition. Respondent, who eventually separated from Morgan and began living with

[1] Morgan is the father of respondent's two youngest children. His parental rights and the parental rights of the oldest child's father were also terminated. Neither father has appealed.

family members, was not represented by counsel at any of these hearings. No evidence was ever presented on her behalf. DHS witnesses testified over the course of several hearings that respondent was making an effort to work with the DHS. She showed improvements in some areas but had recurring problems. In particular, the DHS presented evidence that respondent failed one or two drug screenings during many reporting periods. She claimed to use Vicodin prescribed for chronic pain. She produced a prescription to explain some of the positive drug tests. DHS witnesses and the trial court expressed concern about respondent's continued use of narcotic pain medication. DHS witnesses also suggested that respondent struggled to maintain employment and was unable to find and afford housing adequate for three children.

The DHS filed its petition to terminate respondent's parental rights on November 7, 2007. The trial court first appointed counsel to represent respondent on November 16, 2007. Following trial on November 30, 2007, the trial court terminated respondent's parental rights, citing the statutory grounds for termination set forth in MCL 712A.19b(c)(*i*) (conditions leading to the adjudication continue to exist and there is no reasonable likelihood of rectification within a reasonable time); MCL 712A.19b(c)(*ii*) (other conditions exist that cause the child to come within the court's jurisdiction and the parent has received recommendations and a reasonable opportunity to rectify those conditions but has failed to do so); MCL 712A.19b(g) (without regard to intent, the parent fails to provide proper care or custody and there is no reasonable expectation that she might do so within a reasonable time); and MCL 712A.19b(j) (there is a reasonable likelihood, based on the conduct or capacity of the parent, that the child will be harmed if returned to the home of the parent). The court also found that termination would not be contrary to the best interests of the children. MCL 712A.19b(5).[2]

Respondent appealed, arguing that her plea of admission at the preliminary hearing was invalid because the trial court had failed to advise her that the plea could be used as evidence in a later termination proceeding, and that she was denied due process by the trial court's failure to appoint counsel until 14 days before the termination trial. The Court of Appeals acknowledged that the trial court had failed to advise respondent that her plea could be used as evidence in a proceeding to terminate her parental rights, as required by MCR 3.971(B)(4), but found no plain error because the trial court relied on the testimony of DHS witnesses, rather than respondent's admissions at the preliminary hearing, to support the statutory grounds for termination. It also concluded

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[2] At the time of the termination trial in this case, MCL 712A.19b(5) provided:

> If the court finds that there are grounds for termination of parental rights, the court shall order termination of parental rights and order that additional efforts for reunification of the child with the parent not be made, unless the court finds that termination of parental rights to the child is clearly not in the child's best interests.

that respondent's right to counsel had not been violated because respondent did not request counsel during the more than 24 months between the adjudication and the termination hearing. It added that although earlier appointment of counsel would have more fully protected respondent's constitutional right to counsel, a right explicitly recognized in *In re Powers*, 244 Mich App 111, 121 (2000), "the process afforded minimally satisfied the United States Constitution." Despite its rejection of respondent's arguments on appeal, the panel reversed the trial court's termination decision. Raising these issues sua sponte, it concluded that the trial court clearly erred by finding sufficient evidence of the statutory bases for termination, and in finding that termination would not be contrary to the best interests of the children. *In re Hudson*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2008 (Docket No. 282765).

## II. STANDARD OF REVIEW

Unpreserved constitutional challenges are reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764 (1999).

## III. ADVICE OF CONSEQUENCES OF PLEA AND RIGHT TO COUNSEL

Under the Michigan Court Rules, the trial court may accept a parent's plea of admission or no contest to the original allegations in a DHS petition. MCR 3.971(A). Before accepting a plea, however, the court must advise the respondent on the record or in writing:

> (1) of the allegations in the petition;
>
> (2) of the right to an attorney, if respondent is without an attorney;
>
> (3) that, if the court accepts the plea, the respondent will give up the rights to
>
> (a) trial by a judge or trial by a jury,
>
> (b) have the petitioner prove the allegations in the petition by a preponderance of the evidence,
>
> (c) have witnesses against the respondent appear and testify under oath at trial,
>
> (d) cross-examine witnesses, and
>
> (e) have the court subpoena any witnesses the respondent believes could give testimony in respondent's favor;
>
> (4) of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent. [MCR 3.971(B).]

Moreover, the court "shall not accept a plea of admission or of no contest without satisfying itself that the plea is knowingly, understand-

ingly, and voluntarily made," MCR 3.971(C)(1), and "without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true," MCR 3.971(C)(2).

A respondent's right to an attorney in a child protective proceeding is statutory, court-rule based, and constitutional. MCL 712A.17c provides, in part:

> (4) In a proceeding under section 2(b) or (c) of this chapter,[3] the court shall advise the respondent at the respondent's first court appearance of all of the following:
>
> (a) The right to an attorney at each stage of the proceeding.
>
> (b) The right to a court-appointed attorney if the respondent is financially unable to employ an attorney.
>
> (c) If the respondent is not represented by an attorney, the right to request and receive a court-appointed attorney at a later proceeding.
>
> (5) If it appears to the court in a proceeding under section 2(b) or (c) of this chapter that the respondent wants an attorney and is financially unable to retain an attorney, the court shall appoint an attorney to represent the respondent.
>
> (6) Except as otherwise provided in this subsection, in a proceeding under section 2(b) or (c) of this chapter, the respondent may waive his or her right to an attorney. . . .

The court rules similarly reflect a parent's right to counsel in a child protective proceeding. MCR 3.971(B)(2), quoted earlier, requires the court to advise the respondent of the right to an attorney before accepting a plea of admission or no contest. In addition, MCR 3.965(B)(5) requires the court to "advise the respondent of the right to the assistance of an attorney at the preliminary hearing and at any subsequent hearing pursuant to MCR 3.915(B)(1)(a)." MCR 3.915(B)(1) provides:

> (a) At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that
>
> (i) the respondent has the right to a court appointed attorney if the respondent is financially unable to retain an attorney, and,
>
> (ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.
>
> (b) The court shall appoint an attorney to represent the respondent at any hearing conducted pursuant to these rules if

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[3] These sections give the family division of the circuit court jurisdiction over various types of proceedings involving juveniles, including proceedings concerning a juvenile under 18 years of age found within the county whose parents neglect or refuse to provide proper or necessary care or support, or who is without proper custody or guardianship. MCL 712A.2(b), (c).

(i) the respondent requests appointment of an attorney, and

(ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.

(c) The respondent may waive the right to the assistance of an attorney, except that the court shall not accept the waiver by a respondent who is a minor when a parent, guardian, legal custodian, or guardian ad litem objects to the waiver.[4]

In addition, the United States Supreme Court has recognized the "interest of parents in the care, custody, and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v Granville*, 530 US 57, 65 (2000). It has also held that, in some instances, due process requires the appointment of counsel to represent a parent in a termination proceeding. *Lassiter v Dep't of Social Services*, 452 US 18, 31-32 (1981). In *Lassiter*, *supra* at 31, the United States Supreme Court considered the requirements of due process in the context of a child protective proceeding under the three factors articulated in *Mathews v Eldridge*, 424 US 319, 335 (1976),[5] and concluded that

> the parent's interest is an extremely important one (any may be supplemented by the dangers of criminal liability in some termination proceedings); the State shares with the parent an interest in a correct decision, has a relatively weak pecuniary interest, and, in some but not all cases, has a possibly stronger interest in informal procedures; and the complexity of the proceeding and the incapacity of the uncounseled parent could be, but would not always be, great enough to make the risk of erroneous deprivation of the parent's rights insupportably high.

## IV. THE PRELIMINARY HEARING

At the preliminary hearing in this case, the trial court explained that respondent and Morgan would have the right to be represented by an attorney and to call and cross-examine witnesses at a trial on the allegations in the DHS petition. It then stated:

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[4] A respondent also has the right to be represented by an attorney at the dispositional review hearing following an emergency removal hearing. MCR 3.974(B)(3)(a)(i).

[5] The three factors are: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Eldridge*, *supra* at 335.

> So that's what your rights are on these allegations. Now today I—I need to determine if one or more of these things might be true. So if—if there is no way any of these things are true then I can dismiss this.
>
> * * *
>
> But if one or more might be true then we will set this for a trial. . . . We can either go through a trial or if there is [sic] certain things that you're willing to say yeah that's true and it's enough for me to be concerned about the kids and—and take jurisdiction, then we don't have to have a trial. And what would happen if I take jurisdiction is I would make certain orders and I guess try and get the family back on track.
>
> * * *
>
> So hopefully this case would be dismissed at some point in the future. Now, if I take jurisdiction that doesn't mean the kids leave the house. Sometimes it's—I have to remove the kids but there are times that I don't have to remove kids. We can still provide services and work with you but the kids don't have to be put in foster care or with a relative. So if you look at this and you say, you know, we can admit certain things here and—and I take jurisdiction we don't have to remove the children just because that happens. Before we get started though let me just get some administrative information out of the way.

Later in the hearing, the court asked respondent and Morgan if they wanted to be represented by counsel. Morgan replied, "If this goes any farther, I think . . . ." The court then interrupted and told Morgan and respondent that each of them would need to fill out a financial form. The court then asked whether, "for purposes of today," they intended to "admit any of the things in the—any of the allegations." After Morgan and respondent both stated that they agreed that there were some problems, the court placed them both under oath and read through the allegations. After each admitted several of the allegations, the trial court assumed jurisdiction over the children and ordered respondent and Morgan to, among other things, submit to drug screenings and to participate in DHS services. Although the trial court held numerous dispositional hearings in the interim, it did not appoint counsel to represent respondent until 14 days before the November 2007 termination trial.

## V. ANALYSIS

The trial court erred at the preliminary hearing by failing to fully advise respondent of the consequences of her plea, MCR 3.971(B), and by failing to determine if she was financially unable to retain an attorney

and, if so, to appoint counsel to represent her, MCL 712A.17c(5); MCR 3.915(B)(1). The consequences of these errors pervaded the 26-month child protective proceeding that followed and deprived respondent of due process.

First, the trial court, in violation of MCR 3.971(B)(4), failed to advise respondent that her plea of admission could be used against her in a later termination proceeding. Although the court did advise respondent of her right to a trial on the allegations and her right to call witnesses at such a trial, MCR 3.971(B)(3), it suggested that admitting the allegations would merely speed the process and enable the court to provide services to help "get the family back on track." It never even mentioned the possibility that respondent's parental rights could be terminated on the basis of her admissions. Then, the trial court proceeded with the hearing and placed respondent under oath despite her apparent invocation of her right to counsel. Morgan appeared to speak for both himself and respondent when he expressed a desire to be represented by counsel. The court never inquired of respondent separately regarding her wishes. The record does not reflect any waiver by respondent of her right to counsel. The court appears to have assumed that both respondent and Morgan wanted counsel, because it told them that they would each need to fill out a financial form. Given their expression of desire to be represented by counsel, the trial court was required by statute and court rule to determine whether respondent and Morgan were financially unable to obtain an attorney, and, if so, to appoint counsel to represent them during the remainder of the preliminary hearing. MCR 3.915(B)(1)(b); MCL 712A.17c(5).

Had respondent been represented by counsel during the preliminary hearing, counsel could have fully advised her of the consequences of a plea of admission, which the trial court failed to do. Instead, without full information and understanding of the consequences, respondent admitted most of the allegations in the petition. Respondent's admissions relieved the DHS of the burden of proving the allegations in the petition by a preponderance of the legally admissible evidence, MCR 3.972(C)(1), and enabled the trial court to immediately assume jurisdiction. After the court assumed jurisdiction, it ordered drug screenings of respondent and Morgan and psychological evaluations of the parents and children. The results of these court-ordered services unquestionably formed the basis for the court's later termination decision.

A child protective proceeding is "a single continuous proceeding." *In re LaFlure*, 48 Mich App 377, 391 (1973). In deciding whether to terminate parental rights, a trial court considers evidence admitted at all dispositional and review hearings. *Id*. In this case, the combination of the trial court's errors at the preliminary hearing in failing to appoint counsel and in accepting respondent's invalid plea affected the entire proceeding that followed. First, respondent's invalid plea formed the basis for the trial court's exercise of jurisdiction and for the admission of evidence at subsequent proceedings. Once the allegations in the state's petition are proven, at trial or by a plea, all relevant and material evidence is admissible at dispositional and permanency planning hear-

ings.[6] In this case, respondent's *invalid* plea formed the basis for the admission of hearsay evidence during subsequent hearings. In addition, hearsay evidence is only admissible at the termination hearing to prove the statutory grounds for termination where termination is sought on the same grounds that formed the basis for the trial court's exercise of jurisdiction. MCR 3.977(G)(2); see *In re Gilliam*, 241 Mich App 133 (2000) (reversing the trial court's termination decision where hearsay was admitted to prove grounds for termination that were unrelated to the initial reasons for jurisdiction); *In re Blocker*, unpublished opinion per curiam of the Court of Appeals, issued January 17, 2008 (Docket No. 279581) (reversing the trial court's termination decision where the trial court failed to advise the respondent of the consequences of his plea to the allegations in an abuse report, there was no indication that respondent stipulated the admission of the abuse report to establish the statutory grounds for termination, and the statutory grounds were not otherwise established by legally admissible evidence). Thus, respondent's invalid plea also formed the basis for the admission of hearsay evidence at the termination trial in this case.[7]

The trial court's error in failing to advise respondent of the consequences of her plea was compounded by the absence of counsel to represent respondent during all the dispositional and permanency planning hearings. Although the rules of evidence do not apply at dispositional and permanency planning hearings, and all relevant and material evidence, including oral and written reports, was admissible,[8] counsel for respondent could have challenged the evidence presented by the DHS and could have called and cross-examined the individuals who prepared the many reports DHS witnesses referenced in their testimony at these hearings.[9] Instead, once these proceedings were set in motion by respondent's invalid plea, the DHS was allowed to present unchallenged hearsay evidence, including the results of respondent's drug screenings,

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[6] MCR 3.971; MCR 3.972(C)(1); MCR 3.973(E)(1); MCR 3.976(D)(2); MCR 3.977(G)(2).

[7] As Justice YOUNG points out, a plea is a valid means of proving the allegations in a petition by a preponderance of the evidence and a valid basis for a trial court's exercise of jurisdiction, MCR 3.971(A), (B)(3)(b), and it was the court's assumption of jurisdiction that changed the evidentiary standard. In this case, however, respondent's plea, and, by extension, the trial court's assumption of jurisdiction and the subsequent admission of evidence under the more relaxed evidentiary standard, was *invalid*.

[8] MCR 3.971; MCR 3.972(C)(1); MCR 3.973(E)(1); MCR 3.976(D)(2); MCR 3.977(G)(2).

[9] At an initial dispositional hearing, a permanency planning hearing, and a termination hearing at which termination is sought on the basis of the same circumstances that led the court to take jurisdiction, the parties must be given an opportunity to examine and controvert written reports and may be allowed to cross-examine the individuals who made the

psychologists' reports pertaining to respondent and the children, and statements of respondent's therapist, through the testimony of DHS workers. Other witnesses did not appear at the hearings. No one was subjected to cross-examination. The DHS built a record of respondent's failed drug tests and struggles to maintain employment and appropriate housing over the course of more than two years, while respondent never challenged the veracity of that evidence or offered any evidence of her own. By the time counsel was appointed to represent respondent two weeks before the termination trial, the DHS had built an extensive record against respondent, and there was little counsel could do to remedy the harm. In making its termination ruling, the trial court cited in particular respondent's "mental health needs" and "dependency issues."

In addition, there is a real possibility that counsel could have prevented the removal of the children from the home of respondent and Morgan in January 2006. The DHS caseworker did not even recommend removal at the January 12, 2006, dispositional review hearing after which the trial court entered the removal order. Instead, the caseworker stated that she was leaving it to the discretion of the trial court, but recommended intensive therapy and substance abuse treatment for respondent and Morgan if the children did remain in the home. She also noted that respondent's oldest child, then-14-year-old RH, was "very bonded" to respondent and expressed concern about the effect removal would have on him in particular. The court ordered removal because respondent and Morgan continued to have positive drug screenings and because, contrary to the court's orders, additional family members continued to frequent the home. The court's removal order, however, noted that the "home is appropriate," that there was "[n]o risk to children as to condition," and that the parents were "cooperative." As the caseworker's ambivalence illustrates, this was a close case, and the evidence supporting removal was not overwhelming. Counsel for respondent could have presented evidence on behalf of respondent, challenged the evidence of her failed drug screenings, and argued for the children to remain in the home. There was a strong argument to be made that the removal was not appropriate in the first place, but that case was never made because respondent was not represented by counsel.

Once the children were removed from the home, respondent faced a losing battle in avoiding termination. Even though no evidence was presented on respondent's behalf, the DHS's own witnesses indicated that respondent was making progress, and that termination was neither appropriate nor in the children's best interests. At a dispositional review hearing on December 7, 2006, a DHS caseworker reported that respondent's visits with the children were going well and recommended unsupervised visitation. At another dispositional review hearing on June 7, 2007, a DHS caseworker testified that he did not think termination was appropriate for a 16-year-old, that RH's bond with his mother was strong, and that respondent did not pose a danger to RH. Another caseworker testified that termination would also "be hard on" respon-

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reports when those individuals are reasonably available. MCR 3.973(E)(3); MCR 3.976(D)(2); MCR 3.977(G)(2).

dent's two younger sons because they had "a definitive bond with Mom," and enjoyed and looked forward to visits with her. A DHS service plan for the reporting period ending in August 2007 noted that respondent's therapist had indicated that respondent "had made a lot of progress over the time that she had worked with" respondent, and that respondent "appears to have stabilized emotionally and is capable of caring for her children." Moreover, at a permanency planning hearing held on September 6, 2007—less than three months before the termination trial—a DHS caseworker testified that respondent's therapist did not support termination and believed that "if this case were on the front end without having removal," removal would not even have taken place. The caseworker also testified that respondent's therapist had indicated that respondent had "come a long, long, way" with "the substance abuse issue."

As the above examples indicate, evidence favorable to respondent existed, and respondent showed signs of progress during the two years between the preliminary hearing and the termination trial. Had respondent been represented by counsel, it seems likely that significantly more evidence favorable to respondent would have been presented. Counsel for respondent may also have been able to prevent the removal of the children from respondent's home by arguing that removal was not appropriate, given the favorable evidence, and by advocating for alternatives to removal. Counsel also could have made a strong argument that termination was inappropriate, particularly for respondent's 16-year-old son, to whom respondent posed no danger. Because the trial court's errors at the preliminary hearing pervaded this entire proceeding, I believe that errors that occurred early in the proceedings plainly affected respondent's substantial rights.[10]

This case is part of a disturbing and recent pattern of trial courts' failures to appoint counsel and untimely appointment of counsel to represent parents in child protective proceedings. See, e.g., *In re Clemons*, unpublished opinion per curiam of the Court of Appeals, issued August 19, 2008 (Docket No. 281004) (failure to advise the respondent of her right to counsel, and the respondent appeared at the termination trial without counsel). Our Legislature requires the appointment of counsel in child protective proceedings. Trial courts must comply with these requirements unless and until the Legislature abolishes or modifies them. Moreover, given the nature of the interest at stake in child protective proceedings, I question whether the failure to appoint counsel

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[10] Justice YOUNG's argument that "the admission of the evidence following the entry of the invalid plea is harmless beyond a reasonable doubt" because "[h]ad respondent not entered a plea, the court would have conducted a trial under MCR 3.972" and "certainly would have assumed jurisdiction" is highly speculative. The result in this case was far from inevitable, as is perhaps best illustrated by the DHS caseworker's testimony, noted above, that respondent's therapist did not support termination and believed that "if this case were on the front end without having removal," removal would not even have taken place.

to represent respondents throughout such proceedings can ever be harmless error. As noted, the United States Supreme Court has recognized that parents have a fundamental liberty interest in the care, custody, and control of their children. *Troxel*, *supra* at 65; see also *Santosky v Kramer*, 455 US 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."). In addition, this Court has recognized that "cases involving the involuntary, permanent termination of parental rights are unique in the kind, the degree, and the severity of the deprivation they inflict." *In re Sanchez*, 422 Mich 758, 765-766 (1985) (citation and quotation marks omitted). And, in *Reist v Bay Circuit Judge*, 396 Mich 326, 346 (1976), three justices of this Court concluded:

> Because of the nature of parental rights termination proceedings and of the basic, fundamental nature of the parental relationship in our society, the Due Process Clause requires the assignment of counsel at public expense for an indigent for hearings when the state seeks to terminate his parental rights.

The Court of Appeals has also held that an indigent parent has a constitutional right to counsel at a hearing that may involve termination of parental rights. *In re Powers*, 244 Mich App 111, 121 (2000); *In re Cobb*, 130 Mich App 598, 599 (1983). Whatever the answer to the harmless error question, the harm that resulted from the trial court's failure to appoint counsel at the first appearance is clear.[11]

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[11] Contrary to Justice YOUNG's contention, a structural error rule for the appointment of counsel in termination of parental rights cases would not "catapult parental rights above and beyond a criminal defendant's liberty interest." In a criminal proceeding, the Sixth Amendment guarantees the right to counsel any time incarceration is the actual penalty, even for a misdemeanor conviction. *Scott v Illinois*, 440 US 367 (1979); *Argersinger v Hamlin*, 407 US 25 (1972). See also *Glover v United States*, 531 US 198, 203 (2001) ("[O]ur jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.") Physical liberty is but one aspect of an individual's liberty interest. Another is the relationship between parents and children. A structural error rule for the deprivation of counsel in termination of parental rights proceedings would simply recognize that termination of parental rights is a deprivation of a liberty interest at least as significant as incarceration. Indeed, "[f]ew forms of state action are both so severe and so irreversible." *Santosky*, *supra* at 759.

In *Santosky*, the United States Supreme Court recognized that a parent's interest in her child "is an interest far more precious than any property right." *Id*. at 758-759, citing *Lassiter*, *supra* at 27. If anything, the Court's conception of the importance of such rights has evolved since *Lassiter* and *Santosky*. In *MLB v SLJ*, 519 US 102, 125 (1996), the Court

## VI. CONCLUSION

For the reasons explained by the Court of Appeals, the trial court clearly erred by finding that the DHS presented clear and convincing evidence to support the statutory grounds for termination. In addition, the trial court's errors in failing to advise respondent that her plea of admission could be used against her in a later termination proceeding and in failing to appoint counsel to represent her until 14 days before the termination trial violated statutory and court-rule based protections. These fundamental errors led to the admission of unchallenged and untested evidence in later proceedings. In my view, these flaws deprived respondent of due process.

KELLY, C.J. I join the statement of Justice CORRIGAN.

YOUNG, J. (*concurring*). I concur with the order affirming the Court of Appeals judgment and remanding to the trial court for further proceedings. I write separately only to respond to Justice CORRIGAN's concurring statement.

First, I disagree with Justice CORRIGAN's decision to address respondent's due process challenges because of our rule that we should decline to reach constitutional challenges when controversies can be resolved on nonconstitutional bases.[1] The trial court's violation of numerous court rules and statutes constitutes significant error that requires reversal of the termination order as explained in Justice CORRIGAN's concurring statement. As the numerous state law violations are sufficient to support this decision, this Court should not consider additional constitutional issues.

Second, I disagree with Justice CORRIGAN's conclusion that respondent was denied her right to due process by the admission of hearsay evidence at the termination trial. In general, the rules of evidence do not apply during child protective proceedings.[2] When the court takes jurisdiction over a child, however, the parent has the option to proceed to trial at which the Department of Human Services (DHS) must present legally

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recognized that, "[l]ike a defendant resisting criminal conviction," a parent appealing a decree terminating her parental rights "seeks to be spared from the State's devastatingly adverse action."

[1] *In re Rood*, 483 Mich 73, 128-130 (2009) (YOUNG, J., concurring in part and dissenting in part); *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 734 (2003), citing *People v Riley*, 465 Mich 442, 447 (2001), and *MacLean v Michigan State Bd of Control for Vocational Ed*, 294 Mich 45, 50 (1940); *Delta Charter Twp v Dinolfo*, 419 Mich 253, 264 n 4 (1984).

[2] Several court rules provide that the rules of evidence do not apply at various stages of the proceedings: MCR 3.965(B)(11) (preliminary hearing); MCR 3.966(C)(2)(c) (placement review proceeding); MCR 3.973(E)(1) and MCR 3.975(E) (dispositional review hearings); MCR 3.976(D)(2) (permanency planning hearing).

admissible evidence to establish the grounds for taking jurisdiction by a preponderance of the evidence.[3] However, a parent may waive the right to trial and the right to have the DHS "prove the allegations in the petition by a preponderance of the evidence" by entering a plea of admission and allowing the court to take jurisdiction.[4] By entering a plea, the parent waives the right to have the court take jurisdiction solely on the basis of legally admissible evidence. This waiver does not shift the parent's "right" to have legally admissible evidence presented against him to a later point in the proceedings. Such a result is not contemplated anywhere in the court rules.

Rather, the court rules provide that the rules of evidence do not apply at the termination hearing unless the parent's rights are terminated at the initial dispositional hearing or if the parent's rights are terminated on the basis of grounds stated in a supplemental petition.[5] To the extent that respondent's rights were terminated, partly on the basis of grounds not raised in the initial petition, I agree that the DHS was required to present legally admissible evidence. However, respondent had no right to have the initial grounds for termination established only by evidence that would be admissible under the rules of evidence. Respondent's entry of a plea of admission did not open the door to such inadmissible evidence at the termination trial; the fact that the court had taken jurisdiction over the children, regardless of the method, was the cause of the change in the evidentiary standard. Had respondent not entered a plea, the court would have conducted a trial pursuant to MCR 3.972 to assume jurisdiction. Given the evidence regarding the condition of the home, the presence of several unsuitable adult residents, and the parents' neglect of the children, the trial court certainly would have assumed jurisdiction at that time. Accordingly, the child protective proceedings, including the ultimate termination trial, would have been based on the same otherwise inadmissible evidence. As this result was inevitable, the admission of the evidence following the entry of the invalid plea is harmless beyond a reasonable doubt.[6]

Finally, Justice CORRIGAN makes the stunning announcement that she "question[s] whether the failure to appoint counsel to represent respondents throughout such proceedings can ever be harmless error."[7] Justice CORRIGAN's query suggests a structural error analysis beyond any existing

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[3] MCR 3.972(C)(1).

[4] MCR 3.971(B)(3)(b).

[5] MCR 3.977(E), (F), (G)(2).

[6] Contrary to the suggestion made by Justice CORRIGAN, *ante* at 938 n 10, I do not believe that the removal of the children from respondent's home or the ultimate termination decision was inevitable. Moreover, Justice CORRIGAN has not responded to the point actually made in my concurrence—that the *assumption of jurisdiction was inevitable* based on the evidence that would have been presented at the trial conducted pursuant to MCR 3.972.

[7] *Ante* at 938-939.

precedent. Such a standard goes well beyond the due process right to counsel even in criminal proceedings. In a criminal proceeding, a defendant has a due process right to appointed counsel only in cases that may result "in the defendant's loss of personal liberty."[8] Even then, the denial of counsel only amounts to structural error when it occurs during a critical stage in the proceedings.[9]

In *Lassiter v Dep't of Social Services*, the United States Supreme Court held that a parent's due process rights are not violated because of a failure to appoint counsel, even at a termination hearing, when the potential deprivation of rights is at its greatest.[10] Justice CORRIGAN's query defies the *Lassiter* Court's holding and analysis. Through statute and court rules, Michigan has afforded respondent parents greater protection than that required by the federal constitution. Michigan law requires the courts to advise a parent of his right to counsel and to appoint counsel when requested at any time during a child protective proceeding.[11] However, the creation of a due process right to appointed counsel at any and all stages of a child protective proceeding, the deprivation of which amounts to structural error, is a completely novel concept unsupported by precedent and, in fact, contrary to precedent from the Supreme Court of the United States. Such a rule would catapult parental rights above and beyond a criminal defendant's liberty interest. Such a rule implies that *every* stage of a child protective proceeding is "critical," something that is not true even in criminal procedure.[12]

Ultimately, the respondent was denied her right to appointed counsel, in violation of statute and court rule, when the trial court ignored

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[8] *Lassiter v Dep't of Social Services*, 452 US 18, 25-27 (1981), citing *Scott v Illinois*, 440 US 367, 373-374 (1979), and *Argersinger v Hamlin*, 407 US 25 (1972).

[9] *United States v Cronic*, 466 US 648, 659 (1984).

[10] *Lassiter*, *supra* at 31-32.

[11] MCL 712A.17c(4), (5); MCR 3.915(B)(1); MCR 3.965(B)(5); MCR 3.974(B)(3)(a)(i).

[12] Justice CORRIGAN avoids answering this criticism by focusing solely on the nature of the right being protected. I do not question that a criminal defendant is entitled to counsel when he faces imprisonment. The law is quite clear on this right. That right, however, is not unqualified and does not extend beyond "critical phases" of the criminal adjudicative process. Thus, I question whether Justice CORRIGAN is suggesting that this Court should expand a criminal defendant's constitutional right to counsel to non-critical phases of the proceedings or whether she is implying that parental rights deserve *greater* protection than a criminal defendant's interest in physical liberty. In order to make sense of her position, she must be urging one or the other, but neither is grounded in any current constitutional jurisprudence.

respondent's request for representation. It is completely unnecessary to entertain hypothetical questions regarding whether such an error defies harmless error analysis.

*Order Granting Oral Argument in Case Pending on Application for Leave to Appeal April 8, 2009:*

ROBERTS v SAFFELL, No. 137749. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address: (1) whether the Court of Appeals erred by holding that innocent misrepresentation is not a viable theory of liability under the Seller Disclosure Act (SDA), MCL 565.951 *et seq.*; (2) if not, whether the plaintiffs could nevertheless proceed with their claim to the extent an issue presented to the jury was whether the defendants knew of the termite infestation and intentionally withheld the information from the plaintiffs; (3) whether the defendants failed to preserve the argument that a claim for innocent misrepresentation cannot legally be maintained under the SDA by failing to expressly present it at the Court of Appeals; and (4) if so, whether this failure to preserve the issue acted as a waiver of this defense or acted as a bar to the Court of Appeals consideration of the issue. The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers. Reported below: 280 Mich App 397.

*Summary Disposition April 8, 2009:*

PEOPLE v O'NON, No. 136514. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of the issues: (1) whether the redacted transcript of the prior testimony of Matthew O'Non at his own trial, which was admitted in this case, was "testimonial" under *Crawford v Washington*, 541 US 36 (2004); (2) whether any statements in that transcript were hearsay under MRE 801(c) because they were offered to prove the truth of the matters asserted and therefore were barred by *Crawford*; and (3) whether all statements in that transcript that were offered to prove the falsity of the matters asserted necessarily were not hearsay under MRE 801(c) and thus were not barred by *Crawford*. 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. Court of Appeals No. 280262.

*Leave to Appeal Denied April 8, 2009:*

PEOPLE v ROSARIO, No. 137366; Court of Appeals No. 285847.

PEOPLE v MCCULLOUGH, No. 137410; Court of Appeals No. 260592. KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v GORDON, No. 137680; Court of Appeals No. 261724.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

*Summary Disposition April 10, 2009:*

*In re* KINNEY (KINNEY v DEPARTMENT OF CORRECTIONS), No. 136728. Pursuant to MCR 7.302(G)(1), we vacate the judgment of the Court of Appeals and we remand this case to the Ingham Circuit Court. In light of the unique procedural facts of this case, the circuit court shall afford the plaintiff direct review of his challenge to the defendant's hearings officer's decision, as presented in File No. 04-001149-AA. Court of Appeals No. 277809.

KELLY, C.J. (*concurring*). I concur in the order remanding this case to the circuit court and directing that court to consider plaintiff's appeal of his assault conviction as an appeal of right. I write separately only to highlight the extraordinary delays that occurred in this case and the role that this Court should take in preventing such delays in future cases.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff is an inmate in a state prison. He attempted an escape in 2003. Plaintiff kicked a corrections officer who prevented his escape. The escape attempt led to four misconduct charges. Plaintiff pleaded guilty of three charges, but denied the fourth, a charge of assault and battery of a corrections officer. Plaintiff asserted that he did not kick the officer intentionally, but was simply trying to break out of the officer's grasp. A Department of Corrections (DOC) hearings officer found plaintiff guilty of the assault charge and later denied rehearing.

Under MCL 791.255, plaintiff had 60 days from the delivery or mailing of that denial of rehearing, until May 3, 2004, to file an application for direct review by the circuit court.[1] He delivered his application to prison officials on April 14, 2004. The prison records show that plaintiff's petition was placed in the outgoing mail the next day, April 15. But the Ingham Circuit Court did not date-stamp the application as received until May 10, 2004, ten days *after* the filing deadline.

The circuit court issued an order allowing plaintiff to resubmit his application within 21 days. Plaintiff's new deadline was August 4, 2004. He delivered his application to prison officials well in advance of

[1] MCL 791.255(2) provides:

> Within 60 days after the date of delivery or mailing of notice of the decision on the motion or application for rehearing, if the motion or application is denied or within 60 days after the decision of the department or hearing officer on the rehearing, a prisoner aggrieved by a final decision or order may file an application for direct review in the circuit court in the county where the petitioner resides or in the circuit court of Ingham county.

the deadline, on July 20. The prison records indicate that this application was placed in the outgoing mail on July 21. Again, however, the circuit court did not record the application as received until well after the deadline, on August 13, 2004, 25 days after plaintiff delivered it to prison officials.

This time, the circuit court entered an order dismissing plaintiff's petition as untimely. Plaintiff sought delayed leave to appeal the order, but the Court of Appeals denied it. This Court denied leave to appeal on October 31, 2006.

Almost three full years after filing his application for review of his assault conviction, plaintiff sought superintending control in the Ionia Circuit Court. That court dismissed the complaint, adopting the defendant's reasoning that plaintiff's only remedy had been a direct appeal of right to the circuit court. The Court of Appeals affirmed the dismissal.

Nearly five years after plaintiff filed the initial appeal challenging his assault conviction by the DOC hearing officer, this Court is finally granting plaintiff his day in court. The outrageousness of such a lengthy delay is obvious.

## THE PRISON-MAILBOX RULE

This case strongly demonstrates the need for this Court to adopt a prison-mailbox rule. I have repeatedly advocated the adoption of such a rule in the past.[2] Here, the five-year delay would have been prevented had plaintiff's petition been considered "filed" on the date he first handed it to prison authorities.[3] Fortunately, the Court recently opened an

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[2] *People v Calbert*, 480 Mich 1146, 1147 (2008) (KELLY, J., dissenting from denial of leave to appeal); *Pugh v Dep't of Corrections*, 475 Mich 852-853 (2006) (KELLY, J., dissenting from denial of leave to appeal).

[3] Justice CORRIGAN's concern that "[w]e can make an informed administrative decision concerning a potential mailbox rule only with more specific information concerning the reasons for delay in cases such as this one," *post* at 947, misses the point. Certainly, it would be helpful to know the reasons for the delays in plaintiff's mailings in this case. However, a prison-mailbox rule is not intended to enable courts to identify the cause of filing delays. Rather, it is intended to permit prisoners' appeals to be heard if the necessary pleadings are put in the hands of prison authorities before the filing deadline has expired. Granting plaintiff an appeal of his assault conviction is thus not "premature," as Justice CORRIGAN asserts, because plaintiff did everything possible to get his paperwork to the court clerk on time. This simple fact makes the policy rationale behind the prison-mailbox rule applicable to this case, regardless of the cause of the delays.

My conclusion is consistent with the United States Supreme Court's reasoning in *Houston v Lack*, 487 US 266 (1988). In that case, the inmate also "had done all that could reasonably be expected" to get his application filed on time. *Id.* at 270, quoting *Fallen v United States*, 378 US 139,

administrative file on this issue and will soon be considering the merits of such a rule.[4]

CONCLUSION

I fully concur in the order remanding this case to the circuit court to grant plaintiff a direct appeal as of right from his assault conviction. This case represents an egregious violation of plaintiff's right to his day in court. This Court can prevent future such violations by adopting a

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144 (1964). Therefore, as here, the policy behind adopting a prison-mailbox rule centers around the fact that "the moment at which *pro se* prisoners necessarily lose control over and contact with their notices of appeal is at delivery to prison authorities, not receipt by the clerk." *Id.* at 275.

Finally, Justice CORRIGAN's reference to a possible third delay in plaintiff's mailings in support of her contention that a mailbox rule may be difficult to apply is misguided. First, the two delays in plaintiff's mail discussed in this concurrence were both substantiated by DOC Disbursement Authorization Forms. The date and time the documentation was placed in the outgoing mail is shown on the forms. It is without dispute that the third mailing cited by Justice CORRIGAN was timely. Hence, the form did not need to be included as part of plaintiff's filings. There is no reason to believe another DOC Disbursement Authorization Form is unavailable to show when plaintiff's notice to the Court of Appeals was actually placed in the outgoing mail. The supposed third delay is a distraction from the real issue and does not, as Justice CORRIGAN asserts, illustrate a situation "that would prevent the easy application of a mailbox rule for prison inmates."

[4] Even if Justice CORRIGAN's concerns were valid, I disagree that they should delay or prevent this Court from formulating a prison-mailbox rule and submitting it for public comment. I believe the potential problems Justice CORRIGAN's dissenting statement references could adequately be identified and rectified through our administrative process. Approximately 20 states have adopted the rule in some form, see Anno: *Application of "prison mailbox rule" by state courts under state statutory and common law*, 29 ALR6th 237, § 4. I have found nothing to suggest that states that adopted a prison-mailbox rule have encountered any of the problems raised by Justice CORRIGAN. Rather, the trend in courts across the country has been toward expansion of their prison-mailbox rules. See, e.g., *Sulik v Taney Co, Missouri*, 316 F3d 813 (CA 8, 2003) (joining the other circuits that have considered the issue and holding that the prison-mailbox rule governs the determination of when a prisoner's civil complaint has been filed).

version of the prison-mailbox rule discussed in the United States Supreme Court's opinion in *Houston v Lack*.[5] I once again call upon this Court to do so.

CORRIGAN, J. (*dissenting*). I would remand this case to the trial court and order the Department of Corrections (MDOC) to show cause for the consistent delays in transmitting the plaintiff inmate's legal mail to the courts. First, the delays may have originated from the MDOC's Baraga Maximum Correctional Facility, where plaintiff is housed. The MDOC is a party both to this suit and to the underlying suit in which plaintiff petitioned for judicial review of an MDOC hearing officer's decision. The MDOC is also the beneficiary of the delays, which resulted in the dismissal of plaintiff's petition in the underlying suit. Accordingly, it is appropriate to order the MDOC to explain the delays at a show cause hearing. Second, until the Court has additional facts concerning the cause of the delays, providing relief to plaintiff is premature. Finally, the courts will benefit from explicit fact-finding by the trial court in this case. Even if the delays originated with the MDOC, their causes remain a mystery. For example, in addition to the delays in mail to the trial court noted by Chief Justice KELLY, the record contains a notice mailed to the Court of Appeals and received by that court on June 23, 2008. The meter stamp from Baraga, Michigan, on the face of the envelope suggests that the notice was mailed over a month earlier, on May 19, 2008. Yet the *back* of the envelope reveals a second meter stamp dated June 19, 2008. Accordingly, it is not clear whether this particular piece of mail was delayed at all; if its timeliness was at issue, the unexplained multiple meter stamps presumably would prevent the easy application of a mailbox rule for prison inmates, as described by Chief Justice KELLY, for this piece of mail. Thus, fact-finding in this case concerning the causes for the delays to plaintiff's mail will shed light on whether a mailbox rule is necessary and desirable. We can make an informed administrative decision concerning a potential mailbox rule only with more specific information concerning the reasons for delay in cases such as this one.

YOUNG, J. I join the statement of Justice CORRIGAN.

PEOPLE v NOURI, No. 138479; Court of Appeals No. 290178. The motion for immediate consideration is granted. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

KELLY, C.J. I would deny leave to appeal.

*Leave to Appeal Denied April 10, 2009:*

PEOPLE v TOUCHSTONE, No. 137272; Court of Appeals No. 285108.

KELLY, C.J. (*dissenting*). I dissent from this Court's decision to deny leave to appeal for the reasons stated in my dissenting opinion in

[5] *Houston v Lack*, 487 US 266 (1988).

*People v Petit*.[1] I would remand this case to the trial court for resentencing. The trial court did not give defendant an opportunity to address the court at sentencing. This was a clear violation of MCR 6.425(E)(1)(c).

As I noted in *Petit*, "[a]s early as 1689, the common law acknowledged that reversal is required when a court fails to invite a defendant to speak before sentencing."[2] This case involves facts more egregious than those in *Petit*.[3] Thus, given the importance of the right of allocution and the outright denial of that right here, I would remand this case for allocution and resentencing.

Finally, I concur with Justice MARKMAN's dissenting statement regarding the assessment of probation fees and would include in the remand order directions to the trial court to properly apply MCL 771.3c.

MARKMAN, J. (*dissenting*). Because the trial court failed to follow the Legislature's clear direction in MCL 771.3c, I dissent. That provision directs a court to recoup probation fees from a defendant and provides in part that:

> In determining the amount of the fee, the court shall consider the probationer's projected income and financial resources. The court shall use the following table of projected monthly income in determining the amount of the fee to be ordered:
>
> | Projected Monthly Income | Amount of Fee |
> |---|---|
> | $ 0-249.99 | $ 0 |
> | $ 250.00-499.99 | $10 |
> | $ 500.00-749.99 | $25 |
> | $ 750.00-999.99 | $40 |
> | $ 1,000.00 or more | 5% of projected monthly income, but not more than $135. |
>
> . . . If the court orders a higher amount, the amount and the reasons for ordering that amount shall be stated in the court order. [MCL 771.3c(1).]

Absent any explanation, the trial court here assessed defendant a $10 monthly fee (for 24 months), although the only evidence regarding

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[1] *People v Petit*, 466 Mich 624, 636-639 (2002) (KELLY, J., dissenting).

[2] *Petit*, *supra* at 637 (KELLY, J., dissenting).

[3] In *Petit*, a majority of this Court concluded that the trial court's question regarding whether the parties had "anything further" provided defendant with an adequate opportunity to address the court. In this case, by contrast, the record indicates that the trial court offered no one an opportunity to address the court at any time during the sentencing hearing.

defendant's income showed that he earned $200 a month, correlating with a $0 monthly fee. Accordingly, I would remand to the trial court for that court to either waive the fee or state "the reasons for ordering" the higher fee, as required by law.[1]

PEOPLE v NATHANIEL, No. 138045; Court of Appeals No. 288942.

WEAVER, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

MARKMAN, J. (*dissenting*). Defendant was charged with murder, and the trial court suppressed evidence of his confession. The prosecutor appealed and the Court of Appeals denied leave to appeal "for failure to persuade the Court of the need for immediate appellate review." This reason is simply inapt. See *People v Yost*, 468 Mich 122, 124 n 2 (2003). If defendant proceeds to trial and is found guilty, any subsequent appeal will not consider whether the evidence at preliminary examination was sufficient to warrant a bindover.

The time for review of the trial court's suppression order is now, or never. If the defendant's confession remains suppressed, the prosecutor will either have to dismiss the charges because the evidence independent of the confession is inadequate, or the prosecutor will be forced to proceed to trial without the prosecutor's strongest piece of evidence. Thus, I would remand to the Court of Appeals for consideration as on leave granted.

DAVIS v WHEELER, No. 138478; Court of Appeals No. 288016.

YOUNG, J. (*concurring*). I concur in this Court's order denying leave to appeal. I write separately to address an error in the Court of Appeals decision that plaintiff abandoned in his application for leave to appeal in this Court.

Defendant Marilyn Wheeler was elected to the Highland Park Board of Education. Defendant was removed from office by court order because she failed to file an Acceptance of Office form.[1] Defendant was subsequently appointed to the same position by the board at a special meeting on April 10, 2008.[2] Defendant began participating and voting on matters that same day. It is undisputed that defendant took her oath of office five days later on April 15, 2008.

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[1] Judge WHITE, dissenting in the Court of Appeals, would also have "direct[ed] the trial court to consider the probation costs . . . ." Unpublished order of the Court of Appeals, entered July 24, 2008 (Docket No. 285108).

[1] See MCL 168.309, which provides in relevant part: "Within 10 business days after notification by the school district election coordinator of election or appointment to the board, each person shall file with the secretary of the board an acceptance of the office to which the person has been elected or appointed."

[2] See MCL 168.311, which provides in relevant part: "If less than a majority of the offices of school board member of a school district become vacant, the remaining school board members shall fill each vacant office by appointment. . . . An individual appointed under this subsection serves until a successor is elected and qualified."

Plaintiff brought this action and alleged that defendant's office was vacated a second time when she failed to take the oath of office before conducting board activities.[3] Plaintiff relied on MCL 201.3(7), which provides in relevant part:

> Every office shall become vacant, on the happening of any of the following events, before the expiration of the term of such office:
>
> * * *
>
> 7. [The office holder's] . . . neglect to take his oath of office . . . in the manner and within the time prescribed by law.

Plaintiff argued that "the time prescribed by law" was "before entering upon the duties" of defendant's office, as provided by Const 1963, art 11, § 1.[4] The circuit court ruled that defendant's office was not vacated by her failure to take the oath of office before conducting board activities and dismissed plaintiff's action. The Court of Appeals affirmed and held that "the plain meaning of this constitutional language is that an officer may not enter upon the duties of her office until the oath is taken. This is not a time requirement; rather, it is a substantive requirement for an officer's legal exercise of the duties of her office."[5]

I believe that the circuit court and the Court of Appeals erred. Section 1 of article 11 of the state constitution of 1963 requires that all officers take and subscribe the oath of office "before entering upon the duties of their respective offices . . . ." "Before" is a temporal term. "Before entering upon the duties" of an office is a time. No other time is prescribed by law. Thus, "before entering upon the duties" is "the time prescribed by law." Accordingly, pursuant to MCL 201.3(7), defendant's school board position was vacated when she participated in board activities on April 10, 2008, before she took the oath of office on April 15, 2008, and plaintiff was entitled to a writ of quo warranto. As stated, plaintiff abandoned this issue in his appeal here and is not entitled to relief. Accordingly, I concur in the order denying leave to appeal.

PEOPLE v NOURI, No. 138500; Court of Appeals No. 290555.

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[3] Plaintiff also alleged that defendant was prohibited from being appointed to the board after her first removal for failure to file an Acceptance of Office form. The lower courts rejected plaintiff's argument. I concur in this Court's order denying leave to appeal.

[4] Const 1963, art 11, § 1, provides in relevant part: "All officers, legislative, executive and judicial, before entering upon the duties of their respective offices, shall take and subscribe the following oath or affirmation . . . ."

[5] *Davis v Wheeler*, unpublished opinion per curiam of the Court of Appeals, issued March 17, 2009 (Docket No. 288016), at 3.

*Summary Disposition April 17, 2009:*

PEOPLE v KING GROSS, No. 136579. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, vacate the sentences imposed by the Oakland Circuit Court, and remand this case to the trial court for resentencing on the maximum terms of defendant's sentences only. MCL 769.24; *People v Thomas*, 447 Mich 390 (1994). The sentencing judge erroneously stated that he did not have authority to reduce the maximum sentence below the statutory maximum. Generally that is true. MCL 769.8(1). Here, however, defendant's crimes were all "major controlled substance offense[s]." MCL 761.2. For such offenses, the judge has discretion to fix both the minimum and maximum terms within the limits set by statute. MCL 769.9(3); *People v Wright*, 432 Mich 84, 98-99 (1989); *People v Perez*, 417 Mich 1100.21 (1983). Accordingly, on remand, the court is not required to reduce the defendant's maximum sentences, but may exercise its discretion to do so. Court of Appeals No. 277319.

WEAVER, J. I dissent from the order remanding this case for resentencing as I am not persuaded that there is any manifest injustice in this case and thus would deny leave to appeal.

CORRIGAN, J. (*dissenting*). I would deny defendant's application for leave to appeal. I note preliminarily that the Court's order of remand for resentencing is certainly premature. As the order acknowledges, the trial court is not required to reduce defendant's maximum sentences, but may exercise its discretion to do so. Accordingly, at most we should remand for Judge Michael Warren to decide, at his discretion, whether to resentence defendant, as we have done in other cases. E.g., *People v Yahne*, 477 Mich 998 (2007) (remanding to the circuit court and stating that the court "may, in its discretion, decide whether resentencing is necessary").

In any event, I would not expend the scarce resources of the criminal justice system on this resentencing because defendant was paroled after he filed his application for leave to appeal in this Court. In my view, his current claim is moot precisely because he *is* at liberty while on parole. He is scheduled for discharge from parole on December 2, 2012, long before the expiration of the maximum sentences he now challenges. His paroled sentences will affect his personal liberty only if he reoffends before his discharge and is returned to prison. In that event, he may become liable to serve the remaining portion of the paroled sentences. MCL 768.7a(2). Therefore, I would not grant relief. I would enter an order authorizing defendant to seek resentencing only if he reoffends.

YOUNG, J. I join the statement of Justice CORRIGAN.

*Leave to Appeal Denied April 17, 2009:*

PEOPLE v XIONG, No. 135158. By order of April 23, 2008, the application for leave to appeal the September 25, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Watkins* (Docket No. 135787). On order of the Court, leave to appeal having been denied in *Watkins*, 482 Mich 1114 (2008), the application is again

considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 270213.

KELLY, C.J. (*dissenting*). I would grant defendant's application for leave to appeal. This appeal raises jurisprudentially significant issues including a defendant's right to a fair trial and the proper separation of powers between the Legislature and the judiciary. A failure to rule on this case will leave lower courts without guidance on these important issues, and some accused of crimes will likely receive disparate treatment across the state.

At issue here is the interplay between MCL 768.27a and MRE 404(b). Both govern the admissibility of so-called "other acts" evidence. MRE 404(b) does not allow the admission of such evidence to show a defendant's character or propensity to commit such acts. Rather, it allows the admission of such evidence only for other purposes, such as to show "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident . . . ." MRE 404(b)(1).

By contrast, MCL 768.27a allows such evidence to be admitted for "any matter to which it is relevant," but is limited to proceedings involving defendants charged with "a listed offense against a minor." Listed offenses are set forth in section 2 of the sex offenders registration act, MCL 28.722.

A key question presented, therefore, is whether the statute or the rule of evidence controls in prosecutions for the listed offenses referred to in MCL 768.27a. In *People v Pattison*[1] and *People v Watkins*,[2] two cases that examined MCL 768.27a, the Court of Appeals held that MCL 768.27a is constitutional and that it predominates over MRE 404(b). The Court based those decisions primarily on this Court's decision in *McDougall v Schanz*.[3] *McDougall* held that, where a court rule contravenes a legislative enactment in an area of substantive law, the court rule must yield.

Relying on *McDougall*, the Court of Appeals in *Pattison* concluded that "MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts."[4] On remand to determine which provision controls when the two conflict, the *Watkins* panel ruled that MCL 768.27a predominates over MRE 404(b).[5]

This Court granted leave to appeal in *Watkins*.[6] However, after considering the parties' briefs and hearing oral argument, a majority decided to vacate our grant order and deny leave without further

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[1] *People v Pattison*, 276 Mich App 613 (2007).

[2] *People v Watkins*, 277 Mich App 358 (2007).

[3] *McDougall v Schanz*, 461 Mich 15 (1999).

[4] *Pattison*, *supra* at 619.

[5] *Watkins*, *supra* at 365.

[6] *People v Watkins*, 480 Mich 1167 (2008).

comment.[7] Justice CAVANAGH wrote a statement dissenting from the denial of leave, which I joined.[8] This case, which had been held in abeyance for our disposition in *Watkins*, is before us once again.

The order granting leave in *Watkins* directed the parties to address each of the key issues involved in this case. Included among those issues were whether MCL 768.27a prevails over MRE 404(b) and whether MCL 768.27a interferes with the judicial power to ensure that a criminal defendant receives a fair trial. Another significant question is whether the decision to admit "other acts" evidence under section 27a must include a balancing analysis under MRE 403 to protect a defendant's due process rights.[9] Each of these questions warrants examination by this Court.

First, the proper scope and application of *McDougall* remains an open question. *McDougall* held that a court rule must yield to a statutory provision if the provision concerns a matter of substance rather than procedure. The *McDougall* Court noted that, although "the analytical exercise required will not always be an easy one, . . . it is ultimately this Court that will determine in each instance where the substance/procedure line must be drawn."[10] Yet the Court declines to do so here.

Second, when a prosecutor seeks to admit evidence under MCL 768.27a, the question remains whether the trial court must balance the probative value with the prejudicial effect of that evidence. The companion statute to section 27a, MCL 768.27b, expressly requires the trial court to evaluate the admissibility of otherwise relevant evidence under MRE 403.[11] Section 27a has no such mandatory language.

In *Pattison*, the Court of Appeals held, with little explanation, that evidence admitted under section 27a is subject to the balancing test of

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[7] *People v Watkins*, 482 Mich 1114 (2008).

[8] *Id.* at 1114-1116 (CAVANAGH, J., dissenting).

[9] MRE 403 requires that, even when evidence is relevant and otherwise admissible, it may be excluded if its prejudicial effect substantially outweighs its probative value. The full rule reads: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[10] *McDougall*, *supra* at 31, 37.

[11] MCL 768.27b provides, in relevant part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

MRE 403.[12] However, Court of Appeals authority that holds to the contrary also exists.[13] Moreover, some of the briefing in *Watkins* argued that MRE 403 does not and should not apply when determining the admissibility of propensity evidence under section 27a.[14] Without an answer from this Court, trial courts may very well come to different conclusions on the issue. I believe it is possible, even likely, that similarly situated defendants in various parts of the state may be treated differently by trial courts when this statute is applied.[15]

Finally, whether a trial court's failure to conduct a balancing test under MRE 403 could violate a defendant's constitutional rights is another weighty concern left unresolved by the Court's denial order.[16]

Whatever the merits of the Court of Appeals holdings in *Pattison* and *Watkins*, this Court needs to provide guidance to the lower courts on the issues raised in this case. Yet a majority of this Court has again chosen to deny leave to appeal rather than provide helpful answers. I dissent and would grant the application for leave to appeal.

CAVANAGH, J. I join the statement of Chief Justice KELLY.

PEOPLE V HARN, No.135222. By order of April 23, 2008, the application for leave to appeal the October 18, 2007, order of the Court of Appeals was held in abeyance pending the decision in *People v Watkins* (Docket No. 135787). On order of the Court, leave to appeal having been denied in *Watkins*, 482 Mich 1114 (2008), the application is again considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. Court of Appeals No. 278498.

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[12] The *Pattison* Court "caution[ed] trial courts to take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence. See MRE 403." *Pattison*, *supra* at 621.

[13] See *People v Bennett*, peremptory order of the Court of Appeals, issued August 15, 2006 (Docket No. 272110) ("[A]ssuming the evidence relates to a 'listed offense' and assuming the evidence satisfies the low threshold of relevancy, *the statute implicitly precludes exclusion of the evidence under an MRE 403 analysis*.") (emphasis added).

[14] Amicus Curiae brief for Attorney General Michael A. Cox, Livingston County Prosecutor David L. Morse, and Oakland County Prosecutor David G. Gorcyca, pp 13-33; Amicus Curiae brief for the Prosecuting Attorneys Association of Michigan, pp 13-14.

[15] At a minimum, it appears that prosecutors in Livingston and Oakland counties may argue at the trial court level that MRE 403 does not apply to MCL 768.27a. See note 14 of this statement.

[16] See *United States v LeMay*, 260 F3d 1018 (CA 9, 2001) ("As long as the protections of [the analogous federal] Rule 403 remain in place to ensure that potentially devastating evidence of little probative value will not reach the jury, the right to a fair trial remains adequately safeguarded.").

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J. I join the statement of Chief Justice KELLY.

PEOPLE v MCCAW, No. 135281. By order of July 23, 2008, the application for leave to appeal the October 4, 2007, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Watkins* (Docket No. 135787). On order of the Court, leave to appeal having been denied in *Watkins*, 482 Mich 1114 (2008), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 270197.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J. I join the statement of Chief Justice KELLY.

PEOPLE v THOMAS HAWKINS, No. 135976. By order of June 23, 2008, the application for leave to appeal the January 15, 2008, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Watkins* (Docket No. 135787). On order of the Court, leave to appeal having been denied in *Watkins*, 482 Mich 1114 (2008), the application is again considered, and it is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 273409.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J. I join the statement of Chief Justice KELLY.

PEOPLE v EDING, No. 137024; Court of Appeals No. 285582.

KELLY, C.J. (*dissenting*). I would vacate defendant's sentence and remand the case to the trial court for resentencing because offense variable (OV) 10 of the sentencing guidelines was misscored. Nothing in the record shows that defendant engaged in preoffense conduct aimed at victimizing another person, as MCL 777.40(3)(a) requires to support the score that the trial court gave for OV 10. Because the prosecutor appears to have conceded the scoring error, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82 (2006).

UNIVERSITY REHABILITATION ALLIANCE, INC v FARM BUREAU GENERAL INSURANCE COMPANY OF MICHIGAN, No. 137189; reported below: 279 Mich App 691.

CORRIGAN, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. I would grant leave to appeal in this no-fault insurance case involving an award of attorney fees. The Court of Appeals majority erroneously concluded that defendant's delay in paying personal protection insurance (PIP) benefits was unreasonable. In my view, the dissenting judge in the Court of Appeals properly

articulated the governing legal principles. *Univ Rehabilitation Alliance, Inc v Farm Bureau Gen Ins Co*, 279 Mich App 691, 704-706 (2008).

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant's insured suffered serious brain injuries when her boyfriend allegedly pushed her from a moving motor vehicle. The insured's boyfriend was criminally charged for this assault. Defendant, Farm Bureau General Insurance Company, the no-fault insurer, initially refused to pay the claim of plaintiff, University Rehabilitation Alliance, Inc., for benefits on the ground that if the insured's injuries resulted from an assault, they are exempt from no-fault coverage under MCL 500.3105(4). Plaintiff filed suit, challenging defendant's initial refusal to pay PIP benefits. After the insured's boyfriend was acquitted of criminal assault, defendant voluntarily paid plaintiff's claim with interest. Nevertheless, plaintiff asserted that defendant's delay was unreasonable and moved for attorney fees under MCL 500.3148(1). The trial court awarded plaintiff attorney fees. The majority in the Court of Appeals affirmed, while the dissent concluded that defendant's delay in paying PIP benefits was reasonable because binding precedent exempts injuries resulting from an assault in a motor vehicle from no-fault coverage.

## II. REASONABLENESS UNDER MCL 500.3148(1)

When a no-fault insurer refuses or delays payment of PIP benefits, it has the burden of justifying its refusal or delay under MCL 500.3148(1). *Ross v Auto Club Group*, 481 Mich 1, 11 (2008). "The insurer can meet this burden by showing that the refusal or delay is the product of a legitimate question of statutory construction, constitutional law, or factual uncertainty." *Id*. When a reviewing court makes this inquiry, the determinative factor "is not whether the insurer ultimately is held responsible for benefits, but whether its initial refusal to pay was unreasonable." *Id*.

Defendant's initial refusal to pay benefits was reasonable. Until defendant learned that the insured's boyfriend had been acquitted of criminal assault, it was legitimately factually uncertain about the true cause of its insured's injury. Relying on authority from this Court, defendant properly believed that PIP benefits were not payable if the insured's injuries arose from a criminal assault. *McKenzie v Auto Club Ins Ass'n*, 458 Mich 214, 225-226 (1998); *Bourne v Farmers Ins Exch*, 449 Mich 193, 198 (1995); *Thornton v Allstate Ins Co*, 425 Mich 643, 659 (1986). In *Ross*, this Court concluded that the defendant's denial of benefits was reasonable because the defendant had "relied on a factually similar Court of Appeals decision to adopt a reasonable position on an issue of first impression." *Id*. at 15. Here, defendant similarly adopted a reasonable position in reliance on analogous precedent. Additionally, defendant relied on this Court's seemingly blanket statement that "assaults occurring in a motor vehicle are not closely related to the transportational function of a motor vehicle." *McKenzie*, *supra* at 222. I

see no appreciable distinction between defendant's position here and that of the defendant in *Ross*. In both cases, the defendants relied on earlier caselaw concerning similar issues to adopt a reasonable position regarding payment of benefits. Indeed, as soon as defendant learned that its insured's boyfriend had been acquitted of criminal assault, it voluntarily paid plaintiff more than $187,908 of benefits and $16,000 of interest. Consequently, defendant's initial refusal to pay was not unreasonable under the circumstances.

Moreover, defendant had a separate legitimate question of statutory interpretation regarding MCL 500.3105.[1] The only competing versions of the events involved intentional conduct: Did the boyfriend assault the insured, or did she jump from the moving vehicle? A claimant's bodily injury is accidental "unless suffered intentionally by the injured person or caused intentionally by the claimant." MCL 500.3105(4). In this case, defendant's attempted investigation of the veracity of the insured's claim that her boyfriend had assaulted her was stymied by the ongoing criminal investigation. Defendant could not interview the criminal defendant-boyfriend. Moreover, during his criminal trial, the insured's boyfriend testified that defendant's insured had jumped from the moving vehicle. In contrast, the insured testified that her boyfriend had pushed her. The jury apparently accepted the boyfriend's version of events and acquitted him of all charges. On these facts, the contest is between two versions of "intentional" conduct, and under one version of events, the injuries suffered by the insured were not "accidental" because the insured's injuries were "suffered intentionally . . . or caused intentionally by the claimant." MCL 500.3145(4). If its insured intentionally jumped from the moving vehicle (in what appears to me to be) an apparent suicide attempt, defendant could not have unreasonably delayed in making PIP payments because there was no "accidental" injury. This is a second ground for a determination that the delay in payment reasonable.

## III. JUSTICE WEAVER'S CONSISTENT INTERPRETATION OF MCL 500.3105

This Court recently heard arguments in a case involving the award of no-fault benefits under MCL 500.3105 to a fleeing felon aiming a firearm

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[1] MCL 500.3105(1) requires an insurer to pay PIP benefits for any "accidental bodily injury arising out of the . . . use of a motor vehicle as a motor vehicle . . . ." MCL 500.3105(4) further provides:

> Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

at a pursuing police officer. Although we ultimately denied leave in *Budget Rent-a-Car Sys, Inc v Detroit*,[2] two of my colleagues issued separate statements expressing divergent interpretations of MCL 500.3105. Justice MARKMAN described the result as "extremely troubling," but nevertheless agreed with this Court and the Court of Appeals that "the law is clear that an insurer is required to pay personal protection insurance benefits for any 'accidental bodily injury arising out of the . . . use of a motor vehicle as a motor vehicle . . . .' "[3] Justice WEAVER dissented, explaining that "[t]he claimant was not entitled to no-fault benefits because his injuries did not arise out of an 'accidental bodily injury' as defined in MCL 500.3105. The injuries sustained by the claimant occurred as a result of the claimant's use of a vehicle rented from the plaintiff for the commission of criminal acts."[4] Justice WEAVER further reasoned that, "[w]hile the claimant may not have intended to be injured, he 'caused' his injuries by intentionally engaging in criminal behavior that put him at risk of injury and in fact resulted in his injuries."[5] Accordingly, Justice WEAVER concluded: "Because the claimant did not act, or refrain from acting, 'for the purpose of averting injury to . . . any person including himself,' the claimant's injuries were not 'accidental.' . . . Any remedy for plaintiff's error in mistakenly paying the claimant no-fault benefits for injury stemming from the claimant's intentional criminal activity must be pursued against the claimant."[6] My colleagues' differing interpretations of MCL 500.3105 further suggest that a legitimate issue of statutory interpretation indeed existed in this case.

## IV. ADDITIONAL RELEVANT CASELAW

Several decisions underscore my conclusion regarding the existence of a legitimate question of statutory interpretation. In *American Alternative Ins Co, Inc v York*, 470 Mich 28, 32 (2004),[7] the Court held that under MCL 500.3135(3)(a), "courts are to review only whether the defendant intended to cause the harm that resulted." Therefore, even though the evidence revealed that the tortfeasor drove a vehicle while intoxicated and subsequently crashed into an ambulance, none of the evidence supported "a finding that [the tortfeasor] actually intended to collide

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[2] *Budget Rent-a-Car Sys, Inc v Detroit*, 482 Mich 1098 (2008).

[3] *Budget Rent-a-Car Sys*, *supra* at 1098-1099 (MARKMAN, J., concurring).

[4] *Budget Rent-a-Car Sys, Inc v Detroit*, *supra* at 1099-1100 (WEAVER, J., dissenting).

[5] *Id*. at 1100.

[6] *Id*. at 1101.

[7] Except for Justice MARKMAN, who filed a separate concurring opinion, the full Court signed the opinion per curiam issued in *American Alternative Ins Co, Inc. Id.* at 33.

with the ambulance and cause damage to it. Thus, under the language of the statute, because [the tortfeasor] did not intend to cause damage to the ambulance, he is immune from suit." *Id*. at 32-33. Similarly, in *Amerisure Ins Co v Auto-Owners Ins Co*, 262 Mich App 10, 19 (2004), the Court of Appeals reasoned that "[a]n injured person acts intentionally under the no-fault act if he intended both the act causing the injury and the injury itself, and the finder of fact must focus on the person's *subjective* intent." (Emphasis in original.) Accordingly, the Court of Appeals held that the trial court did not abuse its discretion in considering a person's level of intoxication as one factor when deciding whether he intended to injure himself. *Id*.[8]

The caselaw concerning the issue of intent in no-fault insurance cases, however, continues to engender a variety of holdings. In *Schultz v Auto-Owners Ins Co*, 212 Mich App 199, 201 (1995), the Court of Appeals affirmed a trial court's decision to grant summary disposition, thereby precluding the claimant from receiving PIP benefits.[9] When faced with factual circumstances markedly similar to the facts in this case, the Court of Appeals explained that

> the evidence showed that [the claimant] quarrelled with his girlfriend. He then jumped from a moving van that he was driving. Statements he made before jumping established that he did so either to elicit the girlfriend's sympathy or to arouse feelings of guilt in her. Consequently, plaintiff's intent to cause himself injury can be inferred from the facts. He did not meet his burden of showing no intent to injure himself when he jumped, and defendant's motion for summary disposition was properly granted.[10]

Unlike the conclusion in *Amerisure*, the *Schultz* Court stated that "the fact that [the claimant] claimed to be voluntarily intoxicated at the time of the incident would not vitiate or mitigate his intent."[11] Moreover, in *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 225-226 (1996), the Court of Appeals held that the insured's suicide attempt in crashing his vehicle into a tree was intentional and that the insured therefore was not entitled to PIP benefits, even though the insured was suffering from mental illness. Additionally, this Court has held that a driver who was shot while occupying a motor vehicle was not entitled to benefits where shots were fired during the continuation of an argument that had begun

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[8] See *Miller v Farm Bureau Mut Ins Co*, 218 Mich App 221, 226 (1996) ("One acts intentionally [for purposes of the no-fault act] if he intended both the act *and* the injury.") (emphasis in original).

[9] Chief Justice KELLY was a member of the Court of Appeals panel in *Schultz*.

[10] *Schultz*, *supra* at 201-202.

[11] *Id*. at 202.

before the automobile chase and the involvement of automobiles was incidental under MCL 500.3105(1). *Marzonie v Auto Club Ins Ass'n*, 441 Mich 522, 534 (1992).

Accordingly, because the Court of Appeals erred when it concluded that defendant's initial refusal to pay benefits was unreasonable, I would grant defendant's application for leave to appeal.

MARKMAN, J. I join the statement of Justice CORRIGAN.

PEOPLE v DORSEY, No. 138042; Court of Appeals No. 280524.

MARKMAN, J. (*dissenting*). I respectfully dissent and would grant leave to appeal to consider the issues presented here.

When the police executed a search warrant for drugs at a house, they found three women sitting on a couch in the living room. After the police directed the women to "freeze," defendant raised her arms and dropped her purse to the floor by her feet. Although no drugs were found in the living room where defendant was situated, a small amount of marijuana was found in the dining room. The police also searched defendant's purse and found an unloaded handgun for which defendant lacked a permit.

In *Ybarra v Illinois*, 444 US 85 (1979), the Court held that a search of a customer at a bar while the police were executing a search warrant at the bar was illegal. The Court explained:

> [A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. . . . [A] search or seizure of a person must be supported by probable cause particularized with respect to that person. This requirement cannot be undercut or avoided by simply pointing to the fact that coincidentally there exists probable cause to search or seize another or to search the premises where the person may happen to be. [*Id*. at 91.]

Further, "[t]he 'narrow scope' of the *Terry* [*v Ohio*, 392 US 1 (1968)] exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.* at 94.

In light of *Ybarra*, the police in this case lacked the authority to search defendant's person. However, the United States Supreme Court has distinguished between a search of a person and a search of a person's purse. In *United States v Di Re*, 332 US 581 (1948), the Court held that probable cause to justify a search of a car does not justify a search of the passengers of the car. Subsequently, in *Wyoming v Houghton*, 526 US 295 (1999), the Court held that probable cause to justify a search of a car *does* justify a search of a passenger's purse. The Court held that an item of personal property, like a purse, is not entitled to the "significantly heightened protection afforded against searches of one's person." See *id.* at 303 (distinguishing *Di Re* and *Ybarra*). In response to the dissent that criticized the majority for making a distinction between a search of a person and a search of a person's purse, the majority said:

> Does the dissent really believe that Justice Jackson [in *Di Re*] was saying that a house search could not inspect *property* belonging to persons found in the house—say a large standing safe or violin case belonging to the owner's visiting godfather? Of course that is not what Justice Jackson meant at all. He was referring *precisely* to that "distinction between property contained in clothing worn by a passenger and property contained in a passenger's briefcase or purse" that the dissent disparages. This distinction between searches of the person and searches of property is assuredly *not* "newly minted . . . ." [*Id.* at 303 n 1 (emphasis in the original).]

The United States Supreme Court has further held that "[s]earch warrants are not directed at persons; they authorize the search of 'place[s]' and the seizure of 'things . . . .' " *Zurcher v Stanford Daily*, 436 US 547, 555 (1978). Therefore, "it is untenable to conclude that property may not be searched unless its [owner] is reasonably suspected of crime and is subject to arrest." *Id.* at 559.

In *People v Coleman*, 436 Mich 124 (1990), this Court held that the search of the defendant's purse did not amount to a search of the defendant's person. In that case, the purse was across the room from the defendant and the defendant was not a "mere casual or transient visitor who happened fortuitously to be on the premises at the time it was subject to a lawful search." *Id.* at 135 (BOYLE, J., concurring).

Defendant was eventually charged with carrying a concealed weapon without a permit. The trial court suppressed evidence of the gun, ruling that the search was illegal, and the Court of Appeals affirmed. *People v Dorsey*, unpublished opinion per curiam of the Court of Appeals, issued November 25, 2008 (Docket No. 280524). The prosecutor argues before this Court that because the purse was not on defendant's person when the police seized it, the purse could be searched because it constituted personal property inside a house that was the subject of a valid search warrant. That is, the search constituted a permissible search of a container in which items specified in the warrant might be found. Because this is a jurisprudentially significant issue, and because the prosecutor has raised thoughtful arguments, I would grant leave to appeal.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

WELGOSH v TRI-MOUNT CUSTOM HOMES, INC, No. 138433; Court of Appeals No. 290196.

*Reconsideration Denied April 17, 2009:*

*In re* AUSTIN (DEPARTMENT OF HUMAN SERVICES v AUSTIN), No. 138268. Leave to appeal denied at 483 Mich 903. Court of Appeals No. 285208.

*Summary Disposition April 22, 2009:*

PEOPLE v PINKNEY, No. 138550. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Berrien Circuit Court for reconsideration of the conditions of the appeal bond. We order the trial court, within 21 days of the date of this order, to articulate the specific reasons for imposing a "24/7 curfew" on defendant. The trial court shall file with the Clerk of the Supreme Court a transcript and related documents, if any, within 14 days of the completion of the proceedings on remand. We retain jurisdiction. Court of Appeals No. 286992.

*Leave to Appeal Denied April 22, 2009:*

PEOPLE v GOLDEN, No. 137208. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion for leave to add a new issue or file a complaint for superintending control is denied. Court of Appeals No. 285055.

PEOPLE v HILASKI, No. 137561; Court of Appeals No. 276243.

PEOPLE v CZUJ, No. 137623; Court of Appeals No. 276581.

DAIMLERCHRYSLER CORPORATION v WESCO DISTRIBUTION, INC, No. 137673; reported below: 281 Mich App 240.

PEOPLE v BORGES, No. 137677; Court of Appeals No. 278100.

NEWSUM v WIRTZ MANUFACTURING COMPANY, INC, No. 137760; Court of Appeals No. 277583.

ALLIED PROPERTY AND CASUALTY INSURANCE COMPANY v MICHIGAN CATASTROPHIC CLAIMS ASSOCIATION, No. 137761; Court of Appeals No. 277765.

HATHAWAY, J. I would grant leave to appeal.

PEOPLE v O'NEAL, No. 137796; Court of Appeals No. 257333.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v BECKER, No. 137828; Court of Appeals No. 285858.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v MATHIS, No. 137835; Court of Appeals No. 279352.

KELLY, C.J. I would grant leave to appeal.

PEOPLE v DONALD MORRIS, II, No. 137847; Court of Appeals No. 287893.

BURKHART ASSOCIATES, INC v NOWAKOWSKI, Nos. 137972 and 137973; Court of Appeals Nos. 277744 and 279402.

KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

PEOPLE v MCCALL, No. 137999; Court of Appeals No. 288477.

KELLY, C.J. I would remand this case to the Court of Appeals for consideration as on leave granted.

RUMFIELD v HENNEY, No. 138041; Court of Appeals No. 288687.

*Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal April 24, 2009:*

DECOSTA v GOSSAGE, No. 137480. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 278665.

YOUNG, J. (*concurring*). If the parties choose to submit supplemental briefs for the application for leave to appeal, I would like them to address the theory under which a plaintiff may send a notice of intent to file a claim (NOI) to an address *other than* the defendant's "last known business address," as required by MCL 600.2912b(2), and still receive the benefit of NOI tolling.

I would also like the parties to address whether plaintiff receives the benefit of NOI statutory tolling with respect to defendant Gossage Eye Center (a professional corporation operated as the Gossage Eye Institute, P.L.L.C.), assuming for the sake of argument that the notice provisions of MCL 600.2912b do not expressly apply to a professional corporation.

PEOPLE v EARNEST WARREN, No. 137666. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the trial court is obligated under the statutory sentencing guidelines to score all felonies or only the highest class felony. See *People v Mack*, 265 Mich App 122 (2005), *People v Johnigan*, 265 Mich App 463, 472 (2005), and MCL 777.21(2), as amended effective January 9, 2007. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 276816.

BONKOWSKI v ALLSTATE INSURANCE COMPANY, No. 137672. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether 12 percent no-fault penalty interest under MCL 500.3142 ceases to accrue once the judgment is entered. The parties may file supplemental briefs, limited to that issue, within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Reported below: 281 Mich App 154.

PEOPLE v TENNYSON, No. 137755. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). We order the Wayne Circuit Court, in accordance with Administrative Order No. 2003-3, to promptly determine whether the defendant is indigent and, if so, to immediately appoint Julie E. Gilfix, if feasible, to represent the defendant in this Court. If this appointment is not feasible, the trial court shall, within the same time frame, appoint other counsel to represent the defendant in this Court. At oral argument, the parties shall address whether evidence that a child

was present in the home when the defendant was in possession of concealed drugs and weapons is legally sufficient to support the defendant's conviction for doing an act that tended to cause a child to become neglected or delinquent so as to tend to come under the jurisdiction of the juvenile division of the probate court. MCL 750.145. The parties may file supplemental briefs within 42 days of the appointment of appellate defense counsel, but they should not submit mere restatements of their application papers. Court of Appeals No. 278826.

PEOPLE v PLUNKETT, No. 138123. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether MCL 750.317a encompasses the defendant's actions in this case. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Reported Below: 281 Mich App 721.

*Summary Disposition April 24, 2009:*

UNTHANK v WOLFE, No. 138172. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate the portion of the opinion of the Court of Appeals pertaining to standing. The Court of Appeals should not have considered the validity of the guardianship order entered by the probate court in a separate proceeding in considering whether plaintiffs had standing to bring a custody action. See *In re Hatcher*, 443 Mich 426, 438-444 (1993); *Altman v Nelson*, 197 Mich App 467, 472-479 (1992). The court's standing analysis was unnecessary to its otherwise proper holding. In all other respects, the application for leave to appeal is denied because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 282 Mich App 40.

CORRIGAN, J. (*concurring*). I concur in the Court's order vacating the portion of the Court of Appeals judgment pertaining to standing. I write separately to observe that probate and circuit courts should be aware of and comply with the statutory procedure that exists to insure the orderly and efficient resolution of cases involving both guardianship and child custody proceedings. When a guardian or limited guardian brings a child custody action, MCL 722.26b(5) requires the circuit court to request that the Supreme Court assign the probate judge who appointed the guardian or limited guardian to serve as the circuit judge and hear the child custody action. Although the probate judge who presided over the guardianship proceeding in this case was eventually assigned to hear the child custody action, the circuit court's 11-month delay in deciding defendant Christine Wolfe's appeal of the probate court's guardianship decision intolerably delayed the resolution of this child custody matter. The statutory directive is clear-cut and should be followed.

The courts also fell far short of compliance with the caseflow management guidelines issued by this Court. The guidelines direct probate

courts to adjudicate 75 percent of all guardianship matters with 182 days of filing; 90 percent within 273 days; and 100 percent within 364 days, except in exceptional circumstances. Administrative Order No. 2003-7. The guidelines direct circuit courts to adjudicate 90 percent of all custody disputes within 147 days and 100 percent within 238 days. *Id*. In this case, the Unthanks filed a motion for third-party custody on May 15, 2005, and a petition seeking temporary guardianship on June 3, 2005. It was not until May 19, 2006, that that circuit court decided Wolfe's appeal of the probate court's guardianship order, and not until February 20, 2008, that the probate court entered an order denying the Unthanks' motion for custody and awarding Wolfe sole custody of the child. The courts' failure to abide by our time guidelines is distressing in this tragic case.

HATHAWAY, J. I would grant leave to appeal.

*Leave to Appeal Denied April 24, 2009:*

VANSLEMBROUCK V HALPERIN, No. 135893. On order of the Court, leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of June 25, 2008. The application for leave to appeal the January 15, 2008, judgment of the Court of Appeals is denied, because we are no longer persuaded that the question presented should be reviewed by this Court. Reported below: 277 Mich App 558.

CORRIGAN, J. (*dissenting*). I would reverse the clearly erroneous decision of the Court of Appeals. In this case alleging medical malpractice, the Court incorrectly characterized MCL 600.5851(7) as a statute of limitations. *Vanslembrouck v Halperin*, 277 Mich App 558, 569 (2008). To the contrary, because the Legislature enacted § 5851(7) as an exception to the minority saving provision in § 5851(1)—which is indisputably a saving provision, not a statute of limitations—the statutory scheme clearly conveys that § 5851(7) is not a separate statute of limitations. Further, § 5851(7) does not function as a "statute of limitations" as this phrase is used in legal parlance; "statute of limitations" is a legal term of art describing statutes that set "a time limit for suing . . . based on the date when the claim accrued . . . ." Black's Law Dictionary (7th ed). Sections 5851(1) and (7) provide additional time based *not* on the date of accrual, but on the age of the child, during which a plaintiff may file suit. As § 5851(7) itself acknowledges, the statutory scheme defines accrual in a distinct statute: MCL 600.5838a. Because § 5851(7) is not a statute of limitations, the time during which plaintiff was required to file suit under § 5851(7) was not tolled during the statutory waiting period that began when she mailed the notice of intent to file suit. See MCL 600.2912b; MCL 600.5856(c); *Waltz v Wyse*, 469 Mich 642, 650 (2004). Accordingly, because plaintiff filed the complaint after the limitations and saving periods expired, her suit was untimely as a matter of law. The suit should be dismissed with prejudice.

The parties agree that § 5851(7) applies to this case because the child plaintiff was allegedly injured at birth. The two relevant subsections of § 5851 provide:

> (1) Except as otherwise provided in subsections (7) and (8), if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run. This section does not lessen the time provided for in section 5852.
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> (7) Except as otherwise provided in subsection (8), *if, at the time a claim alleging medical malpractice accrues to a person under section 5838a the person has not reached his or her eighth birthday, a person shall not bring an action based on the claim unless the action is commenced on or before the person's tenth birthday or within the period of limitations set forth in section 5838a, whichever is later*. If, at the time a claim alleging medical malpractice accrues to a person under section 5838a, the person has reached his or her eighth birthday, he or she is subject to the period of limitations set forth in section 5838a. [Emphasis added.]

Plaintiff, through her mother and next friend, alleges that she was injured by defendants' alleged malpractice on the day she was born, December 1, 1995. Plaintiff claims that defendants' negligence during her birth caused her hypoxic-ischemic encephalopathy and cerebral palsy, which were diagnosed shortly after her birth. Accordingly, under § 5838a, the claim accrued on December 1, 1995 "at the time of the act or omission that is the basis for the claim of medical malpractice," § 5838a(1), or perhaps shortly thereafter when plaintiff's diagnoses alerted her mother to the potential claim, § 5838a(2) (the claim accrues when "the plaintiff discovers or should have discovered the existence of the claim"). Because the claim accrued before plaintiff's eighth birthday, § 5851(7) expressly precluded her from bringing an action "unless the action is commenced on or before [her] tenth birthday or within the period of limitations set forth in section 5838a, whichever is later." It is undisputed that her tenth birthday was the later of the two potentially applicable filing dates.

Plaintiff mailed the presuit notice required by § 2912b for all medical malpractice claims on November 10, 2005, less than a month before her tenth birthday. After a medical malpractice plaintiff mails the notice, he must wait for the relevant statutory notice period—at most 182 days, see § 2912b(1)—to expire before he files the complaint. Here, the earliest plaintiff could have filed suit was 154 days after sending the notice because defendants did not respond to the notice, see § 2912b(8). Therefore, she could not file until after her tenth birthday had passed. But she argued that the time for filing prescribed by § 5851(7) should be tolled during the full 182-day statutory waiting period under § 5856(c), thus permitting her to file several months after her tenth birthday without regard for the prohibition in § 5851(7).

MCL 600.5856(c) provides, in relevant part: "The statutes of limitations or repose are tolled . . . [a]t the time notice is given in compliance with the applicable notice period under section 2912b, if during that period a claim would be barred by the statute of limitations or repose . . . ." The statute expressly permits tolling only for "statutes of limitations or repose." *Waltz*, *supra* (addressing former § 5856[d], which was re-lettered as subsection c effective April 22, 2004, 2004 PA 87). Section 5856(c) thus does not toll saving provisions, which are not statutes of limitations but "appl[y] to whatever period of limitation is or may be applicable in a given case." *Miller v Mercy Mem Hosp*, 466 Mich 196, 202 (2002). Contrary to the Court of Appeals conclusion, § 5851(7) is not a statute of limitations or repose; rather, it is a saving provision and, therefore, the outer limit it prescribes for filing suit is not tolled during the statutory waiting period under § 5856(c).

First, as is evident from the language of § 5851 quoted above, § 5851(7) is an exception to § 5851(1), which applies "[e]xcept as otherwise provided in subsections (7) and (8)." Section 5851(1), in turn, is a saving provision that may apply "although the period of limitations has run." MCL 600.5851(1); *Vega v Lakeland Hosps*, 479 Mich 243, 245 (2007); compare *Waltz*, *supra* at 651 (MCL 600.5852, the wrongful death saving provision, is not a statute of limitations because it applies "although the period of limitations has run."). Accordingly, § 5851(7) functions as an alternative saving provision triggered when the facts of the case qualify for exception to the general rule of § 5851(1). See *Vega*, *supra* at 250-251 (concurring opinion by CAVANAGH, J.) (Sections 5851[1] and [7] are both applicable to medical malpractice actions; § 5851[7] is controlling when the facts render it inconsistent with § 5851[1].); and compare *Miller*, *supra* at 202 (applying similar reasoning in the context of statutory limitations periods and holding, given the structure of MCL 600.5838a[2]: "As an alternative to the other periods of limitation, [the six-month discovery period] is itself a period of limitation."). Nothing in the language or structure of § 5851 indicates that § 5851(7), as an exception to a saving provision, constitutes a distinct statute of limitations rather than an alternative saving provision. Indeed, the Legislature clearly enacted § 5851(7) to shorten the period during which minors can bring medical malpractice causes of action, given that under § 5851(1) an infant would have until he was 19 years old to file an action, but under § 5851(7) that infant only has until he is 10 years old to file the action. Plaintiff's argument—that although the notice of intent tolling provision of § 5856(c) does not apply to § 5851(1), it does apply to § 5851(7)—is completely inconsistent with the legislative purpose of § 5851(7)—to shorten, not lengthen, the period during which medical malpractice minors have to bring their causes of action.

In holding otherwise, the Court of Appeals quotes *Miller*, *supra* at 202, which referred to a statute of limitations as "a statutory provision that requires a person who has a cause of action to bring suit within a specified time." *Vanslembrouck*, *supra* at 569. But this statement from the *Miller* Court is clearly over-generalized; if taken to its logical extreme, it would obliterate the distinction between statutes of limitations and saving provisions, which both arguably "require[] a person who

has a cause of action to bring suit within a specified time." Yet this Court has long acknowledged the distinction; indeed, *Miller* itself acknowledges it. *Miller*, *supra* at 202 (distinguishing the saving provision in MCL 600.5852 from the statutes of limitations in MCL 600.5838a); and see *Howard v Gen Motors Corp*, 427 Mich 358, 384 (1986) (lead opinion by BRICKLEY, J., quoting 53 CJS, Limitations of Actions, § 1, p 900) (" 'A statute of limitations is an act limiting the time within which an action shall be brought. However, not every statute prescribing a limit of time within which an act may be performed or action taken is necessarily a statute of limitations as that term is ordinarily used.' "). Thus, a more specific definition of "statute of limitations" is necessary.

The Revised Judicature Act, MCL 600.101 *et seq.*, does not define "statute of limitations" or "saving provision." This Court has defined saving provisions, in direct contrast to statutes of limitations, as "exception[s] to the statute of limitations" that operate "to suspend the running of the statute," *Lindsey v Harper Hosp*, 455 Mich 56, 61, 65 (1997), and that may "*save*" a claim "during the *grace period* provided for in the saving provision," *Waltz*, *supra* at 650 n 12 (emphasis in original). But definitions for "statute of limitations" beyond generalized statements like those in *Miller* are less forthcoming. It is helpful to consult MCL 8.3a, which addresses construction of Michigan statutes and provides: "All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning." In accord with MCL 8.3a, it is appropriate to consult a legal dictionary to construe a legal term of art. *Brackett v Focus Hope*, 482 Mich 269, 276 (2008). Black's Law Dictionary (7th ed) defines "statute of limitations" in the civil context as follows: "A statute establishing a time limit for suing in a civil case, based on the date when the claim accrued (as when the injury occurred or was discovered)." (Also according to Black's [7th ed], a statute of repose is one "that bars a suit a fixed number of years after the defendant acts in some way (as by designing or manufacturing a product), even if this period ends before the plaintiff has suffered an injury.")

The definitions from Black's comport with Michigan's statutory scheme. MCL 600.5827 provides: "Except as otherwise expressly provided, *the period of limitations runs from the time the claim accrues. The claim accrues at the time provided in sections [MCL 600.5829 to 600.5838]*, and in cases not covered by these sections the claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." (Emphasis added.) MCL 600.5838a(1) states that a medical malpractice claim generally "accrues *at the time of the act or omission* that is the basis for the claim of medical malpractice." (Emphasis added.) Section 5838a(2) then "provides two distinct periods of limitation: two years after the accrual of the cause of action, and six months after the existence of the claim *was or should have been discovered* by the medical malpractice claimant." *Miller*, *supra* at 202 (emphasis added). Thus, § 5838a establishes statutes of limitations for medical malpractice suits consistent with the Black's definition of such

statutes as those "establishing a time limit for suing in a civil case, based on the date . . . when *the injury occurred* or *was discovered* . . . ." (Emphasis added.)

MCL 600.5838a(2) further specifies: "an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [MCL 600.5805] or [MCL 600.5851 to 600.5856]." Section 5805 generally establishes the limitations periods for civil actions; § 5805(6) establishes the two-year period for malpractice actions that generally begins to run "at the time of the act or omission that is the basis for the claim of medical malpractice," § 5838a(1). The remaining sections, 5851 to 5856, provide alternative times for the commencement of a suit under specific circumstances. Significantly, none of these sections describes distinct, alternative statutes of limitations measured from the date when the claim accrued. Rather, each rule appears to do one of two things: it either establishes a saving period that permits a plaintiff to bring his claim *although the limitations period has run*, or it delays the running of the established limitations period by measuring that period not from the date of accrual, but from some point after accrual, under specified unusual circumstances.

To illustrate, the statute at issue in this case, MCL 600.5851, defines disabilities of infancy, insanity, and imprisonment. Section § 5851(1), discussed above, is a saving provision because it applies "although the period of limitations has run." Indeed, § 5851(5) explicitly refers to the one-year saving provision for infants and the insane as a "year of grace." Further, the alternative saving provision applicable to this case, § 5851(7), expressly distinguishes its alternative deadline for filing suit from the limitations periods listed in § 5838a; § 5851(7) requires the action to be "commenced on or before the person's tenth birthday *or within the period of limitations* set forth in section 5838a, *whichever is later*." (Emphasis added.) Thus, § 5851(7) does not shift the limitations period itself forward in time, to begin running at some later date; it establishes an alternative deadline for filing suit that it expressly distinguishes from the statute of limitations. Other saving provisions listed in sections 5851 to 5856 include the wrongful death saving provision discussed above, § 5852 (additional time to commence suit after a person's death "although the period of limitations has run"), and the additional time allotted when a defendant fraudulently conceals the existence of a claim, § 5855 ("[T]he action may be commenced at any time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, *although the action would otherwise be barred by the period of limitations*.").

In contrast, the remaining sections delay the running of the statutory limitations period. MCL 600.5853 provides that, under some circumstances, "[i]f any person is outside of this state at the time any claim accrues against him *the period of limitation shall only begin to run* when he enters this state." (Emphasis added.) Section 5854 provides that, if a person is "unable to use the courts of this state" for reasons arising out of a war with the United States, "*the time of the continuance of the war shall not be counted as a part of the period limited* for the commencement

of any action." (Emphasis added.) (The final section referred to by § 5838a[2] is § 5856, the tolling statute, which applies only to statutes of limitations and repose as explained above.)

Thus, the Legislature clearly distinguishes saving provisions through its use of language and the structure of the statutory scheme. Consistent with the definition from Black's Law Dictionary, MCL 600.5838a provides the statutes of limitations applicable to medical malpractice cases on the basis of accrual or discovery. MCL 600.5851(7) does not establish a distinct statute of limitations. Accordingly, the notice tolling statute, MCL 600.5856(c), does not toll the grace period provided in § 5851(7). Therefore, the complaint in this case was untimely because it was filed after the grace period, which extended the time for commencement only to plaintiff's tenth birthday. The complaint should have been dismissed with prejudice.

YOUNG and MARKMAN, JJ. We join the statement of Justice CORRIGAN.

JUAREZ v HOLBROOK, Nos. 137358 and 137359; Court of Appeals Nos. 275040 and 276312.

CORRIGAN, J. (*dissenting*). I would vacate that part of the Court of Appeals judgment that held that the trial court properly determined the amount of attorney fees as case evaluation sanctions, and I would remand this case to the Wayne Circuit Court for reconsideration in light of *Smith v Khouri*, 481 Mich 519 (2008). In all other respects, I would deny leave to appeal.

MARKMAN, J. (*dissenting*). I dissent and would vacate that part of the Court of Appeals judgment that held that the trial court properly determined the amount of attorney fees as case evaluation sanctions. I would also remand to the trial court for reconsideration in light of *Smith v Khouri*, 481 Mich 519 (2008).

Defendant was entitled to such sanctions because the jury verdict was well below the case evaluation award that all parties had rejected. The trial court awarded $68,893 in attorney fees, calculating the amount by taking the defense attorneys' hourly rate, which the court found to be low, and multiplying it by the number of hours billed, which the court found to be high. Defendants appealed, arguing that the amount was inadequate, but the Court of Appeals affirmed. One day later, this Court issued *Smith*, in which we clarified the process of calculating case evaluation attorney fees:

> [T]he trial court should begin the process of calculating a reasonable attorney fee by determining factor 3 under MRPC 1.5(a), i.e., the reasonable hourly or daily rate customarily charged in the locality for similar legal services, using reliable surveys or other credible evidence. This number should be multiplied by the reasonable number of hours expended. This will lead to a more objective analysis. After this, the court may consider making adjustments up or down in light of the other factors listed in *Wood* [*v Detroit Automobile Inter-Ins Exch*, 413 Mich 573 (1982)] and MRPC 1.5(a). In order to aid appellate review, the court should briefly indicate its view of each of the factors. [*Smith*, *supra* at 522.]

A remand to the trial court for compliance with *Smith* is clearly required here. See *Young v Nandi*, 482 Mich 1007 (2008). However, the majority's disdain for *Smith* is apparently viewed as adequate justification for ignoring *Smith*. Rather than forthrightly overruling this decision, something the new majority is apparently loath to do (perhaps because several majority justices repeatedly and loudly proclaimed fealty to stare decisis, and dissented, whenever the former majority overruled a precedent), it is increasingly becoming the modus operandi of this Court that relevant precedents simply be ignored. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where the new majority ignored *Vega v Lakeland Hospitals*, 479 Mich 243, 244 (2007), *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where the new majority failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008), and *Sazima v Shepherd Bar*, 483 Mich 924 (2009), where the new majority failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471 (1999).

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

PEOPLE v OLMAN, No. 138071; Court of Appeals No. 281151.

MARKMAN, J. (*concurring*). Defendant was convicted of second-degree criminal sexual conduct. Although the sentencing guidelines called for a minimum sentence of 0 to 17 months of imprisonment, the trial court sentenced defendant to 2 to 15 years. The Court of Appeals affirmed the conviction, but remanded for resentencing, concluding that the trial court failed to articulate substantial and compelling reasons to justify the sentencing departure. *People v Olman*, unpublished opinion per curiam, issued June 12, 2007 (Docket No. 268464) (*Olman I*). This Court denied leave to appeal (although defendant appealed the affirmance of his conviction, the prosecutor did not file a cross-appeal regarding the sentencing issue). *People v Olman*, 480 Mich 925 (2007). On remand, the trial court again sentenced defendant to 2 to 15 years. The Court of Appeals again remanded for resentencing. *People v Olman*, unpublished opinion per curiam, issued November 18, 2008 (Docket No. 281151) (*Olman II*).

The trial court's first reason for departing was that offense variable 10, MCL 777.40, gives the victim's age inadequate weight. However, in the first appeal, the Court of Appeals held that the victim's age did not justify a departure, and the prosecutor never appealed. Therefore, this was clearly the law of the case in the second appeal.

The trial court's second reason for departing was that defendant is a corrections officer, a position of public trust. However, MCL 769.34(3)(a) prohibits the court from using the defendant's legal occupation to depart from the guidelines range. Contrary to the dissent's contention, this case is significantly distinguishable from *People v Smith*, 482 Mich 292, 298 n 3 (2008), because there the "defendant *exploited his position* of trust as a child-care provider for the vulnerable victim" to commit the offense. Here, defendant did not use his position in any way to commit the crime; he was not acting in any way as a corrections officer. He could have just

as easily been a dentist or an auto mechanic. Under these circumstances, the fact of his occupation is simply irrelevant.[1]

The dissent contends that the departure was justified because defendant's conduct "cast doubt on [his employer] and its employees." *Post* at 974. However, this justification could be applied in *every* case to *every* defendant.[2] The dissent asserts that this is not true because only public employees can abuse the public trust. It also contends that MCL 769.34(3)(a) only prohibits a trial court from relying on a defendant's occupation as a reason for a departure when the trial court does so for "discriminatory reasons." *Post* at 973. Essentially, then, the dissent would rewrite MCL 769.34(3)(a) to provide that a trial court cannot rely on a defendant's occupation to justify a departure where that reliance is based on "discriminatory reasons," but the trial court *can* rely on a defendant's occupation as long as its reliance is not based on "discriminatory reasons" or the defendant is a public employee. Because this is not what the statute as actually written provides, I cannot agree. Similarly, the dissent's contention that defendant's conduct "raises questions about his conduct behind closed doors while exercising his official power over a captive prison population," *post* at 974, is nothing more than pure and unvarnished speculation. There is utterly no such evidence in this case.

WEAVER, J. (*dissenting*). I dissent for the reason that I would grant leave to appeal.

CORRIGAN, J. (*dissenting*). I would either grant leave to appeal in order to consider the legality of the trial court's stated grounds for departing upward from the sentencing guidelines or peremptorily reinstate the trial court's sentence. I believe that the trial court properly departed upward on the basis of defendant's abuse of the public trust placed in him as a corrections officer in the Department of Corrections. Moreover, the Court of Appeals result in this case directly contradicts our contrary view of MCL 769.34(3)(a) in *People v Smith*, 482 Mich 292, 298 n 3 (2008).

Defendant was convicted of second-degree criminal sexual conduct after a four-year-old child reported that she had touched his penis until he ejaculated. Defendant's wife was the child's day-care provider. Although the 0- to 17-month guidelines range called for an intermediate sanction, the court departed upward because defendant's criminal conduct also abused the public trust placed in him as a corrections officer. Addressing defendant at sentencing, Macomb Circuit Judge Peter Maceroni observed:

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[1] To rebut the dissent's assertion, yes, the trial court could undoubtedly "impose an upward departure on a judge who took a bribe for abusing the public trust," *post* at 974, because in that hypothetical case, as in *Smith*, the defendant would have *used* his position of trust to commit the crime. Here, defendant's position of trust had absolutely nothing to do with the crime that he committed.

[2] Further, as the Court of Appeals explained, "the issue of defendant's actions having adverse affects on his coworkers is a subjective factor that cannot be objectively verified and thus does not provide a valid basis for a departure." *Olman II*, *supra* at 5.

> As a correctional officer . . . , you held a position of public trust. Such a position enabled you to understand better than anybody else that people should abide by criminal statutes, especially one prohibiting sexual conduct with a young, tender girl of four years of age.
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> In my opinion, you violated this position of trust by committing this crime. In committing this sexual offense you have cast aspersions not only upon yourself but upon your profession, and potentially causing your former colleagues to have reduced esteem within the community of the Department of Corrections and already take enough abuse from the prisoners as it is.
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> I am firmly convinced that taking everything into account, your misconduct[,] committed by a person holding an important public position, constitutes an objective, verifiable basis for exceeding the minimum guideline range, since these factors are not included within the offense variables applicable to this crime, and enable me as the trial court to impose the minimum term beyond and [sic] prescribed by the sentence guidelines.

The court correctly observed that it could exceed the guidelines on the basis of substantial and compelling factors not contemplated by the offense variables. MCL 769.34(3). But the Court of Appeals reversed, concluding that the trial court improperly departed on the basis of defendant's "legal occupation," citing MCL 769.34(3)(a), which states: "The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range."

The plain language of MCL 769.34(3)(a) prohibits a sentencing judge from "us[ing]" any of the enumerated characteristics of a defendant "to depart." The statute lists status characteristics of a defendant such as gender, race, ethnicity, alienage, national origin, and legal occupation. Its clear import is that a judge cannot depart on the basis of *the fact that* a defendant is male or female, is of a particular background or origin, or holds a particular legal occupation. The Court of Appeals has reasonably observed that MCL 769.34(3)(a) thus prohibits departure for discriminatory reasons, such as a judge's personal assumptions that a particular broad class of persons is more likely to reoffend. See *People v Cline*, 276 Mich App 634, 651 (2008) (citing MCL 769.34[3][a] and noting earlier cases holding that predictions of "future behavior based on a status characteristic such as race, religion, gender, or age are suspect") (quotation marks and citations omitted); *People v Armstrong*, 247 Mich App 423, 425 (2001) (citing MCL 769.34[3] and noting that "[t]he court may depart from the guidelines for nondiscriminatory reasons").

The judge here did not depart *because of the fact that defendant was a corrections officer*. He did not "use" defendant's "legal occupation" as the reason "to depart." Rather, he departed because defendant abused the public trust. This distinction is significant. The contrary, stunted view of the Court of Appeals has serious ramifications because it conflates

departure based on the *fact* of one's legal occupation with departure based on abuse of the trust inherent in a public role—particularly one involving law enforcement—and the ramifications of that abuse. One's legal occupation as a public officer may be a necessary predicate for departure based on abuse of the public's trust, but this is because the occupation is evidence of the existence of that trust; the mere fact of the legal occupation is not the *reason* for departure under these circumstances. Under the Court of Appeals rationale, a sentencing court could not impose an upward departure on a judge who took a bribe for abusing the public trust, as the judge would be punished for being a judge!

The Court of Appeals rationale also contradicts *Smith*, *supra* at 298 n 3, in which the Court stated that the trial court permissibly departed on the basis of the defendant's position of trust as a child-care provider. In *Smith*, the judge referred at sentencing to the defendant sex offender's status as a child-care provider. On appeal, the defendant argued that, in so doing, the judge violated MCL 769.34(3)(a) and punished the defendant on the basis of his legal occupation. *Id.* We rejected that view:

> The record indicates that [the] defendant was not legally working as a child-care provider during the period in question. His wife was primarily responsible for the baby-sitting services they advertised, and the home was not licensed to provide child-care. *We infer from the judge's statements that he referred to the child-care position because defendant had exploited his position of trust as a child-care provider for the vulnerable victim. We conclude that the judge did not depart on the basis of defendant's occupation*. [*Id.* (emphasis added).]

The departure in this case may differ from the departure in *Smith* because it represents a different permutation of the abuse of trust rationale. But Judge Maceroni's reasoning was equally valid. He did not depart *because of* defendant's lawful occupation. Rather, he departed because defendant was a public official entrusted with the public's safety, the duty to enforce the law, and the security of prisoners over whom he had broad authority as a result of their captivity. By committing this predatory sex crime, he abused the trust placed in him—and, as Judge Maceroni observed, cast doubt on the Department of Corrections and its employees—in part because his crime raises questions about his conduct behind closed doors while exercising his official power over a captive prison population. His conduct therefore had objective consequences exceeding the normal ramifications of his crime. Defendant's act reflected on a public institution as a direct result of the trust placed in him by that institution.

Indeed, the crux of my disagreement with Justice MARKMAN's position appears to be our difference of opinion concerning whether there was adequate evidence that defendant abused the public trust in this case, not whether MCL 769.34(3)(a) prohibits a departure based on abuse of the public trust. I disagree with Justice MARKMAN's contention that defendant did not abuse the public trust because he "did not use his position in any way to commit the crime; he was not acting in any way as a corrections officer. He could have just as easily been a dentist or an auto mechanic."

A dentist or an auto mechanic is not a public official charged with upholding the law. In contrast, the public places corrections officers in positions of power in part on the very basis of its conclusion that they may be trusted to uphold the law. Indeed, I presume that, even if he had not been imprisoned, defendant would not have been permitted to maintain his job as a corrections officer in the wake of this conviction; defendant's ineligibility to work as a corrections officer in light of this crime would be an objective fact, not a subjective observation. Further, when an official undertakes a duty to uphold the law, his conduct off the job is particularly relevant to the trust we place in him to lawfully carry out his official acts outside the public view. Would we not say that a judge abused the public trust and impugned the judiciary as an institution if that judge sold illegal drugs off the job, although he in no way employed his public position to further the activity?

For these reasons, I would grant leave to appeal to consider whether the rationale for departure complied with MCL 769.34(3)(a) or would peremptorily reverse to reinstate the sentence imposed by Judge Maceroni.

YOUNG, J. I join the statement of Justice CORRIGAN.

JOHNSON v TITAN INSURANCE COMPANY, No. 138215; Court of Appeals No. 287448.

DETROIT MEDICAL CENTER v TITAN INSURANCE COMPANY, No. 138217; Court of Appeals No. 288353.

FREEWAY MEDIA OF MICHIGAN, LLC v VISION MEDIA, No. 138650; Court of Appeals No. 286920.

*Summary Dispositions April 28, 2009:*

PEOPLE v EDDIE BROWN, No. 137705. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 286716.

CORRIGAN, J., did not participate for the reasons she stated in *People v Parsons*, 728 NW2d 62 (2007).

PEOPLE v BAISDEN, No. 137890. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration of the defendant's claims of sentencing error. On September 26, 2008, this Court reversed in part the judgment of the Court of Appeals and remanded this case to the Court of Appeals for consideration of the defendant's remaining issues. In a memorandum opinion, the Court of Appeals adopted the analysis of the opinion dissenting from its unpublished opinion per curiam issued March 4, 2008 in Docket No. 269999 for its resolution of the remaining issues. The Court then affirmed the defendant's conviction and sentence. However, the dissenting opinion had determined that the defendant should be resentenced, finding that the trial court abused its discretion in departing from the sentencing

guidelines because the reasons articulated for departure were not substantial and compelling, as required by MCL 769.34(3). The Court of Appeals affirmance of the defendant's sentence in its memorandum opinion is inconsistent with the determination that resentencing is required. 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. Court of Appeals No. 269999.

*Leave to Appeal Denied April 28, 2009:*

VAUGHAN v THOMAS, No. 134989; Court of Appeals No. 267396.

PEOPLE v RICKY FRANKLIN, No. 136300. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 280365.

BEHNKE, INC v STATE OF MICHIGAN and VAN'S DELIVERY SERVICE, INC v ATTORNEY GENERAL, Nos. 136411 and 136412; reported below: 278 Mich App 114.

MICTA SERVICE CORPORATION v MICTA, No. 136467; Court of Appeals No. 280132.

PEOPLE v RONALD MCBRIDE, No. 136764. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282814.

GRAND BLANC VENTURE, LLC v GRAND BLANC CHARTER TOWNSHIP, No. 136928; Court of Appeals No. 276311.

PEOPLE v BRANDON MOORE, No. 136986. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283907.

PEOPLE v GAMBLE, No. 137017; Court of Appeals No. 276034.

PEOPLE v KEVIN JACKSON, No. 137128. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282928.

PEOPLE v LARABEE, No. 137132; Court of Appeals No. 275658.

PEOPLE v BAYONES, No. 137227; Court of Appeals No. 275985.

PEOPLE v ANTHONY SMITH, No. 137270. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285536.

PEOPLE v BONGA, No. 137295; Court of Appeals No. 283630.

PEOPLE v CERDAVALENCIA, No. 137304. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283877.

PEOPLE v CARSON, No. 137328. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284731.

PEOPLE v LANGO, No. 137377. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284369.

PEOPLE v CARLOS COLLINS, No. 137387; Court of Appeals No. 277098.

PEOPLE v TAMBURINO, No. 137413; Court of Appeals No. 286161.

PEOPLE v WILLIAM BROWN, No. 137430. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284779.

PEOPLE v ROBART, No. 137444. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285358.

PEOPLE v CALL, No. 137455; Court of Appeals No. 278809.

FRANKLING v VAN BUREN CHARTER TOWNSHIP, No. 137484; Court of Appeals No. 271228.

PEOPLE v WHITEHORN, No. 137502; Court of Appeals No. 278899.

PEOPLE v GILBERT, No. 137581. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285514.

DETROIT INTERNATIONAL BRIDGE COMPANY v COMMODITIES EXPORT CORPORATION, No. 137611; reported below: 279 Mich App 662.

PEOPLE v MALCOLM WALKER, No. 137650; Court of Appeals No. 279515.

PEOPLE v COLEMAN, No. 137661; Court of Appeals No. 278948.

PEOPLE v BURRELL, No. 137676. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286763.

PEOPLE v GREGG, No. 137693. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286717.

PEOPLE v JOHN THOMPSON, No. 137697; Court of Appeals No. 285235.

PEOPLE v HOLMES, No. 137715; Court of Appeals No. 276591.

PEOPLE v MCNAMEE, No. 137719. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 288097.

PEOPLE v FLOYD, No. 137720; Court of Appeals No. 287468.

PEOPLE v DUSENBERY, No. 137722; Court of Appeals No. 287337.

PEOPLE v TERRANCE HALL, No. 137732. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285605.

PEOPLE v CARLOS DAVIS, No. 137733. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286764.

PEOPLE v MALDONADO-ZAPON, No. 137746. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286699.

PEOPLE v LOPEZ, No. 137758; Court of Appeals No. 287412.

HESSELL v SOCIER, No. 137763; Court of Appeals No. 276642.

PEOPLE v GREGORY YOUNG, No. 137766; Court of Appeals No. 286840.

PEOPLE v UPSHAW, No. 137776; Court of Appeals No. 287840.

PEOPLE v ECCKLES, No. 137789; Court of Appeals No. 287976.

PEOPLE v VANDENBOSCH, No. 137792; Court of Appeals No. 287960.

RODRIGUEZ v FARMERS INSURANCE EXCHANGE, No. 137795; Court of Appeals No. 285270.

PEOPLE v MARK MURRAY, No. 137798. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286276.

PEOPLE v ROACH, No. 137799; Court of Appeals No. 278791.

PEOPLE v FEAGIN, No. 137809. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285449.

SHIELDS v MCLACHLAN, No. 137815; Court of Appeals No. 286381.

PEOPLE v BARNES, No. 137820; Court of Appeals No. 287616.

PEOPLE v DUFRESNE, No. 137830; Court of Appeals No. 273407.

PEOPLE v MOORER, No. 137831; Court of Appeals No. 281029.

PEOPLE v BEATHEA, No. 137841; Court of Appeals No. 278568.

PEOPLE v ANTHONY DEVARO JONES, No. 137858; Court of Appeals No. 277854.

PEOPLE v BRIDGES, No. 137867; Court of Appeals No. 277758.

PEOPLE v MICHAEL THOMPSON, No. 137873; Court of Appeals No. 278172.

PATULSKI v THOMPSON, Nos. 137876 and 137877; Court of Appeals Nos. 278944 and 280033.

PEOPLE v COOLEY, No. 137878; Court of Appeals No. 278574.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case because I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v STEVEN MONTGOMERY, No. 137880; Court of Appeals No. 278836.

PEOPLE v JAMES LAWSON, No. 137884; Court of Appeals No. 288391.

PEOPLE v CADARETTE, No. 137899; Court of Appeals No. 278701.

PEOPLE v BOYLE, No. 137900; Court of Appeals No. 288199.

BENSON v DEPARTMENT OF CORRECTIONS, No. 137919; Court of Appeals No. 286605.

PEOPLE v HAZEN, No. 137924; Court of Appeals No. 288665.

PEOPLE v BURKS, No. 137935; Court of Appeals No. 287053.

PEOPLE v MOY, No. 137957; Court of Appeals No. 277548.

PEOPLE v HYNES, No. 137965; Court of Appeals No. 288321.

PEOPLE v MUNLIN, No. 137978; Court of Appeals No. 272019.

PEOPLE v PACELY, No. 138002; Court of Appeals No. 286026.

PEOPLE v BEDNARSH, No. 138003; Court of Appeals No. 286537.

PEOPLE v RUMPH, No. 138006. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285689.

PEOPLE v PURIFY, No. 138016; Court of Appeals No. 281195.

PEOPLE v RAMNARINE, No. 138020; Court of Appeals No. 279115.

MCNEILL v WAYNE COUNTY, No. 138021; Court of Appeals No. 287111.

PEOPLE v CIAVONE, No. 138023; Court of Appeals No. 256187.

PEOPLE v FIDLER, No. 138026; Court of Appeals No. 280811.

PEOPLE v ACQUAAH, No. 138028; Court of Appeals No. 279638.

PEOPLE v MORTON, No. 138029; Court of Appeals No. 278833.

PEOPLE v CORTLAND MILLER, No. 138032; Court of Appeals No. 281690.

PEOPLE v GARRY JONES, Nos. 138046 and 138047; Court of Appeals Nos. 281464 and 281465.

PEOPLE v BOBBY MORRIS, No. 138052; Court of Appeals No. 278582.

PEOPLE v COOPER, No. 138060; Court of Appeals No. 278738.

PEOPLE v JAMES JOHNSON, No. 138064; Court of Appeals No. 279294.

PEOPLE v CAMPBELL, No. 138072; Court of Appeals No. 280424.

PEOPLE v KING, No. 138073; Court of Appeals No. 279809.

PEOPLE v ARCHER, No. 138075; Court of Appeals No. 288149.

HENRY v DEPARTMENT OF CORRECTIONS, No. 138078; Court of Appeals No. 288129.

PEOPLE v JAGER, No. 138079; Court of Appeals No. 288359.

PEOPLE v CENACA WILLIS, No. 138087; Court of Appeals No. 278073.

BIG BARNEY'S DUST CONTROL, LLC v DUBUC, No. 138092; Court of Appeals No. 286902.

PEOPLE v MASHAWNTAY MONTGOMERY, No. 138095; Court of Appeals No. 281857.

PEOPLE v BENTON, No. 138111; Court of Appeals No. 286873.

PEOPLE v SANDOVAL, No. 138121; Court of Appeals No. 277509.

PEOPLE v WILLIAM MILLER, No. 138122; Court of Appeals No. 288380.

PEOPLE v ANDERSEN, No. 138124; Court of Appeals No. 288963.

MAYES v CITY OF OAK PARK, No. 138125; Court of Appeals No. 287367.

PEOPLE v PARKER, No. 138126; Court of Appeals No. 279246.

PEOPLE v BLAIR, No. 138127; Court of Appeals No. 279914.

PEOPLE v MORRIS JOHNSON, No. 138131; Court of Appeals No. 287928.

PEOPLE v KENNETH HALL, No. 138132; Court of Appeals No. 283871.

PEOPLE v MARK WILSON, No. 138134; Court of Appeals No. 288401.

SMITH v RIVERFRONT CONDOMINIUM ASSOCIATION, No. 138136; Court of Appeals No. 281245.

PEOPLE v EVENSON, No. 138137; Court of Appeals No. 289004.

PEOPLE v CUNNINGHAM, No. 138142; Court of Appeals No. 281859.

PEOPLE v PAYNE, No. 138144; Court of Appeals No. 281187.

MCCOLLUM v ITT CORPORATION, No. 138146; Court of Appeals No. 287098.

PEOPLE v HERRERA, No. 138148; Court of Appeals No. 288324.

ATLANTIC XXXI, LLC v ART MIDWEST, LP, No. 138154; reported below: 281 Mich App 733.

MIDWEST RUBBER COMPANY v STATE OF MICHIGAN, No. 138156; Court of Appeals No. 278223.

PEOPLE v MONNAN, No. 138159; Court of Appeals No. 276895.

TIME OUT, LLC v NEW BUFFALO TOWNSHIP, No. 138160; Court of Appeals No. 278916.

LUTCHMAN v FAST DECKS, INC, No. 138167; Court of Appeals No. 287445.

PEOPLE v KEEL, No. 138169; Court of Appeals No. 288931.

PEOPLE v BOYD, No. 138170; Court of Appeals No. 288662.

PEOPLE v JAMES RAY, No. 138176; Court of Appeals No. 273541.

FAIR v MOODY, No. 138186; Court of Appeals No. 278906.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v COCHRAN, No. 138189; Court of Appeals No. 279970.

BEACHUM v DEPARTMENT OF LABOR & ECONOMIC GROWTH, No. 138223; Court of Appeals No. 287222.

PEOPLE v STALEY, No. 138234; Court of Appeals No. 280081.

PEOPLE v RAY, No. 138300; Court of Appeals No. 280730.

FLAGSTAR BANK v DILORENZO, No. 138301; Court of Appeals No. 289856.

*Leave to Appeal Denied April 28, 2009:*

LOMBARDO v ASKAR, No. 138162; Court of Appeals No. 289492.

PEOPLE v LOMAX, No. 138205; Court of Appeals No. 284526.

*Reconsiderations Denied April 28, 2009:*

PEOPLE v JAMES SIMPSON, No. 135932. Leave to appeal denied at 483 Mich 886. Court of Appeals No. 280279.

PEOPLE v BECHTOL, No. 136470; Leave to appeal denied at 482 Mich 1030. Court of Appeals No. 280131.

PEOPLE v BAEZ, No. 136570; Leave to appeal denied at 482 Mich 1032. Court of Appeals No. 280564.

KNIGHT ENTERPRISES, INC v FAIRLANE CAR WASH, INC, No. 136787. Summary Disposition entered at 482 Mich 1006. Court of Appeals No. 276838.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

MORALES v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 136823; Leave to appeal denied at 483 Mich 877. Reported below: 279 Mich App 720.

PEOPLE v GLENN WILLIAMS, No. 136929. Leave to appeal denied at 482 Mich 1035. Court of Appeals No. 284585.

PEOPLE v PLATTE, No. 137011. Leave to appeal denied at 482 Mich 1078. Court of Appeals No. 282046.

KELLY, J. I would grant the motion for reconsideration.

PEOPLE v WALLACE, No. 137296. Leave to appeal denied at 483 Mich 887. Court of Appeals No. 282681.

KELLY, C.J. I would grant reconsideration.

CAVANAGH, J. I would grant reconsideration and, on reconsideration, would grant leave to appeal.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v WHITT, No. 137306. Leave to appeal denied at 482 Mich 881. Court of Appeals No. 286559.

PEOPLE v EDENSTROM, No. 137390. Leave to appeal denied at 483 Mich 887. Reported below: 280 Mich App 75.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

MUNSTER v CITY OF BATTLE CREEK, No. 137542. Leave to appeal denied at 483 Mich 855. Court of Appeals No. 284666.

PEOPLE v CORRION, No. 137564. Leave to appeal denied at 483 Mich 882. Court of Appeals No. 278169.

PEOPLE v LEIGH, No. 137599. Leave to appeal denied at 483 Mich 883. Court of Appeals No. 279202.

BURNETT v GENERAL MOTORS CORPORATION, No. 137780. Leave to appeal denied at 483 Mich 896. Court of Appeals No. 288091.

*Leave to Appeal Granted April 29, 2009:*

KYSER v KASSON TOWNSHIP, No. 136680. The parties shall include among the issues to be briefed: (1) whether the "no very serious consequences" rule of *Silva v Ada Twp*, 416 Mich 153 (1982), was superseded by the enactment of 1978 PA 637, MCL 125.297a (now recodified in nearly identical language as MCL 125.3207); (2) whether the "no very serious consequences" rule violates the separation of powers doctrine by providing enhanced judicial review of local zoning decisions; and (3) whether the "no very serious consequences" rule impermissibly shifts the burden of proof onto the local government to defend its zoning policy.

The motions for leave to file briefs amicus curiae are granted. Other persons or groups interested in the determination of the issues presented

in this case may move the Court for permission to file briefs amicus curiae. Reported below: 278 Mich App 743.

WEAVER, J., did not participate in this case because she has a past and current business relationship with Kasson Township Supervisor Fred Lanham and his family.

HENDEE v PUTNAM TOWNSHIP, Nos. 137446 and 137447. The parties shall include among the issues to be briefed: (1) whether a rule of finality or ripeness applies to the plaintiffs' exclusionary zoning claim, see *Paragon Props Co v City of Novi*, 452 Mich 568, 576 (1996); *Warth v Seldin*, 422 US 490, 508 n 18 (1975) ("[U]sually the focus should be on a particular project."); (2) if so, whether the Court of Appeals majority properly held that the defendant township's previous denials of the plaintiffs' applications to rezone their property for less intensive uses excused the finality requirement under the futility doctrine; (3) whether the trial court erred in granting injunctive relief prohibiting the defendant township from interfering with the plaintiffs' proposed use of their property for a manufactured housing community when the plaintiffs had never proposed that use to the township, see *Schwartz v City of Flint*, 426 Mich 295, 327-328 (1986); (4) whether a claim that a zoning ordinance unconstitutionally excludes a lawful use is properly analyzed without regard to whether a demonstrated need for the use exists, as suggested by the Court of Appeals' reliance on *Kropf v Sterling Hts*, 391 Mich 139, 155-156 (1974), or whether the enactment of 1978 PA 637, MCL 125.297a (now recodified in nearly identical language as MCL 125.3207), superseded the analysis of *Kropf* on which the majority relied; and (5) whether the trial court abused its discretion in awarding the plaintiffs their costs and expert witness fees.

The motion for leave to file brief amicus curiae is granted. The Real Property Law Section of the State Bar of Michigan and the Michigan Townships Association are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals Nos. 270594 and 275469.

*Summary Disposition April 29, 2009:*

ORCHARD ESTATES OF TROY CONDOMINIUM ASSOCIATION, INC v DAWOOD, No. 137974. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the Court of Appeals conclusion, under the provisions of the master deed and the restrictive covenants in this case, that neither the bylaws nor the restrictive covenants were binding on the defendants, because they were unrecorded. We vacate the Court of Appeals majority's analysis of the Michigan Condominium Act, MCL 559.101 *et seq*., because it is unnecessary to the decision in this case. 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. Court of Appeals No. 278514.

*Leave to Appeal Denied April 29, 2009:*

HICKS FAMILY LIMITED PARTNERSHIP v 1ST NATIONAL BANK OF HOWELL, No. 137146; Court of Appeals No. 276575.

JOHNSON v CITY OF CHARLEVOIX ZONING BOARD OF APPEALS, No. 137335; Court of Appeals No. 284193.

NORWOOD TWP CITIZENS FOR HEALTH AND SAFETY v NORWOOD LIMESTONE QUARRY, No. 137624; Court of Appeals No. 283386.

LEWIS v LEWERENZ HEALTH & WELLNESS CENTER FOR FAMILY & SPORTS, PC, No. 137704; Court of Appeals No. 277179.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

SLAUGHTER v BLARNEY CASTLE OIL COMPANY, No. 137794; reported below: Court of Appeals No. 281 Mich App 474.

KRISPIN v FOSTER, No. 137857; Court of Appeals No. 284255.

WILLIAMS v SHEEHAN'S ON THE GREEN, INC, No. 137888; Court of Appeals No. 285920.

*Reconsideration Denied April 29, 2009:*

DEPARTMENT OF ENVIRONMENTAL QUALITY v REXAIR, INC, No. 136700. Summary disposition entered at 482 Mich 1009. Court of Appeals No. 272652.

KELLY C.J., and HATHAWAY, J. We would grant reconsideration.

*Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 1, 2009:*

PEOPLE v HOCH, No. 137908. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 269739.

CORRIGAN, J. (*concurring*). I would direct the parties to include in their discussion the applicability and effect of MCR 7.210(B)(2), which describes the appellant's duty to file a settled statement of facts when a transcript of proceedings in the trial court is unavailable. The record before this Court appears to have been filed without heed to this rule.

YOUNG, J. I join the statement of Justice CORRIGAN.

LOOS v JB INSTALLED SALES, INC, No. 137987. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 275704.

*Summary Disposition May 1, 2009:*

CONSUMERS ENERGY COMPANY v ACEY, No. 137425. In lieu of granting leave to appeal, we reverse the Court of Appeals judgment to the extent that it reversed the trial court's order limiting the easement to a "66-foot working strip." Although the majority of the written easements at issue in this case does not include the limitation, the plaintiff voluntarily and expressly agreed on the record to the imposition of this limitation. See *Dana Corp v Employment Security Comm*, 371 Mich 107, 110 (1963); *Bowman v Coleman*, 356 Mich 390, 392-393 (1959). Court of Appeals No. 277039.

*Reconsideration Granted May 1, 2009:*

DAVIS v FOREST RIVER, INC, No. 136114. The motions for reconsideration of this Court's December 19, 2008, order are granted. We vacate our order dated December 19, 2008. On reconsideration, the application for leave to appeal the February 21, 2008, judgment of the Court of Appeals is again considered, and it is granted. The parties shall address: (1) whether the Uniform Commercial Code (UCC), MCL 440.1101 *et seq*., applies to the purchase contract between the plaintiff and the dealer, Kitsmiller RV; (2) if the UCC applies, whether the UCC provides the plaintiff's exclusive remedy for revoking acceptance of the purchase contract, MCL 440.2608; (3) whether the UCC requires privity to revoke acceptance of the purchase contract; (4) whether third-party beneficiary status under the warranty confers on the plaintiff any rights independent of the warranty; (5) whether the economic loss doctrine and the UCC, MCL 440.1101 *et seq*., apply to the plaintiff consumer's claims for breach of warranty; and (6) if the plaintiff's consumer complaints are not governed by the UCC, what is the nature and source of any non-UCC remedy.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Summary disposition entered at 482 Mich 1123. Court of Appeals No. 270478.

*Leave to Appeal Denied May 1, 2009:*

HALL v CLAYA, No. 137162; Court of Appeals No. 277202.

MARKMAN, J. (*concurring*). I concur with the Court's order denying leave to appeal, but write separately to express considerable sympathy for defendant's position. Defendant finds himself subject to a jury verdict of $9,467 in actual damages and $170,000 in exemplary damages. It is clear to me that defendant's initial actions fell within the scope of his employment and were undertaken in good faith. Indeed, defendant's actions reflected a conscientious public servant determined to prevent the abuse of public monies. Normally, this would warrant a finding that defendant, a public school official, was entitled to governmental immunity. But, viewing the evidence in the light most favorable to plaintiff, as

is required in reviewing an appeal from a motion for a directed verdict, *Zsigo v Hurley Med Ctr*, 475 Mich 215, 220-221 (2006), I can only conclude that defendant's final communication with plaintiff's insurer exaggerated the actual facts as they then existed and that this communication contained unfounded and inaccurate information to the extent that defendant was no longer acting in good faith. Finally, I note that the amount of exemplary damages here seems extraordinarily excessive in light of the actual damages awarded. But, defendant has not raised any claim regarding the propriety or amount of such exemplary damages.

JAMIL v JAHAN, No. 137332; reported below: 280 Mich App 92.

PEOPLE v BLACKSTON, No. 137627; Court of Appeals No. 245099.

MARKMAN, J. (*concurring*). For the reasons stated in my dissenting opinion in *People v Blackston*, 481 Mich 451 (2008), I continue to believe that the trial court abused its discretion here in excluding the recanting statements and that the error was not harmless. However, because this Court has already addressed this issue and my position did not prevail, and because I agree with the Court of Appeals that defendant's remaining issues are without merit, I concur in this Court's decision to now deny leave to appeal.

KELLY, C.J. I join the statement of Justice MARKMAN.

PEOPLE v KIRCHER, No. 137652; Court of Appeals No. 275215.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider whether the sentencing guidelines apply to MCL 324.3115(4). On the one hand, MCL 777.13c states that the guidelines apply to specifically listed felonies, including the offense specified in MCL 324.3115(4), which suggests that the guidelines *are* applicable and that a conviction under § 3115(4) carries a five-year *indeterminate* maximum sentence. On the other hand, MCL 324.3115(4) states that the trial court "shall" impose a five-year term of imprisonment, which apparently communicates a *determinate* sentence, thereby rendering the guidelines inapplicable pursuant to MCL 769.34(5). Moreover, whether MCL 324.3115(4) effectively imposes a determinate sentence for purposes of MCL 769.34(5) is placed into issue by the Legislature's use of substantially more definite language in other criminal statutes imposing determinate sentences, e.g., MCL 750.227b (possession of a firearm during the commission of a felony) (the defendant "shall" be sentenced to a "mandatory term" that "shall not be suspended" and the defendant is "not eligible for parole"); MCL 750.316(1) and MCL 791.234(6) (murder) (the defendant "shall be punished by imprisonment for life" and is "not eligible for parole"); MCL 750.543f(2) (terrorism) (the defendant "shall" be punished by imprisonment for life "without eligibility for parole"). Because of the substantial consequences for defendant's term of incarceration, I would grant leave to appeal to address this issue.

KELLY, C.J., and CAVANAGH, J. We join the statement of Justice MARKMAN.

POWERS v POST-NEWSWEEK STATIONS, No. 138114; Court of Appeals No. 288582.

KELLY, C.J. (*concurring*). Plaintiff, an African-American woman, worked for defendant WDIV-TV as an advertising account executive. She was eventually promoted to the position of sales manager. When she was not made general sales manager (GSM), she filed suit alleging that she had been discriminated against on the basis of her race and gender.

The previous GSM, Matt Kell, held the position until he succumbed to cancer. While he was ill, plaintiff applied for and received short-term disability leave for depression. Plaintiff claimed that defendants discriminated against her by terminating her employment after denying her an extension of her medical leave of absence. Finally, she alleged that defendants' conduct constituted intentional infliction of emotional distress.

Defendants moved for summary disposition on the ground that plaintiff had failed to create a genuine issue of material fact concerning racial discrimination or intentional infliction of emotional distress. The trial court denied the motions. On interlocutory appeal, the Court of Appeals reversed the trial court's ruling on the intentional infliction of emotional distress claim, but denied leave to appeal with respect to her discrimination claims. Defendants now seek leave to file an interlocutory appeal in this Court.

Under the Michigan Civil Rights Act (CRA),[1] a claim of racial or gender discrimination in employment may be made with direct or indirect evidence.[2] Where the employee adduces direct evidence of bias, a plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case.[3] Where direct evidence is unavailable, to avoid summary disposition, the employee must present evidence from which the fact-finder could infer that the plaintiff was the victim of unlawful discrimination.[4] Thus, to establish a prima facie case of discrimination, a plaintiff must present evidence that she was

> (1) a member of a protected class; (2) subject to an adverse employment action; (3) qualified for the position; and that (4) others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct.[5]

Once the employee establishes a prima facie case, the employer must articulate a nondiscriminatory reason for its actions. If the employer adduces such a reason, even if that reason later turns out to be incredible, the presumption of discrimination evaporates.[6] Nonetheless, the evidence supporting an employee's prima facie case may also be considered

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[1] MCL 37.2201 *et seq*.

[2] *Town v Michigan Bell Tel Co*, 455 Mich 688, 694-695 (1997).

[3] "Direct evidence" is evidence that, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. *Hazle v Ford Motor Co*, 464 Mich 456, 462 (2001).

[4] *Hazle*, *supra* at 462-463.

[5] *Town*, *supra* at 695.

[6] *Id*.

in deciding whether a genuine issue exists about whether the employer's purported nondiscriminatory reasons constitute a pretext.[7]

Here, defendants claim that plaintiff failed to create a genuine issue of material fact that she suffered an adverse employment action in defendants' failure to promote her to GSM. According to defendants, plaintiff failed to show that the position was open at any time before she became disabled. But plaintiff asserts that, although she was available for the job, defendant never formally offered it to anyone and took no steps to screen candidates to fill it. Plaintiff states that she was forced to assume the duties and responsibilities of the position and yet was never given the title or the pay.

Plaintiff gave deposition testimony about Theodore Pearse, the head of her department, showing that he acted in a discriminatory manner. Plaintiff also testified about disparate treatment by Pearse concerning the hours that she worked and the duties that she performed. This contrasted with the favorable treatment that Pearse gave to Kell. Plaintiff's testimony establishes a genuine issue of material fact about adverse employment actions. It also raises an inference that Pearse acted out of racial animus in failing to pay plaintiff for her work as GSM and in refusing to promote her to that position. According to plaintiff's testimony, Pearse could have chosen a GSM when Kell died, but did not. If plaintiff's testimony is believed, a finder of fact could infer racial animus from Pearse's decision not to formally promote plaintiff to the position of GSM.

Defendants also argue that plaintiff failed to provide evidence of an adverse employment action with respect to her medical leave extension. They assert that she did not show that she was disparately treated compared to similarly situated employees. Defendants point out that white employees were also denied leave extensions.

However, plaintiff persuasively argues that the failure to extend her medical leave resulted in the termination of her employment, which could clearly constitute an adverse employment action. Moreover, although plaintiff's employment was terminated in accord with defendants' standard policy, an exception to that policy had been made for Kell. But, no exception to defendants' standard policy exists for terminally ill employees. As a result, a genuine issue of fact exists concerning whether plaintiff was treated differently because of her race.

Finally, defendants contend that plaintiff's retaliation claim fails as a matter of law. They assert that no one involved in the decision not to offer her the GSM position or to deny her a medical leave extension knew of the alleged protected activity. However, plaintiff claimed that Pearse was aware of her complaints of racial discrimination. Thus, if believed, plaintiff's testimony demonstrates resentment toward plaintiff by Pearse that could constitute retaliation.

For these reasons, summary disposition, in favor of defendants, of plaintiff's discrimination claims was inappropriate. The case should proceed to trial. Therefore, I concur in the Court's order denying

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[7] *Id*. at 696.

defendants' application for leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent. Plaintiff filed suit alleging multiple claims of racial and gender discrimination. The trial court denied defendants' motions for summary disposition, and the Court of Appeals denied leave to appeal on all but one of these motions. *Powers v Post-Newsweek Stations Michigan Inc*, unpublished order of the Court of Appeals, entered December 11, 2008 (Docket No. 288582). Because I believe that all but one of plaintiff's remaining claims should be dismissed, I dissent.

To raise an inference of discrimination, a plaintiff must establish a prima facie case by showing that

> (1) she belongs to a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. [*Hazle v Ford Motor Co*, 464 Mich 456, 463 (2001).]

Establishing a prima facie case, however, "does not necessarily preclude summary disposition in the defendant's favor." *Id.* at 463-464. Instead, the defendant can "articulate a legitimate, nondiscriminatory reason for its employment decision" that rebuts the inference of discrimination. *Id.* at 464. Once the defendant has articulated such a reason, the plaintiff can only survive summary disposition by demonstrating that the evidence would allow a reasonable trier of fact to conclude that the employer's action was motivated by discriminatory animus and that the employer's proffered reason was " 'a pretext for [unlawful] discrimination.' " *Id.* at 465-466 (alteration in original), quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 176 (1998).

Plaintiff first claims that defendants discriminated against her by not promoting her to the general sales manager (GSM) position, which was the next level above her local sales manager position. The previous GSM, Matt Kell, held the position until he died from cancer. While Kell was sick, plaintiff applied for and received short-term disability leave for work-induced depression. She was still on short-term leave when Kell died. Defendants did not seek to fill the GSM position until approximately a year after Kell passed away. By that time, defendants had terminated plaintiff's employment because she did not return after her short-term disability leave expired. The GSM position was eventually filled by a black man.

Plaintiff has failed to establish a material issue of fact regarding an adverse employment action, because the GSM position did not open until after she had effectively ended her employment by not returning when her short-term leave expired. Plaintiff has also not established an inference of a discriminatory purpose because defendants hired an individual in the same "protected class" to which she belonged. Additionally, even assuming plaintiff has established a prima facie case, defendants' non-discriminatory reason, that defendants did not want to remove Kell from the position while he battled terminal cancer, clearly overcomes any presumption of discrimination. See *Hazle*, 464 Mich at

473. Plaintiff presented no evidence showing that defendants' reason was a pretext for keeping her out of the position.

Plaintiff next claims discrimination based on defendants' decision to not extend her short-term disability leave. The thrust of her argument is that defendants' denial of an extension was based on race because Kell, a white male, had received short-term disability extensions while he battled cancer. Kell was the only employee who received extensions beyond the period set by defendants' policy (two other white employees also did not receive extensions). I do not believe that this raises an inference of discrimination, because the differences between plaintiff's and Kell's medical situations were drastic.[1] However, again, even assuming that plaintiff established a prima facie case, she did not rebut defendants' non-discriminatory reason for extending Kell's benefits (that he was battling terminal cancer). Accordingly, I believe the presumption of discrimination "drops away," *Hazle*, 464 Mich at 465, and plaintiff's claim cannot continue because she did not present further evidence showing that defendants' actions were motivated by discriminatory animus.

Plaintiff lastly claims that defendants retaliated against her for complaining to their general manager about the mistreatment of black employees. To establish a prima facie case of retaliation, a plaintiff must show

> "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." [*Garg v Macomb Co Community Mental Health Servic*es, 472 Mich 263, 273 (2005) (citation omitted).]

For one of plaintiff's claims, there are material facts in dispute regarding these elements. Plaintiff alleged that Kell's supervisor did not discipline Kell for making plaintiff's job more difficult. A "supervisor's decision not to take action to stop harassment" can be considered an "adverse employment action." *Meyer v Center Line*, 242 Mich App 560, 571 (2000). When plaintiff complained to the supervisor regarding Kell's behavior, he told her that Kell was upset that plaintiff had complained to the general manager about racial mistreatment and that she should leave if she did not like Kell's behavior. I believe this arguably establishes a material dispute about whether the supervisor's inactivity was causally connected to plaintiff's earlier complaints to the general manager.

However, I do not believe that plaintiff has presented any evidence of a causal connection between her complaints and defendants' decisions

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[1] I respectfully disagree with Chief Justice KELLY that an inference of discrimination was raised because "no exception to defendants' standard policy exist[ed] for terminally ill employees." *Ante* at 988. I do not believe any formal exception is required to explain an employer's decision to provide an employee with extended disability care while he battled a serious cancer that would eventually cause his death.

not to promote her to the GSM position and not to extend her short-term disability. Plaintiff only shows that the decision-makers for those actions had knowledge of plaintiff's past complaints, which I believe alone is insufficient to establish a causal connection between plaintiff's complaints and the alleged adverse employment actions. See *West v Gen Motors Corp*, 469 Mich 177, 186 (2003) ("Something more than a temporal connection between protected conduct and an adverse employment action is required to show causation where discrimination-based retaliation is claimed.").

Accordingly, I would reverse the trial court's decision and dismiss plaintiff's claims with respect to the GSM promotion and short-term disability leave. Likewise, I would dismiss plaintiff's retaliation claim, except with respect to the portion of that claim arising out of the supervisor's failure to correct Kell's alleged mistreatment of plaintiff.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v RAYMOND DAVIS, No. 138225; Court of Appeals No. 282886.

MARKMAN, J. (*dissenting*). Defendant was charged with possession of ecstasy, being a felon in possession of a firearm, possession with intent to deliver marijuana, and possession of a firearm during the commission of a felony. The trial court suppressed evidence of defendant's incriminating statement to the police on the ground that he was interrogated without first being advised of his *Miranda* rights after he was arrested, *Miranda v Arizona*, 384 US 436 (1966). The Court of Appeals affirmed. *People v Davis*, unpublished opinion per curiam of the Court of Appeals, issued December 18, 2008 (Docket No. 282886).

While the police were executing a search warrant at a house, defendant jumped out of a bedroom window. He was brought back into the house and asked whether he lived there. Defendant indicated that he was living at the house. After narcotics were found in the house, defendant was arrested and advised of his *Miranda* rights. Defendant again indicated that he lived at the house.

A defendant must be made aware of his *Miranda* rights prior to a custodial interrogation. A "custodial interrogation" is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Yarborough v Alvarado*, 541 US 652, 661 (2004). "[C]ustody must be determined based on how a reasonable person in the suspect's situation would perceive his circumstances." *Id.* at 662. I agree with the trial court that defendant was in custody. He tried to leave the house, the police prevented him from doing so, brought him back into the house, and handcuffed him. A reasonable person in defendant's situation would have believed himself to have been in custody.

I also agree with the trial court that defendant was subjected to interrogation. "[T]he term 'interrogation' under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v Innis*, 446 US 291, 301 (1980). Here, the police asked defendant if he lived at the house that they had reason to believe contained drugs. Thus, they should

have known that they were likely to elicit an incriminating response. Accordingly, the statement made before defendant was advised of his *Miranda* rights was made during a custodial interrogation, and, thus, would seem to be inadmissible.

The more difficult issue here is whether the *subsequent* statement made *after* defendant was advised of his *Miranda* rights is also inadmissible. In *Missouri v Seibert*, 542 US 600 (2004) (a plurality opinion), the United States Supreme Court held that the police cannot deliberately wait to advise a defendant of his *Miranda* rights until after a station-house interrogation produces a confession and then admit the statement made after *Miranda* rights are given. However, the *Seibert* Court also held that *Oregon v Elstad*, 470 US 298 (1985), remained good law. In *Elstad*, the Court held that if the failure to warn before the initial statement constituted an oversight, and the initial statement was made at the suspect's home and the subsequent statement was made after the suspect was advised of his rights and after a station-house interrogation, the subsequent statement is admissible because "any causal connection between the first and second responses to the police was 'speculative and attenuated.' " *Seibert*, 542 US at 615, quoting *Elstad*, 470 US at 313. The pertinent question is "Could the warnings effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture?" *Seibert*, 452 US at 612. "Could they reasonably convey that he could choose to stop talking even if he had talked earlier?" *Id.* The Court articulated several factors to evaluate when determining whether "*Miranda* warnings delivered midstream could be effective enough to accomplish their objective: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first." *Id.* at 615.

This case is similar to *Elstad* in several important respects—the failure to advise defendant of his *Miranda* rights appears to have been an oversight and the custodial interrogation was not carried out in a station-house environment. However, in other respects, this case is similar to *Seibert*—the questions and answers were the same on two occasions and they occurred relatively closely in time. I would grant leave to appeal.

CORRIGAN, J. I join Justice MARKMAN's statement insofar as he sees a jurisprudentially significant issue in defendant's post-*Miranda*[1] statement. I would additionally grant leave to appeal on the issue whether the police officer's questions regarding defendant's address truly constituted custodial interrogation under *Rhode Island v Innis*, 446 US 291 (1980), or amounted to routine booking questions.

YOUNG, J. I join the statement of Justice MARKMAN.

*In re* MILLER (DEPARTMENT OF HUMAN SERVICES v ALLERTON), No. 138606; Court of Appeals No. 287955.

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[1] *Miranda v Arizona*, 384 US 436 (1966).

*Order Entered May 1, 2009:*

*In re* APPLICATION OF DETROIT EDISON COMPANY (ATTORNEY GENERAL v MICHIGAN PUBLIC SERVICE COMMISSION), Nos. 134667, 134668, 134669, 134671, 134673, 134674,134676 and 134677. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the July 3, 2007, judgment of the Court of Appeals on the issue of Detroit Edison Company (Edison) recovering a portion of the control premium that DTE Energy paid to acquire MCN Energy, and we affirm the Court of Appeals judgment that "transmission costs" may be recovered through a power supply cost recovery (PSCR) clause on different grounds. The Public Service Commission (PSC) excluded the control premium costs from Edison's general rate. On appeal, Edison bore the burden "to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8); see MCL 460.4 (adopting MCL 462.26 standards). Judicial review of administrative agency decisions must "not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views." *Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 124 (1974); see also *In re Payne*, 444 Mich 679, 692-693 (1994) ("When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact, if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record."). The Court of Appeals did not give due deference to the PSC's findings of fact, and Edison failed to meet its burden. Accordingly, we reinstate the PSC's decision excluding the control premium costs from Edison's general rates. The Court of Appeals also held that "[p]ayments made by Edison for transmission costs . . . are necessarily 'transportation costs,' and therefore are properly recoverable in a PSCR clause." *In re Detroit Edison Application*, 276 Mich App 216, 229 (2007). Electric utilities can recover two types of power supply costs through a PSCR clause: (1) "booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation"; or (2) "booked costs of purchased and net interchanged power transactions." MCL 460.6j(1)(a). The Court of Appeals interpretation does not give any meaning to the limitation that the "transportation costs" must be those "of *fuel* burned by the utility for electric generation." (Emphasis added.) However, the second clause, "booked costs of purchased and net interchanged power transactions," is a technical phrase that has acquired a "peculiar and appropriate" meaning in the regulation of electric utilities to include "transmission costs" charged by third parties. MCL 8.3a; see *In re Wisconsin Electric Power Co*, unpublished opinion and order of the Public Service Commission, issued September 16, 2002 (Case No. U-12725), at 16. Accordingly, it "shall be construed and understood according to such peculiar and appropriate meaning," MCL 8.3a, and the PSC did not err in permitting Edison to recover transmission costs through its PSCR clause. The Court of Appeals affirmance of the PSC decision is thus affirmed on this alternate ground. Reported below: 276 Mich App 216.

CORRIGAN, J. (*concurring in part and dissenting in part*). I respectfully dissent from the order reversing the Court of Appeals and reinstating the decision of the Public Service Commission (PSC) excluding the recovery of the control premium sought by the Detroit Edison Company (Edison) in this general rate case. Although I concur with the Court's decision to affirm the PSC regarding the recovery of transmission costs, and although no one disputes that Edison may attempt to substantiate savings in its next general rate case to recover a portion of the control premium, I write separately because the PSC erred by foreclosing Edison from recovering any part of the control premium paid to acquire MCN Energy Group, Inc. (MCN), in this rate case. In my view, the PSC's decision regarding the control premium was not supported by competent, material, and substantial evidence on the whole record. Accordingly, I would affirm the Court of Appeals decision to reverse the PSC and remand for further proceedings concerning the control premium issue.

On June 20, 2003, Edison, the largest electric utility provider in Michigan, filed an application for a general rate case. The PSC described the subsequent proceedings as "among the most complex cases ever considered." Indeed, the case involved myriad matters, including an increase in Edison's rate schedules, determination of its stranded costs, implementation of its power supply cost recovery clause, and recovery of its control premium. Specifically, Edison sought recovery from its ratepayers for an allocated share of the control premium arising from the acquisition of MCN. According to Edison, its ratepayers benefited financially from the cost savings or synergies that the control premium made possible.

The PSC staff opined that substantial savings to ratepayers resulted from the acquisition and that these synergistic savings justified the pass-through of the acquisition control premium. The hearing referee also essentially determined that Edison's control premium argument was persuasive, stating in relevant part:

> The [hearing referee] finds Detroit Edison's and Staff's position persuasive. The [hearing referee] finds that the savings are real substantial and a direct result of the merger and planning going into the merger which contributed to effectuating the savings which justifies the pass through of the acquisition control premium with one exception, that exception being that the [hearing referee] is persuaded by the arguments of the [Attorney General (AG), Association of Businesses Advocating Tariff Equity (ABATE), and Michigan Environmental Council (MEC)/Public Interest Research Group in Michigan (PIRGIM)] that 40 years is too long a period of time to project savings.
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> The [hearing referee] does recognize concerns raised regarding the ability of Detroit Edison to show these savings in perpetuity or more specifically in this case 40 years into the future. The [hearing referee] agrees that such forecasting calls into play too many

> variables for such long-term projections[,] including[] regulatory practices, electric choice industry restructuring, alternative energy sources, and even the needs of DTE Energy, Detroit Edison, and MCN as a result of the merger. The [hearing referee] further recognizes that the approval in this rate case is limited to those costs and savings actually realized thus far. Detroit Edison in its next rate case will, likewise, be required to substantiate the asserted savings for continuing recovery. At that time, Staff and Intervenors, as in this case, may present challenges to the asserted cost savings.

Nevertheless, the PSC rejected the hearing referee's recommendation to include $46.2 million for the control premium. The PSC reasoned that

> DTE's decision to pay $893 million over the market price of MCN to acquire MCN's assets was not subject to any form of oversight by the Commission and is curious in light of the acknowledgment by a Detroit Edison witness that MCN was "financially distressed" at the time of the merger. The Commission is persuaded that Detroit Edison never adequately explained why it would pay such an enormous premium for a company that was in such poor financial condition. The Commission is without any basis to question either the appropriateness of the merger or the reasonableness of the price paid by DTE to acquire MCN. Moreover, if DTE subsequently sells MCN for a profit, the Commission will likely be powerless to recoup any portion of the sale price for Detroit Edison's ratepayers, and could possibly be asked to raise rates again to cover the cost of lost synergies. Any system that requires ratepayers to endure rate increases for both found and lost synergies is truly dubious.
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> Additionally, the Commission is skeptical of Detroit Edison's contention that the alleged synergy savings associated with the merger could be expected to last for the immediate future let alone the next 40 years. A significant core function of Detroit Edison—its fossil and nuclear generation groups—"were excluded from the merger transition process" because they "were not impacted by the merger." Detroit Edison even admitted that some of the centralization of activities could have been achieved without the merger.
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> According to Detroit Edison, much of the value created from the MCN acquisition was in the form of cost reductions realized through combining overlapping functions and internal services. But a significant portion of the labor savings appears to be attributable to early retirements and voluntary resignations, which are not necessarily permanent. Other aspects of the merger produced confusion and customer consternation. A still pending investigation of Detroit Edison's and Mich Con's [Michigan Consolidated Gas Company] efforts to combine their billing systems, which apparently contributed to the incorrect billing of approximately 480,000 Mich Con customers in January 2002, has yet to be resolved. The costs

> associated with the billing system problems apparently were not included in the calculation of the merger synergies. Still, other savings were derived by considering cost savings on early-terminated contracts without any consideration of the expenses caused by the early termination of such contracts. While Detroit Edison claims that, without the merger, Detroit Edison's O&M [operation and maintenance] expenditures for 2004 would have increased by $84 million, the fact remains that the company's post-merger O&M spending exceeds its pre-merger spending levels by over $100 million. [Citations omitted.]

Disagreeing with the recommendation of the PSC staff and the findings of the hearing referee, the PSC held that "none of the control premium requested by Detroit Edison should be included in Detroit Edison's rates."

The Court of Appeals thereafter reversed the PSC's ruling that Edison may not recover its allocated share of the control premium in a unanimous published opinion. *In re Application of Detroit Edison Co*, 276 Mich App 216 (2007). The Court stated:

> As the PSC staff opined and the hearing referee recommended, we hold that the substantial savings to Edison customers are a direct result of the acquisition of Michigan Consolidated Gas Company (MichCon) and that these synergistic savings fully justify the pass-through of the acquisition control premium. Edison seeks and is entitled to that portion of the control premium that permits Edison to accomplish these synergistic savings. We hold that Edison is clearly entitled to recover its share of the control premium that resulted in these synergistic savings. Like the hearing referee, we reject the arguments of the AG and MEC/PIRGIM in opposition to Edison's rate request regarding the control premium. Of course, the PSC should determine the precise amount of the appropriate recovery and the period over which to amortize Edison's recovery of its portion of this control premium. [*Id*. at 235-236.]

The Court of Appeals further explained that "[t]he PSC's clearly erroneous decision resulted in a reduction of $46.2 million in Edison's revenue requirement for 2004, and a significant reduction of hundreds of millions in the future." *Id*. at 237. Additionally, the Court of Appeals held that Edison must "substantiate savings in its next rate case in order to continue recovering the control premium." *Id*.

In my view, the PSC erred when it foreclosed Edison from recovering any control premium in this general rate case. The PSC possesses only the authority granted by the Legislature. *Consumers Power Co v Pub Service Comm*, 460 Mich 148, 155 (1999). Words and phrases contained in the PSC's enabling statutes must be read in the context of the statutory scheme. *Id*. at 155-156. Moreover, this Court has often stated that any exercise of power by an agency "must be conferred by clear and unmistakable language, since a doubtful power does not exist." *Mason Co Civic Research Council v Mason Co*, 343 Mich 313, 326-327 (1955) (citation and quotation marks omitted). Although MCL 460.6 grants the PSC broad authority over matters pertain-

ing to public utilities, this Court has consistently held that the broad language in MCL 460.6 "serves as an outline of the PSC's jurisdiction, not a grant of specific powers." *Consumers Power Co*, *supra* at 160. Here, the PSC's determination that "none of the control premium requested by Detroit Edison should be included in Detroit Edison's rates" has precluded Edison from receiving a control premium recovery in these rates. No one disputes the Court of Appeals holding that Edison may substantiate savings resulting from the control premium in future rate cases. *In re Application of Detroit Edison Co*, *supra* at 237.[1] Nevertheless, I disagree with the PSC's decision to discount the conclusions of both PSC staff and the hearing referee concerning control premium recovery in this particular rate case.[2] As the Court of Appeals properly observed, "the PSC's decision is not supported by competent, material, and substantial evidence on the whole record." *Id.* at 238.[3]

I also question the PSC's rationale for ignoring the recommendation of the hearing referee and denying Edison any recovery whatsoever of its control premium in this case. After first stating that it had no basis to question the purchase price, the PSC went on to question Edison for "never [having] adequately explained why it would pay such an enormous premium for a company that was in such poor financial condition." But, as the Court of Appeals stated, the record evidence indicated that MCN's market value at the time it was acquired reflected the diminished financial value of the company and that the purchase price was within the range for comparable transactions. *In re Application of Detroit Edison Co*, *supra* at 238. Thus, the record does not support the PSC's characterization of the amount paid for MCN as being an "enormous premium." The PSC obviously rejected the business judgment of management involved in the acquisition of MCN. As this Court has stated, however, "the PSC's authority to regulate a utility's rates and charges does not include the power to make management decisions." *Consumers Power Co*, *supra* at 158. Whether the PSC would have made a different management decision concerning the merger is irrelevant to whether Edison can recoup synergies or cost savings reaped by its ratepayers.

Additionally, the PSC expressed skepticism that "the alleged synergy savings associated with the merger could be expected to last for the immediate future let alone the next forty years." Skepticism regarding

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[1] As counsel for the PSC stated at oral argument: "The Commission ruled on the evidence before it. The Commission did not reject the control premium on the basis that they could not award such a grant."

[2] The control premium recovery sought by Edison was not unprecedented. Indeed, the PSC acknowledged its authority to adjust rates in light of acquisition savings in a previous case, when it stated that "public policy dictates that we allow recovery of and on acquisition adjustments only where ratepayers receive a net benefit from the change in ownership." See order of the PSC, November 23, 2004 (Case No. U-13808), p 46 (citation and quotation marks omitted).

[3] See Const 1963, art 6, § 28.

long term savings is not a valid ground for denying Edison recovery of the documented net cost savings proven for 2004. Even if the PSC's skepticism regarding long term savings is well-founded, I agree with the PSC staff, the hearing referee, and the Court of Appeals that although Edison's amortization forecast may have been too speculative, Edison is nevertheless entitled to recover the actual savings proven for 2004 in this case and to attempt to substantiate such savings in its next general rate case in order to recover some of the control premium. *In re Application of Detroit Edison Co*, *supra* at 235-237.

The PSC also noted that Edison's postmerger O & M spending exceeded its premerger spending levels by over $100 million. This statement is irrelevant, given record evidence that Edison's O & M expenses would have been significantly higher if they had not been offset by the merger savings. A rate cannot be created by recognizing reductions in certain costs while ignoring the increases in other costs. *Michigan Consolidated Gas Co v Pub Service Comm*, 389 Mich 624, 633 (1973).

Accordingly, because the Court of Appeals correctly resolved the control premium issue, I dissent from this Court's order of reversal because it allows the PSC to foreclose any recovery sought by Edison concerning its allocated share of the control premium in this case.

MARKMAN, J. I join the statement of Justice CORRIGAN.

ATTORNEY GENERAL v MICHIGAN PUBLIC SERVICE COMMISSION, No. 136431. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we affirm the April 1, 2008, Court of Appeals judgment that "transmission costs" may be recovered through a power supply cost recovery (PSCR) clause on different grounds. The Court of Appeals followed the binding decision of *In re Detroit Edison Application*, 276 Mich App 216, 229 (2007), which held that "[p]ayments made by Edison for transmission costs . . . are necessarily 'transportation costs,' and therefore are properly recoverable in a PSCR clause." See MCR 7.215(J)(1). Electric utilities can recover two types of power supply costs through a PSCR clause: (1) "booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation;" or (2) "booked costs of purchased and net interchanged power transactions." MCL 460.6j(1)(a). The Court of Appeals interpretation does not give any meaning to the limitation that the "transportation costs" must be those "of *fuel* burned by the utility for electric generation." (Emphasis added.) However, the second clause, "booked costs of purchased and net interchanged power transactions," is a technical phrase that has acquired a "peculiar and appropriate" meaning in the regulation of electric utilities to include "transmission costs" charged by third parties. MCL 8.3a; see *In re Wisconsin Electric Power Co*, unpublished opinion and order of the Public Service Commission, issued September 16, 2002 (Case No. U-12725), at 16. Accordingly, it "shall be construed and understood according to such peculiar and appropriate meaning," MCL 8.3a, and the PSC did not err in permitting Consumers Energy Company to recover

transmission costs through its PSCR clause. The Court of Appeals affirmance of the PSC decision is thus affirmed on this alternate ground. Court of Appeals No. 261747.

*Leave to Appeal Granted May 7, 2009:*

DAWE v DR REUVAN BAR-LEVAV & ASSOCIATES, PC, No. 137092. The application for leave to appeal is granted. The parties shall address whether the 1995 amendment of MCL 330.1946 affected the scope of the statute's application. The application for leave to appeal as cross-appellants remains pending. Reported below: 279 Mich App 552.

PELLEGRINO v AMPCO SYSTEMS PARKING, No. 137111. The motion for immediate consideration of the motion to strike is granted. The motion to strike is granted in part. The paragraph spanning pages 1 and 2 of the plaintiffs' response to the defendant's application for leave to appeal is stricken because it contains information that is not part of the record on appeal. MCR 7.210(A)(1). The motion for extension of time to file a reply and the motion to note recent Supreme Court decision are granted. The application for leave to appeal the May 27, 2008, judgment of the Court of Appeals is granted, limited to the issue whether the defendant is entitled to a new trial based on a violation of MCR 2.511(F)(2). Court of Appeals No. 274743.

PEOPLE v GURSKY, No. 137251. The application for leave to appeal the July 17, 2008, judgment of the Court of Appeals is granted, limited to the issues: (1) whether the statements made by the complainant to Stacy Morgan on or about May 4, 2006, were "shown to have been spontaneous and without indication of manufacture" within the meaning of MRE 803A(2), and (2) whether it was more probable than not that any error in this regard was outcome determinative. See *People v Lukity*, 460 Mich 484, 495-496 (1999).

We further order the Macomb Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 274945.

WOODMAN v KERA, LLC, No. 137347. The application for leave to appeal is granted, limited to the issue whether the parental preinjury liability waiver was valid and enforceable. In all other respects, leave to appeal is denied, because we are not persuaded that the remaining questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is also denied, because we are not persuaded that the question presented should be reviewed by this Court.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 280 Mich App 125.

INSURANCE INSTITUTE OF MICHIGAN v COMMISSIONER FINANCIAL & INSURANCE SERVICES, DEPARTMENT OF LABOR & ECONOMIC GROWTH, Nos. 137400 and 137407. The parties shall include among the issues to be briefed: (1) whether, under § 64 of the Administrative Procedures Act (APA), MCL 24.264, the plaintiffs were permitted to bring an original declaratory judgment action in the circuit court without having first requested a declaratory ruling from the defendant; (2) whether § 244(1) of the Insurance Code, MCL 500.244(1), provides the exclusive means of seeking judicial review of rules promulgated by the defendant; (3) whether judicial review of the challenged administrative rules was limited to the administrative record prepared during the public hearing process, see § 104(3) of the APA, MCL 24.304(3), and *Michigan Ass'n of Home Builders v Dep't of Labor & Economic Growth*, 481 Mich 496 (2008); and (4) whether the challenged administrative rules (a) violated the plaintiffs' due process rights, (b) were valid and enforceable under the Insurance Code, (c) were arbitrary and capricious, or (d) exceeded defendant's rulemaking authority.

The motion for expedited consideration is granted. The Clerk of the Court is directed to place this case on the October 2009 session calendar for argument and submission. The Insurance and Indemnity Law Section of the State Bar of Michigan, the American Insurance Association, the Michigan Consumer Federation, and the National Consumer Law Center are invited to file briefs amicus curiae.

Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 280 Mich App 333.

FIRST NATIONAL BANK OF CHICAGO v DEPARTMENT OF TREASURY, No. 137527. The parties shall include among the issues to be briefed: (1) whether the plaintiff assignee of the mortgage on the property in question had standing to assert the due process rights of its assignor, which was formerly known as BankBoston, NA; and, if so, (2) whether BankBoston's due process rights were violated by the defendants' mailing of notice to FNB—the entity into which BankBoston had merged and to which it had changed its name—at FNB's address, rather than to the Boston address listed on BankBoston's mortgage assignment. Reported below: 280 Mich App 571.

DEPARTMENT OF AGRICULTURE v APPLETREE MARKETING, LLC, No. 137552. The motions for leave to file briefs amicus curiae are granted. The application for leave to appeal the September 16, 2008, judgment of the Court of Appeals is granted. The parties shall include among the issues to be briefed: (1) whether the plaintiffs may simultaneously pursue claims against Appletree Marketing, LLC, for alleged violations of the Agricultural Commodities Marketing Act, MCL 290.651 *et seq.*, and for common-law and statutory conversion under MCL 600.2919a; and (2) whether, under the circumstances of this case, the plaintiffs may pursue claims for

common-law and statutory conversion against Appletree's principal, Steven Kropf. Reported below: 280 Mich App 635.

HOLMAN v RASAK, No. 137993. The parties shall include among the issues to be briefed whether the Health Insurance Portability and Accountability Act of 1996 (HIPAA), PL 104-191, 110 Stat 1936, permits ex parte interviews by defense counsel with treating physicians pursuant to a qualified protective order.

The motion for leave to file brief amicus curiae is granted. The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 281 Mich App 507.

PEOPLE v FEEZEL, No. 138031. The Criminal Defense Attorneys of Michigan and Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 276959.

*Leave to Appeal Denied May 7, 2009:*

TOSA v YONO, No. 136320; Court of Appeals No. 274301.

*Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 8, 2009:*

MICHIGAN EDUCATION ASSOCIATION v SECRETARY OF STATE, No. 137451. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 56 days of the date of this order addressing the following issues: (1) whether a school district's use of government resources for a payroll deduction plan for contributions made by members of plaintiff Michigan Education Association (MEA) to MEA's political action committee is either an "expenditure" or a "contribution" under § 6 of the Michigan Campaign Finance Act (MCFA), MCL 169.206; (2) whether § 57(1) of the MCFA, MCL 169.257(1), prohibits a school district from expending government resources for such a payroll deduction plan if the costs of the plan are prepaid by the MEA; and (3) whether a school district has the authority to collect and deliver payroll deductions for such contributions. The parties should not submit mere restatements of their application papers. Reported below: 280 Mich App 477.

BEZEAU v PALACE SPORTS & ENTERTAINMENT, INC, No.137500. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the jurisdictional standard established at MCL 418.845, as interpreted by this Court in *Karaczweski v Farbman &*

*Stein Co*, 478 Mich 28 (2007), should be applied in this case. The parties may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers.

The Workers' Compensation Section of the State Bar of Michigan is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals No. 285593.

ALLEN V BLOOMFIELD HILLS SCHOOL DISTRICT, No. 137607. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether post-traumatic stress disorder may qualify as a "bodily injury" that permits a plaintiff to avoid the application of governmental immunity from tort liability under the motor vehicle exception, MCL 691.1405. The parties may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., and the Insurance Institute of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 281 Mich App 49.

MYERS V MUFFLER MAN SUPPLY COMPANY, No. 137608. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether defendant Muffler Man Supply Company's alleged negligent act of removing the machine guard was a proximate cause of the injury to plaintiff Ronnie L. Myers. The parties may file supplemental briefs within 56 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 277542.

*Leave to Appeal Denied May 8, 2009:*

EXPRESS PLUMBING, HEATING & MECHANICAL, INC V BECHLER, No. 136961; Court of Appeals No. 282310.

MARKMAN, J. (*dissenting*). Because I believe the Michigan Employment Security Commission (MESC), in a split decision, erred in finding that the claimant was qualified to receive unemployment benefits after she *voluntarily* left her job with her employer, I dissent. Unemployment benefits in this state are intended for individuals—of whom there is no current shortage—who find themselves "unemployed through no fault of their own." MCL 421.2. However, in this case, such benefits are paid to support the claimant's *own* decision to become unemployed out of unhappiness with her employer's altogether reasonable expectation that she provide a full day's work in exchange for her compensation.

"[A]n individual is disqualified from receiving [unemployment] benefits if he or she . . . [l]eft work voluntarily without good cause attributable to the employer . . . ." MCL 421.29(1)(a). " '[G]ood cause' compel-

ling an employee to terminate his employment should be found where an employer's actions would cause a reasonable, average, and otherwise qualified worker to give up his or her employment." *Carswell v Share House, Inc*, 151 Mich App 392, 396-397 (1986).

In 2000, the employer hired the claimant to provide assistance with its storage rental business. The claimant subsequently resigned in May 2006 and sought unemployment benefits. In finding that the claimant had "good cause" for leaving her job, and therefore qualified for unemployment benefits, the administrative hearing officer cited new services in which the employer became involved that required the claimant to perform new duties. Yet, the claimant began performing these duties without objection long before she quit in May 2006. The claimant testified that a rental truck moving service began in December 2000, approximately six months after she began her employment; furnace sales began in March 2002; a shrink-wrap service began in September 2003 and ended in April 2005; and sign sales began in November 2003.

The claimant's duties with respect to these new services were similar to her duties performed with respect to the storage rentals. Mainly, she interacted with customers and provided them with information and service. The claimant never indicated that she was not qualified to perform her new duties; nothing indicates that she had any particular difficulty in completing these duties within her regularly scheduled hours; and, as the hearing officer herself concluded, "[n]one of these tasks required a great deal of time for claimant to assist the customers with." Accordingly, in my judgment, it cannot be said that a reasonable employee would have relinquished her employment because of these new duties, given that the duties were well within the claimant's qualifications and she was able to reasonably complete these duties during her normal work hours.

The hearing officer noted that, based on daily reports transmitted to the employer's main place of business, which was separate from the storage rental facility, the claimant's tasks increased from an average of 7.4 "tasks" a day in 2000 to 17.7 "tasks" a day in 2005. These reports, however, afford no evidence at all of any particular *work* increase. For example, the claimant testified that one of her duties relating to the storage units was to process payments. In July 2000 reports, the claimant specified, "[p]rocessed several payments." Later, in an October 2005 report, she listed "[p]rocessed a couple payments," "[p]rocessed a couple more payments," and "[p]rocessed a phone credit card payment. And mailed out the receipt." Thus, although the number of recorded *entries* related to processing payments may have increased over this period, nothing is revealed about whether the actual *work* increased. The daily reports, in my view, fail to establish *any* increase in work and thus do not support the hearing officer's finding that the claimant had "good cause" to give up her employment.

Although an award for unemployment benefits is reviewed by this Court under a standard according considerable deference to the MESC's factual determinations, the evidence here does not, in my judgment, support the conclusion that the claimant had good cause for quitting her employment. Instead, the evidence demonstrates that, although the

claimant *may* have performed additional duties, in no way did those duties increase her workload beyond what she could reasonably perform during the workday. As the dissenting member of the MESC concluded:

> Here, the record showed the claimant did not have enough to do while on company time. The employer assigned her additional duties to keep her busy, and so that the claimant would not conduct her own personal business while on company time.

Being required to work during all hours of one's employment is hardly a circumstance of employment that would cause a reasonable person to leave. Rather, such an employee must expect that any position of employment, even one that may start out slowly, will eventually require the employee to be working during the hours for which he or she is being paid. To hold otherwise would seemingly permit an employee hired in the midst of a poor economy, when business is slow, to later assert "good cause" once the economy strengthens and the employer's business increases, based on the fact that such employee must then work harder. It is hard to imagine a less responsible unemployment compensation policy, and I do not see evidence in MCL 421.29(1)(a) that this is what Michigan has established. I would reverse the MESC's decision.

PEOPLE v STOVALL, No. 137326. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287160.

KELLY, C.J. (*dissenting*). In 1991, defendant shot and killed two victims. With respect to each killing, he pleaded guilty of second-degree murder. Both pleas involved a sentence agreement under which defendant would be sentenced to parolable life imprisonment.

At the plea hearing, his counsel stated, "I've advised [defendant] that the statute permits the Parole Board to consider him for [parole] at the end of ten years on this type of life sentence . . . ." Defendant later moved to withdraw his pleas, arguing that defense counsel had misled him concerning the likelihood that he could be paroled from his life sentences. The trial court denied the motion. The Court of Appeals affirmed, finding that defendant's pleas were freely, voluntarily, and understandingly made. This Court denied defendant's application for leave to appeal.[1]

Defendant then filed two unsuccessful motions for relief from judgment. This is defendant's third such motion. Although MCR 6.502(G)(1) states that a court must return without filing any successive motions for relief from judgment, MCR 6.502(G)(2) provides an exception to that rule when a retroactive change in the law has occurred.

Defendant argues that, because the Michigan Parole Board has established a policy that "life in prison means life in prison," the trial judge and defense counsel operated under a misunderstanding of the law when he was sentenced. Thus, defendant claims that he is entitled to resentencing because he did not understand the consequences of his guilty plea. Furthermore, defendant claims that changes in the parole

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[1] *People v Stovall*, 446 Mich 862 (1994).

board's policy regarding life sentences that went into effect in 1992 and 1999 violate the Ex Post Facto Clause of the United States Constitution.[2]

Defendant relies on *Foster Bey v Rubitschun*,[3] a federal case in which United States District Judge Marianne O. Battani held that the parole board policy changes in question violated the Ex Post Facto Clause when retroactively applied to prisoners. Judge Battani noted that (1) the board's understanding of its ability to exercise its discretion in light of its changed policy, (2) its redefinition of the eligibility procedure for non-mandatory life sentences, and (3) the changes in the timing and intervals of the interview and review process have significantly disadvantaged prisoners with parolable life sentences.

This issue has been addressed by the Court of Appeals.[4] But this Court has never spoken on whether the changes in the parole board's policy constitute a violation of the Ex Post Facto Clause. The issue is jurisprudentially significant and a resolution of it by this Court is long overdue. Accordingly, the Court should grant defendant's application for leave to appeal to consider the issue presented in *Foster Bey* and hear this case along with *People v La Salle Washington*, 483 Mich 1005 (2009).

PEOPLE V LA SALLE WASHINGTON, No. 137518. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284148.

KELLY, C.J. (*dissenting*). In 1967, defendant shot and killed the owner of a market. When a jury was unable to reach a verdict on the charged offense of first-degree felony murder, the trial court declared a mistrial. Several weeks later, defendant pleaded guilty of second-degree murder. He was sentenced to a parolable term of life imprisonment.

Defendant did not file a direct appeal. However, he later moved to withdraw his guilty plea because the trial court had failed to advise him that he had the right to testify at trial. The trial court denied the motion, and the Court of Appeals denied leave to appeal for lack of merit. This Court denied leave to appeal.[1]

Defendant filed this motion for relief from judgment in 2003. The trial court denied the motion. The Court of Appeals denied leave to appeal for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Defendant seeks relief from judgment because, after his sentence was pronounced, the Michigan Parole Board changed its policy on paroling convicts incarcerated for life sentences. The policy now is that "life means life," meaning those sentenced to life terms are ineligible for parole. At sentencing, defendant, the trial judge, and counsel believed

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[2] US Const, art I, § 10, cl 1.

[3] *Foster Bey v Rubitschun*, 2007 LEXIS 95748 (ED Mich, 2007).

[4] See *People v Hill*, 267 Mich App 345 (2005).

[1] *People v Washington*, 390 Mich 786 (1973).

that a person sentenced to parolable life became eligible to be considered for parole and could be paroled after 10 years of incarceration.

Thus, defendant claims that he is entitled to resentencing because he did not understand the consequences of his guilty plea. Furthermore, defendant claims that, because the parole board adopted the "life means life" policy after he was sentenced, the new policy, as applied to him, violates the Ex Post Facto Clause of the United States Constitution.[2]

Defendant relies on *Foster Bey v Rubitschun*,[3] a federal case in which United States District Judge Marianne O. Battani ruled that the changes in the parole board's policy violated the Ex Post Facto Clause when retroactively applied to prisoners. Judge Battani noted that (1) the board's understanding of its ability to exercise its discretion in light of its changed policies, (2) its redefinition of the eligibility procedure for non-mandatory life sentences, and (3) the changes in the timing and intervals of the interview and review process significantly disadvantaged prisoners with parolable life sentences.

This issue has been addressed by the Court of Appeals.[4] But this Court has never spoken on whether the changes in the parole board's policy constitute a violation of the Ex Post Facto Clause. The issue is jurisprudentially significant and a resolution of it by this Court is long overdue. Accordingly, the Court should grant defendant's application for leave to appeal to consider the issue presented in *Foster Bey* and hear this case along with *People v Stovall*, 483 Mich 1004 (2009).

SAAB V FARAH, Nos. 137664 and 137665; Court of Appeals Nos. 278384 and 278772.

MARKMAN, J. (*dissenting*). Because I believe the lower courts erred in their interpretation of the parties' property settlement agreement (PSA), I dissent. In particular, I believe the trial court erred in determining that the PSA only allowed for the division of "marital assets." Instead, the parties stated that any non-disclosed "real or personal assets," without further limitation, were subject to judicial division. By contrast, when the parties intended to refer to "marital assets," they clearly knew how to communicate this, because they used this specific phrase in other provisions of the PSA.

CORRIGAN, J. I join the statement of Justice MARKMAN.

*In re* STAGGER (DEPARTMENT OF HUMAN SERVICES V STAGGER), No. 138644; Court of Appeals No. 287433.

*In re* GROVE-SHEALY (DEPARTMENT OF HUMAN SERVICES V GROVE), No. 138759; Court of Appeals No. 286790.

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[2] US Const, art I, § 10, cl 1.

[3] *Foster Bey v Rubitschun*, 2007 LEXIS 95748 (ED Mich, 2007).

[4] See *People v Hill*, 267 Mich App 345 (2005).

*Reconsideration Granted May 8, 2009:*

STONE v RW LAPINE, INC, No. 136438. The motion for leave to file brief amicus curiae is granted. The motion for reconsideration of this Court's September 17, 2008, order is granted, in part. On reconsideration, we modify our order dated September 17, 2008, by adding the following language at the end of the order: "Although the magistrate did not err by choosing to utilize MCL 418.371(6) to calculate the plaintiff's average weekly wage, he did err by failing to apply the specific formula provided in subsection 6. We remand this case to the Board of Magistrates for a recalculation of the plaintiff's average weekly wage using the formula stated in MCL 418.371(6)." In all other respects, the motion for reconsideration is denied. We do not retain jurisdiction. Court of Appeals No. 275684.

CORRIGAN, J. I would deny reconsideration.

*Leave to Appeal Denied May 12, 2009:*

PEOPLE v TERRY WILLIAMS, No. 138829; Court of Appeals No. 280428.

*Leave to Appeal Denied May 15, 2009:*

*In re* JERNAGIN (DEPARTMENT OF HUMAN SERVICES v FULBRIGHT), No. 138713; Court of Appeals No. 288098.

*Leave to Appeal Denied May 22, 2009:*

PEOPLE v FISHER, No. 136591. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of October 3, 2008. The application for leave to appeal the March 25, 2008, judgment of the Court of Appeals is denied, because we are no longer persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 276439.

WEAVER, J. (*dissenting*). I dissent from this Court's order and conclusion that leave was improvidently granted because, after hearing oral arguments, I would reverse the judgment of the Court of Appeals for the reasons stated in Judge TALBOT's dissent.

YOUNG, J. (*dissenting*). I dissent from this Court's order denying leave to appeal. I would reverse the judgment of the Court of Appeals because the police officer's entry into the defendant's home was lawful under the emergency aid exception to the Fourth Amendment of the United States Constitution.

Officer Chris Goolsby and his partner responded to a noise disturbance on Steven Road in Brownstown, Michigan. When they arrived, two pedestrians informed Officer Goolsby that there was a man on adjoining Allen Road who was "going crazy." The officers went to Allen Road and saw a man later identified as defendant, Jeremy Fisher, through the front window of a house "walking around the residence screaming and throwing stuff." Officer Goolsby could hear objects breaking. Officer Goolsby observed that a truck parked in the driveway had a damaged front end

and that fence posts along the property line had been knocked down. When the officers tried to speak with defendant, he repeatedly swore at them and told them to get a search warrant. Officer Goolsby observed fresh blood on the hood of the truck, on some clothes inside the truck, and on the back door. Officer Goolsby believed that he saw a cut on defendant's hand. The officers also observed that three house windows had been broken and the glass was still outside on the ground.

Officer Goolsby testified that he attempted to enter the house "[b]ecause we did not know if there's somebody else inside" and he was concerned that someone else was inside "[b]ecause of the amount of blood we found on the outside." Officer Goolsby was able to open the front door, but only 12 to 18 inches because a couch was blocking it. Officer Goolsby heard a dog bark, looked to his right, through the glass of the door, and saw defendant sitting on his bed and pointing a rifle at Officer Goolsby. Officer Goolsby retreated.

Defendant was subsequently arrested and charged with felonious assault[1] and possession of a firearm during the commission of a felony.[2] Defendant sought to suppress Officer Goolsby's testimony about the rifle incident, arguing that it was obtained in violation of his Fourth Amendment rights. The prosecutor argued that Officer Goolsby's entry was lawful under the emergency aid exception to the Fourth Amendment. The trial court granted defendant's motion without an evidentiary hearing. The prosecutor appealed and the Court of Appeals majority reversed and remanded for an evidentiary hearing.[3] On remand, the trial court held an evidentiary hearing and again granted defendant's motion.

The prosecutor again sought leave to appeal. The Court of Appeals granted leave and affirmed in a split, unpublished opinion.[4] The Court of Appeals majority held that the emergency aid exception to the Fourth Amendment did not apply because

> [a]lthough there was evidence that there was an injured person on the premises, the mere drops of blood did not signal a likely serious, life-threatening injury. This is particularly so given that the police observed a cut on defendant's hand, which likely explained the trail of blood, but also that defendant was very much on his feet and apparently able to see to his own needs.[5]

Judge TALBOT dissented and argued that Officer Goolsby's entry was lawful under the emergency aid doctrine because

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[1] MCL 750.82.

[2] MCL 750.227b.

[3] *People v Fisher*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2005 (Docket No. 256027).

[4] *People v Fisher*, unpublished opinion per curiam of the Court of Appeals, issued March 25, 2008 (Docket No. 276439) (hereinafter referred to as *Fisher II*).

[5] *Fisher II* at 2.

> [g]iven defendant's bizarre behavior, it was reasonable for officers to surmise that he might need medical or psychiatric intervention to prevent him from incurring injury. Further, the mere observation of an injury to defendant's hand is not dispositive of his need or lack of need for aid. The very fact that police observed an injury, coupled with defendant's behavior, made it reasonable to surmise that he may have additional injuries, which were not readily observable, particularly given the condition of the vehicle and fence posts surrounding the home.[6]

The prosecutor sought leave to appeal, which this Court granted.[7]

"We review a trial court's factual findings in a ruling on a motion to suppress for clear error. To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."[8]

Under the emergency aid exception to the Fourth Amendment, "a police officer may enter a dwelling without a warrant when he reasonably believes that a person inside is in need of medical assistance."[9] Under this standard, probable cause is not required for entry[10] and "[t]he officer's subjective motivation is irrelevant."[11]

Faced with an irrational and violent man, who was creating a disturbance and not responding to the police officers, and a blood trail leading from a truck to the house, Officer Goolsby could reasonably believe that someone inside, including defendant, needed medical assistance. Indeed, as Judge TALBOT observed, "it was reasonable for officers to

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[6] *People v Fisher*, unpublished dissenting opinion by TALBOT, J., filed March 25, 2008 (Docket No. 276439) (hereinafter referred to as *Fisher II* dissent).

[7] *People v Fisher*, 482 Mich 1007 (2008).

[8] *People v Attebury*, 463 Mich 662, 668 (2001); see also *People v Williams*, 472 Mich 308, 313 (2005).

[9] *City of Troy v Ohlinger*, 438 Mich 477, 481 (1991); see also *People v Davis*, 442 Mich 1, 25-26 (1993).

[10] *Davis*, *supra* at 11, 20.

[11] *Brigham City v Stuart*, 547 US 398, 404 (2006). The United States Supreme Court also added that "[a]n action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justified [the] action.' " *Id.*, quoting *Scott v United States*, 436 US 128, 138 (1978) (emphasis added in *Brigham City*). See also *People v Williams*, 472 Mich 308, 314 n 7 (2005) ("The reviewing court considers the objective facts relating to the [seizure]; the officer's subjective state of mind is not relevant to the determination whether detention was proper.").

surmise that [defendant] might need medical or psychiatric intervention to prevent him from incurring injury."[12]

The Court of Appeals majority's reliance on the "mere drops of blood" to suggest that there was no "signal of a likely serious, life-threatening injury" is misplaced.[13] The United States Supreme Court rejected a similar argument in *Brigham City*, *supra*. In that case the officer was called to a noise disturbance at 3:00 a.m. and observed a juvenile punch an adult in the mouth, resulting in a bloody lip. The Utah Supreme Court held that the officer's subsequent entry was unlawful because "the injury caused by the juvenile's punch . . . did not give rise to an 'objectively reasonable belief that an unconscious, semi-conscious, or missing person feared injured or dead [was] in the home.' "[14] The United States Supreme Court reversed and explained:

> Nothing in the Fourth Amendment required them to wait until another blow rendered someone "unconscious" or "semi-conscious" or worse before entering. The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.[15]

A similar analysis applies here. Although the "mere drops of blood" might indicate a minor injury, nothing required the officers to have confirmation of a severe injury. Moreover, the cut on defendant's hand was only one explanation for the trail of blood. The cut also indicated a physical altercation, which could have reasonably led Officer Goolsby to believe that defendant injured someone else. All of the evidence pointed to the fact that the defendant may have needed psychiatric attention.

Because the facts supported a "reasonabl[e] belie[f] that a person inside [was] in need of medical assistance," I would reverse the Court of Appeals judgment and remand the case for further proceedings.

CORRIGAN, J. I join the statement of Justice YOUNG.

GULF UNDERWRITERS INSURANCE COMPANY v MCCLAIN INDUSTRIES, INC, No. 137621; Court of Appeals No. 273768.

YOUNG, J. (*concurring*). I concur in the order to deny leave. I write separately only to respond to Justice CORRIGAN's dissenting statement.

Although I share Justice CORRIGAN's theoretical interest regarding the proper interpretation of the complex contract at issue in this case, the

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[12] *Fisher II* dissent at 2.

[13] *Fisher II* at 2.

[14] *Brigham City*, *supra* at 401-402, quoting *Brigham City v Stuart*, 122 P3d 506, 513 (Utah, 2005).

[15] *Brigham City*, *supra* at 406.

appellant, Gulf Underwriters, has not cited adequate grounds to support this Court's review as required by MCR 7.302(B).[1]

Specifically, this case involves a surplus lines insurance contract that, despite the considerable attention that Justice CORRIGAN gives to the statute, is not subject to the general provisions of the Insurance Code, MCL 500.100 *et seq*. See MCL 500.402b(a); MCL 500.1904. The policy here includes language *similar* to the required "bankruptcy provision" for contracts controlled by the Code. MCL 500.3006. However, Gulf Underwriters has not indicated that contractual bankruptcy provisions similar to its own are included with any regularity in surplus lines contracts generally. And, contrary to Justice CORRIGAN's suggestion, there is no reason to assume that the nonapplicable statutory provision will "ensure" that similar provisions will appear with any regularity in contracts not controlled by the Insurance Code.

Gulf Underwriters' application for leave to appeal demonstrates only a narrow dispute regarding the interpretation of *its* contract. Accordingly, Gulf Underwriters has not shown that this case "has significant public interest" or "involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(2), (3).

Justice CORRIGAN accurately highlights the potential inconsistencies between the contract's bankruptcy provision and the self-insured retention (SIR) endorsement. However, and significantly, she makes no mention of the effect of Gulf Underwriters' failure to cancel or terminate the contract as provided under the plain language of the SIR endorsement. Gulf Underwriters has failed to explain why it is not bound by its obligation because it failed to cancel the policy upon McClain Industries' failure to pay.

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[1] The court rule mandates that an appellant establish a ground for this Court's review in the application, such as:

> (1) the issue involves a substantial question as to the validity of a legislative act;
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> * * *
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals . . . . [MCR 7.302(B).]

Finally, I believe that Gulf Underwriters has not supported its application for leave to appeal by showing that the Court of Appeals decision is clearly erroneous. MCR 7.302(B)(5).

CORRIGAN, J. (*dissenting*). This case involves a dispute between plaintiff Gulf Underwriters Insurance Company (Gulf) and defendant McClain Industries and several other affiliated corporate defendants (the McClain defendants). Gulf issued four liability insurance policies to the McClain defendants, each of which included a self-insured retention endorsement (SIR endorsement). The SIR endorsement of each contract provided, in part:

> In consideration of the premium charged, it is hereby agreed that such coverage as is afforded by this policy shall be excess of a 250,000 Self-Insured Retention [for] each "claim." It is also agreed that all expenses and costs under the Supplementary Payments section stated in the Coverage Form (Section 1) shall contribute to the exhaustion of the 250,000 Self-Insured Retention Limit and all such expenses and costs shall be entirely borne by the insured.
>
> All the terms of the policy including, but not limited to, those with respect to notice of "claim" or "suit" and the Company's right to investigate, negotiate, defend and settle any "claim" apply irrespective of the application of the Self-Insured Retention.
>
> The Company may, but is not obligated to, pay all or part of the Self-Insured Retention to effect settlement of any "claim," "suit" or expense. Upon notification of the action taken, the insured shall promptly reimburse the Company for such Self-Insured Retention amount paid by the Company[.]
>
> * * *
>
> The Self-Insured Retention obligation to this contract shall be considered to be an executory contract under all circumstances and payments on this obligation shall be paid by the insured. *Failure to make the payment entitles the insurer to terminate the contractual obligation between the parties as a failure to the Self-Insured Retention endorsement is a material breach to the entire contract.* In the event of a bankruptcy filing, the contract is deemed executory as under 11 U.S.C. 365, and the payments of the self-insured retention shall be made on a monthly basis and treated as an administrative expense under 11 U.S.C. 507(a)(1). [Emphasis added.]

In addition, Section IV of the policies ("COMMERCIAL GENERAL LIABILITY CONDITIONS"), provided, in part:

> 1. Bankruptcy
>
> Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

Defendant David Cook filed a products liability action against the McClain defendants, and defendant Daniel Berg notified the McClain defendants that he also intended to sue. After the McClain defendants asserted an inability to pay the SIR endorsement because of their insolvency, Gulf sought a declaratory judgment that it was not obligated to provide coverage because of the McClain defendants' failure to comply with the SIR endorsement.[1] The trial court granted summary disposition in favor of Gulf, holding that Gulf had no obligation to defend or indemnify the McClain defendants because of their failure to pay the SIR endorsement. It also awarded Gulf defense costs. The Court of Appeals affirmed the award of defense costs but reversed the trial court's grant of summary disposition in favor of Gulf. It concluded that "the insolvency provision provides an exception to the requirement that McClain Industries must satisfy the SIR endorsement limit before Gulf Underwriters is required to defend and indemnify defendants." *Gulf Underwriters Ins Co v McClain Industries, Inc*, unpublished opinion per curiam of the Court of Appeals, issued August 5, 2008 (Docket No. 273768), at 3.

I dissent from this Court's order denying Gulf's application for leave to appeal. There is a strong argument that under the SIR endorsement, Gulf had no obligation to provide coverage because the McClain defendants failed to pay the SIR endorsement. The McClain defendants obtained favorable pricing on their general liability insurance policy with Gulf by agreeing to the large self-insured retention. Under the endorsement, the failure of the McClain defendants to make the retention payment "entitles the insurer to terminate the contractual obligations of the parties as a failure to the Self-Insured Retention is a material breach as to the entire contract." It appears that the bankruptcy or insolvency provision of the parties' contract merely clarifies that the McClain defendants' insolvency does not relieve Gulf of its contractual obligations. If this is correct, the bankruptcy or insolvency provision does not, as the Court of Appeals opinion suggests, alter those obligations in the event of bankruptcy or insolvency. Indeed, the SIR itself contemplates the possibility of bankruptcy by providing that, "[i]n the event of a bankruptcy filing, the contract is deemed executory under 11 U.S.C. 365 and the payments of the Self-Insured Retention shall be made on a monthly basis and treated as an administrative expense under 11 U.S.C. 507(a)(1)." This provision suggests that the bankruptcy or insolvency provision may not be, as the Court of Appeals held, an "exception" to the SIR endorsement. *Gulf Underwriters Ins Co*, *supra* at 3.

Another reason favoring a grant of leave to appeal is that this case presents an issue of contractual interpretation that is likely to recur. MCL 500.3006 provides:

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[1] As Justice YOUNG points out, Gulf did not attempt to terminate or cancel the contract. Instead, it filed this declaratory judgment action to clarify its obligations under the contract. I do not find Gulf's failure to terminate the contract significant in light of its filing of this declaratory judgment action.

> *In such liability insurance policies there shall be a provision that the insolvency or bankruptcy of the person insured shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of such policy*, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action in the nature of a writ of garnishment may be maintained by the injured person, or his or her personal representative, against such insurer under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy. [Emphasis added.]

The Court of Appeals in this case held that Gulf was not subject to MCL 500.3006 because Gulf is a " 'surplus lines carrier,' i.e., an insurer that is not authorized by the state insurance commissioner to transact insurance in the state of Michigan." *Gulf Underwriters Ins Co*, *supra* at 4. Even assuming the Court of Appeals is correct that the requirement is inapplicable to Gulf,[2] this statute ensures that bankruptcy provisions similar to the one at issue here will appear in many insurance contracts because they are required in insurance contracts that are subject to the code.[3] Because I would grant leave to consider this jurisprudentially significant issue of contract interpretation, I respectfully dissent from the Court's order denying leave to appeal.

MARKMAN, J. I join the statement of Justice CORRIGAN.

NOBLE METAL PROCESSING-INDIANA, INC v CHALLENGE MANUFACTURING COMPANY, No. 138541. The motion for immediate consideration is granted. The motion to file supplemental brief and to expand the record on appeal is granted. The application for leave to appeal the March 25, 2009, order of the Court of Appeals denied, because we are not persuaded that the questions presented should be reviewed by this Court. Court of Appeals No. 290892.

KELLY, C.J. (*concurring*). I agree with the Court's order denying defendant's application for leave to appeal. I write separately to briefly

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[2] In his response to Gulf's application for leave to appeal, defendant Berg argues, as defendant Cook did in the Court of Appeals, that MCL 500.3006 precludes Gulf from denying coverage because of the McClain defendants' insolvency.

[3] Justice YOUNG misses the jurisprudential significance of this case by taking the unnecessarily narrow view that the only issue it presents is the meaning of bankruptcy or insolvency provisions in contracts *not* subject to the Insurance Code. My point is that, because of MCL 500.3006, bankruptcy or insolvency provisions similar to the one at issue here will be common in contracts that *are* controlled by the Insurance Code. That the contract at issue here may not have been *required* to include the bankruptcy or insolvency provision under the Insurance Code does not diminish the jurisprudential significance of this case.

respond to Justice CORRIGAN's allegation that changed circumstances warrant remanding this matter to the trial court.

Justice CORRIGAN claims that a dramatic change in circumstances justifies requiring the trial court to reweigh the imposition of its preliminary injunction against defendant. The change is the alleged bankruptcy of plaintiff's parent company, coupled with alleged bankruptcies of 13 other domestic subsidiaries of plaintiff's parent company. However, neither plaintiff nor defendant has notified this Court that plaintiff has initiated a bankruptcy proceeding. Therefore, nothing in the record before the Court supports Justice CORRIGAN's suggestion that plaintiff is insolvent.

Should either of the parties wish to seek modification of the preliminary injunction, it may do so in the trial court. As Justice CORRIGAN correctly notes, a trial court may always modify an injunction if the facts merit it.[1] Thus, should the record ultimately reflect Justice CORRIGAN's concerns, the trial court has the authority to grant the relief currently requested by defendant. However, any action in that regard at this time would be premature.

Accordingly, I concur in the Court's order denying leave to appeal.

CORRIGAN, J. (*dissenting*). I would vacate the preliminary injunction against defendant and remand this case to the trial court for consideration of the reported bankruptcy of plaintiff and plaintiff's parent company of which plaintiff is the alleged guarantor. The trial court granted plaintiff's motion for preliminary injunction on the basis of factual conditions that have changed significantly in the interim. Accordingly, I would remand for possible modification of the injunction in light of the changed factual conditions or stay the matter depending on the status of the bankruptcy court proceedings.

On February 27, 2009, plaintiff automotive supplier moved for a preliminary injunction to prevent defendant component parts supplier from stopping shipment. During a motion hearing on March 4, 2009, plaintiff asserted that it was presently current on its account, and it would continue to make future payments to defendant. After observing that the entire automotive industry was "on the same rope," the trial court stated that it would be "very dangerous to open up for every link in the chain." In response, plaintiff reiterated the importance of issuing the preliminary injunction "[b]ecause [otherwise] everyone can turn around and bail on General Motors, your Honor, and Chrysler and Ford. He wants you to open the door and say, [ ']Okay everyone can stop shipping tomorrow. This whole town is going to heck.[']" On March 16, 2009, the trial court granted plaintiff's motion for a preliminary injunction, thereby requiring that defendant continue to ship component parts to plaintiff "on 30 day payment terms." Less than one month later, on April 15, 2009, plaintiff's parent company, plaintiff, and 13 other domestic subsidiaries of plaintiff's parent company reportedly filed voluntary bankruptcy petitions.

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[1] *Opal Lake Ass'n v Michaywé Ltd Partnership*, 47 Mich App 354, 367 (1973).

The reported bankruptcy filings of plaintiff and plaintiff's parent company reveal that the facts have changed drastically since the trial court granted the preliminary injunction against defendant. When defendant previously expressed its concern regarding not receiving adequate assurance about plaintiff's ongoing performance, the trial court responded that defendant was "not totally irrational, but I'm holding that Plaintiff has complied with the contract up to this point, as long as they are paying on the 30 days." In the interim, however, plaintiff became insolvent, and defendant's concern regarding plaintiff's precarious financial condition has proven to be well-founded. Accordingly, I would remand to the trial court in light of the changed factual circumstances. This Court has recognized that " '[a] continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need.' " *First Protestant Reformed Church of Grand Rapids v DeWolf*, 358 Mich 489, 495 (1960), quoting *United States v Swift & Co*, 286 US 106, 114 (1932). "Moreover, an injunction is always subject to modification or dissolution if the facts merit it." *Opal Lake Ass'n v Michaywé Ltd Partnership*, 47 Mich App 354, 367 (1973). Similarly, the United States Court of Appeals for the Sixth Circuit has held that changed factual conditions warrant the modification of an injunction. See *In re Detroit Auto Dealers Ass'n, Inc*, 84 F3d 787, 790 (CA 6, 1996) ("If this case were to be brought in front of the Commission today on the present facts, the previous injunction would not be entered against the petitioners today.") Because the factual circumstances have allegedly changed dramatically in this case, I would allow the trial court to weigh the current situation or to stay the matter depending on the status of proceedings in bankruptcy court.

*In re* BROOKMAN (BROOKMAN v BLEVINS), No. 138816; Court of Appeals No. 287131.

*Leave to Appeal Denied May 27, 2009:*

PEOPLE v WILLIAM HALL, No. 137151. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 284785.

PEOPLE v CARL REED, No. 137256; Court of Appeals No. 276849.

PEOPLE v OGDEN, No. 137327; Court of Appeals No. 278372.

PEOPLE v GARY WATKINS, No. 137351; Court of Appeals No. 283745.

PEOPLE v WARLAW-BROWN, No. 137369. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283276.

PEOPLE v RANDALL DURR, No. 137474; Court of Appeals No. 277877.

GRIEVANCE ADMINISTRATOR v WARREN, No. 137512; ADB: 07-103-GA.

WHITTAKER v WAYNE CIRCUIT JUDGE, No. 137535; Court of Appeals No. 284139.

PEOPLE v SNELL, No. 137582. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286999.

PEOPLE v JOSH RUSSELL, No. 137583. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283796.

PEOPLE v RURKA, No. 137584. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283797.

PEOPLE v BEELBY, No. 137587; Court of Appeals No. 276998.

PEOPLE v MENDELL FRITZ, No. 137588. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284453.

PEOPLE v CLAY, No. 137595; Court of Appeals No. 278115.

PEOPLE v HOLM, No. 137629. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286554.

PEOPLE v KEITH, No. 137701. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284052.

PEOPLE v HARDY, No. 137711. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287787.

PEOPLE v MILTON, No. 137714. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286443.

PEOPLE v KILBOURNE, No. 137730. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285761.

PEOPLE v KAUFMAN, No. 137731. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285264.

*In re* APPLICATION OF MICHIGAN CONSOLIDATED GAS COMPANY, No. 137734; reported below: 281 Mich App 545.

PEOPLE v RICHARD ARNOLD, No. 137737. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285185.

WALTON v WHITEWATER TOWNSHIP, No. 137741; Court of Appeals No. 274969.

PEOPLE v EDWARD FINLEY, No. 137742. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285875.

PEOPLE v CRY, No. 137744. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283682.

PEOPLE v JURICH, No. 137751. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 287300.

PEOPLE v SALLY BENNETT, No. 137754; Court of Appeals No. 277682.

PEOPLE v KNUCKLES, No. 137769. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284839.

BRICKMAN v BRICKMAN, No. 137770; Court of Appeals No. 278403.

PEOPLE v LANNING, No. 137777. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286655.

PEOPLE v BOWLER, No. 137791. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285675.

ASSET ACCEPTANCE LLC v EVANS, No. 137793; Court of Appeals No. 282774.

PEOPLE v SANDERS, No. 137849; Court of Appeals No. 278740.

PEOPLE v CREWS, No. 137859. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286278.

PEOPLE v BRIDGEFORTH, No. 137868. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286101.

PEOPLE v RONE, No. 137872; Court of Appeals No. 286385.

PEOPLE v TAPERT, No. 137901; Court of Appeals No. 288084.

PEOPLE v HEISS, No. 137943; Court of Appeals No. 278790.

DOE v HENKE, No. 137948; Court of Appeals No. 278763.

PEOPLE v CLOIS BELL, No. 137954; Court of Appeals No. 277554.

PEOPLE v GADOMSKI, No. 137955; Court of Appeals No. 279864.

PEOPLE v HUGO RODRIGUEZ, No. 137964; Court of Appeals No. 279184.

PEOPLE v MARCUS ADAMS, No. 137982; Court of Appeals No. 279203.

WESLEY & VELTING, LLC v VILLAGE OF CALEDONIA, No. 137996; Court of Appeals No. 278264.

PEOPLE v RICHARD MATTHEWS, No. 138017; Court of Appeals No. 278689.

WEATHERS-TAYLOR v RUETTINGER, Nos. 138057 and 138069; Court of Appeals Nos. 267097 and 265511.

BAKER CONCRETE CONSTRUCTION, INC v WHALEY STEEL CORPORATION, No. 138066; Court of Appeals No. 272455.

HOLMES v HOLMES, No. 138086; reported below: 281 Mich App 575.

PEOPLE v THADDEUS WILLIAMS, No. 138089; Court of Appeals No. 279713.

PEOPLE v TYRESE MOORE, No. 138090; Court of Appeals No. 279973.

PEOPLE v SINESIO, No. 138097; Court of Appeals No. 288459.

*In re* TRAWCZYNSKI (MAGNUS v CLINARD), No. 138107; Court of Appeals No. 287368.

PEOPLE v LAFEY, No. 138113; Court of Appeals No. 288534.

PEOPLE v MICHAEL JAMES MILLER, No. 138130; Court of Appeals No. 279545.

MACHINING ENTERPRISES, INC v WAUSAU BUSINESS INSURANCE COMPANY, No. 138138; Court of Appeals No. 277950.

PEOPLE v ALAN THOMPSON, No. 138140; Court of Appeals No. 288413.

PEOPLE v JERRY HILL, No. 138147; Court of Appeals No. 280986.

PEOPLE v BOGARD, No. 138149; Court of Appeals No. 282393.

SEBA v LAWYER'S TITLE INSURANCE CORPORATION, No. 138155; Court of Appeals No. 278911.

PEOPLE v RYANS, No. 138164; Court of Appeals No. 280419.

PEOPLE v PIERSON, No. 138175; Court of Appeals No. 279653.

PEOPLE v COURTLAND, No. 138190; Court of Appeals No. 276206.

PEOPLE v IGLESIAS, No. 138200; Court of Appeals No. 288494.

PEOPLE v ATHEY, No. 138210; Court of Appeals No. 286899.

PEOPLE v ALLEN WHITE, No. 138212; Court of Appeals No. 286535.

STANLEY v STANLEY, No. 138214; Court of Appeals No. 286877.

PEOPLE v KNIGHTEN, No. 138218; Court of Appeals No. 281341.

MICHIGAN STATE UNIVERSITY ADMINISTRATIVE PROFESSIONAL ASSOCIATION, MEA/NEA v MORALEZ, No. 138222; Court of Appeals No. 278415.

PEOPLE v CESARE GREER, No. 138227; Court of Appeals No. 280083.

PEOPLE v ROGER JONES, II, No. 138231, Court of Appeals No. 289300.

PEOPLE v RICHARD SMITH, No. 138243; Court of Appeals No. 282230.

PEOPLE v LARAY WILLIAMS, No. 138245; Court of Appeals No. 282324.

PEOPLE v JOSEPH SMITH, No. 138248; Court of Appeals No. 277901.

PEOPLE v ROE, No. 138255; Court of Appeals No. 281544.

PEOPLE v LENERO THOMAS, No. 138259; Court of Appeals No. 280728.

PEOPLE v JOHN RAY, No. 138267; Court of Appeals No. 288438.

PEOPLE v DARREN FOX, No. 138276; Court of Appeals No. 282603.

PEOPLE v WILLIAM MOORE, No. 138285; Court of Appeals No. 280192.

PEOPLE v MCCART, No. 138288; Court of Appeals No. 282085.

PEOPLE v BLACKSHIRE, No. 138289; Court of Appeals No. 278467.

PEOPLE v WOOLL, No. 138293; Court of Appeals No. 279651.

PEOPLE v ROGER JOHNSON, No. 138295; Court of Appeals No. 287242.

WILLIAMS v THARP, No. 138311; Court of Appeals No. 280938.

VAN ELSLANDER v THOMAS SEBOLD & ASSOCIATES, INC, Nos. 138320 and 138322, Court of Appeals Nos. 274966 and 272396.

BOWSER v BOWSER, No. 138336; Court of Appeals No. 279007.

PEOPLE v NOLAN, No. 138339; Court of Appeals No. 288970.

PEOPLE v BYRD, No. 138340; Court of Appeals No. 289813.

PEOPLE v LOVELL FINLEY, No. 138350; Court of Appeals No. 286105.

PEOPLE v CAMMON, No. 138357; Court of Appeals No. 288813.

PEOPLE v BLUNT, No. 138358; reported below: 282 Mich App 81.

PEOPLE v HAMM, No. 138359; Court of Appeals No. 282744.

EDWARD C LEVY COMPANY v METAMORA TOWNSHIP, No. 138362; Court of Appeals No. 279431.

PEOPLE v SUDDETH, No. 138371; Court of Appeals No. 280193.

PEOPLE v RAAR, No. 138376; Court of Appeals No. 279463.

PERCIVAL v OAKLAND COUNTY, No. 138377; Court of Appeals No. 287745.

PEOPLE v MICHAEL WARD, No. 138379; Court of Appeals No. 287819.

PEOPLE v SILER, No. 138386; Court of Appeals No. 281527.

PEOPLE v O'BRIEN, No. 138387; Court of Appeals No. 280670.

SIMPSON v MOBILE MEDICAL RESPONSE, INC, No. 138388; Court of Appeals No. 283128.

CUNMULAJ v CHANEY and CUNMULAJ v MICHIGAN STATE UNIVERSITY, Nos. 138390 and 138391; Court of Appeals Nos. 282264 and 282265.

CAUFF v FIEGER, FIEGER, KENNEY & JOHNSON, PC, No. 138397; Court of Appeals No. 281442.

LAGACE v DAVID J STANTON & ASSOCIATES, INC, No. 138403; Court of Appeals No. 287561.

PEOPLE v POTLOW, No. 138420; Court of Appeals No. 280646.

PEOPLE v BRADLEY, No. 138427; Court of Appeals No. 289130.

PEOPLE v RONNIE JONES, No. 138454; Court of Appeals No. 280698.

PEOPLE v SHAWN MURRAY, No. 138464; Court of Appeals No. 289753.

PEOPLE v MARTIN WILLIS, No. 138465; Court of Appeals No. 288635.

PEOPLE v BRUCE BROWN, No. 138477; Court of Appeals No. 280721.

SCHELLENBERG v BINGHAM TOWNSHIP, No. 138571; Court of Appeals No. 289401.

CITY OF CENTER LINE v POLICE OFFICERS ASSOCIATION OF MICHIGAN, INC, No. 138692; Court of Appeals No. 289248.

*Reconsideration Granted May 27, 2009:*

PEOPLE v SOARES, No. 137268. The motion for reconsideration of this Court's January 16, 2009, order is granted. We vacate our order dated January 16, 2009. On reconsideration, the application for leave to appeal the July 24, 2008, judgment of the Court of Appeals is considered and, it appearing to this Court that the case of *People v Feezel* (Docket No. 138031) is pending on appeal before this Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we order that the application be held in abeyance pending the decision in that case. Leave to appeal denied at 483 Mich 874. Court of Appeals No. 273333.

*Reconsiderations Denied May 27, 2009:*

PEOPLE v ANTONIO HUNTER, No. 137416. Leave to appeal denied at 483 Mich 913. Court of Appeals No. 285529.

PEOPLE v GARY MORRIS, No. 137429. Leave to appeal denied at 483 Mich 882. Court of Appeals No. 284140.

PEOPLE v NIXON, No. 137434. Leave to appeal denied at 483 Mich 913. Court of Appeals No. 286317.

PEOPLE v DENNIS HALL, No. 137860. Leave to appeal denied at 483 Mich 915. Court of Appeals No. 273908.

KRUG v VICTOR, No. 137920. Leave to appeal denied at 483 Mich 851. Court of Appeals No. 289308.

*Summary Disposition May 28, 2009:*

PEOPLE v ADAM ADAMS, No. 138048. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. The record indicates that the defendant, through counsel, attempted to submit a timely request for appointment of appellate counsel, but through misunderstanding or error, the Wayne Circuit Court refused to accept it. Had the court accepted the form and ruled on the request for appellate counsel within 14 days, as required by MCR 6.425(G)(1)(a), and then submitted a copy of the appointment order and judgment of sentence to the Court of Appeals, as required by MCR 6.425(G)(3), the defendant's appeal of right would have been preserved.

We further direct the Court of Appeals to remand this case first to the Wayne Circuit Court, in accordance with Administrative Order No. 2003-3, so that the circuit court can determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in the Court of Appeals. Appellate counsel, if one is appointed, shall review the new issues raised by the defendant in his supplemental brief filed in this Court before filing an appeal brief in the Court of Appeals on remand. Court of Appeals No. 286641.

*Leave to Appeal Denied May 28, 2009:*

PEOPLE v BLACKMON, No. 137431; reported below: 280 Mich App 253.

KELLY, C.J. I would grant leave to appeal.

HOLLINRAKE v HOLLINRAKE, No. 137610; Court of Appeals No. 274229.

PEOPLE v RAAR, No. 137635; Court of Appeals No. 277419.

PEOPLE v KEYON BROWN, No. 137800. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286614.

PEOPLE v JOSHUA, No. 138044; Court of Appeals No. 279700.

SCHAFER v SCHAFER, No. 138128; Court of Appeals No. 286744.

MARKMAN, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ECKFORD, No. 138145; Court of Appeals No. 279501.

PEOPLE v LEWIS, No. 138191; Court of Appeals No. 288787.

CAVANAGH, J. I would remand this case to the Court of Appeals for consideration as on leave granted.

*Orders Granting Oral Argument in Cases Pending on Application for Leave to Appeal May 29, 2009:*

SMITH v ANSARA RESTAURANT GROUP, INC, No. 137164. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties shall submit supplemental briefs within 42 days of the date of this order limited to addressing whether and how defendant breached its duty of reasonable care, whether that breach was a proximate cause of the injuries to Morgan Smith, and the significance of the presence of Morgan's parents and their actions in assessing plaintiff's negligence claim. Court of Appeals No. 283826.

*Summary Disposition May 29, 2009:*

PEOPLE v COOK, No. 137691. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether 25 points were properly assessed for offense variable 13 (MCL 777.43), and whether the trial court satisfied the provisions of MCL 767.61a when, without objection by the defendant, it reviewed documents but did not call witnesses in determining that the defendant was a sexually delinquent person. 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. Court of Appeals No. 287411.

WEAVER, J. I would not remand this case because I am not persuaded that this Court should take action, particularly where it appears that the second issue was not even preserved for appeal.

YOUNG, J. I join the statement of Justice WEAVER.

WILCOXSON-BEY v PROVIDENCE HOSPITAL & MEDICAL CENTERS, INC, No. 138033. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the Wayne Circuit Court's order denying the defendant's motion for summary disposition with regard to causation. When the record is reviewed in its entirety, there was sufficient evidence presented to demonstrate that daily fetal monitoring is effective in the vast majority of cases in detecting cord compression and fetal distress—which are events that precede cord occlusion and that signal the need for intervention to prevent injury. The actual timing of the occlusion itself is not relevant to the question of whether it is more likely than not that daily fetal monitoring would have discovered cord compression and fetal distress. We therefore remand this case to the Court of Appeals for consideration of the other issues raised by the defendant that were not addressed in its opinion. Court of Appeals No. 279146.

CORRIGAN, J. I would grant leave to appeal or hold oral argument on the application.

WOLVERINE COMMERCE, LLC v PITTSFIELD CHARTER TOWNSHIP, Nos. 138314 and 138315. Pursuant to MCR 7.302(G)(1), in lieu of granting

leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the judgment of the Washtenaw Circuit Court. The Court of Appeals failed to accord due weight to the findings of the Washtenaw Circuit Court, which were not clearly erroneous. See *Kropf v Sterling Hts*, 391 Mich 139, 163 (1974).

Further, the Court of Appeals erred in precluding relief based on the "self-imposed-hardship rule." The self-imposed-hardship rule applies to preclude relief in taking claims asserted by a property owner who has subdivided or physically altered the land so as to render it unfit for the uses for which it is zoned, not to cases in which the legal status of the property has been altered. See, e.g., *Johnson v Robinson Twp*, 420 Mich 115, 117 (1984); *Bierman v Taymouth Twp*, 147 Mich App 499, 506 (1985). Rather, a plaintiff who purchases property with knowledge of existing zoning regulations takes the property along with the seller's legal right to challenge those regulations. *Kropf*, *supra*, 391 Mich at 152. There is no legal precedent to extend the self-imposed-hardship rule to prevent a plaintiff who personally sought to conform the property's zoning classification to the municipality's master plan in the first instance from later seeking, in good faith, to rezone the property to another classification to allow a different use. Court of Appeals Nos. 278417 and 282532.

MARKMAN, J. I would grant leave to appeal to consider the Court of Appeals' application of the "self-created hardship" doctrine, *Johnson v Robinson Twp*, 420 Mich 115 (1984).

*Leave to Appeal Granted May 29, 2009:*

PEOPLE v REDD, No. 138161. The parties shall address whether the Court of Appeals erred in concluding: (1) that the trial court abused its discretion when it granted the defendant a new trial; (2) that there was no error in the admission of the police detective's repeated testimony about the defendant's failure to deny certain accusations and his act of departing from the police interview, see *People v Bigge*, 288 Mich 417 (1939); and (3) that the defendant waived any error when defense counsel expressed satisfaction with the trial court's instructions to the jury. Court of Appeals No. 283934.

BRIGGS TAX SERVICE, LLC v DETROIT PUBLIC SCHOOLS, Nos. 138168, 138179, and 138182. The applications for leave to appeal the judgment of the Court of Appeals are considered, and they are granted, limited to the issue of whether the petitioner's dispute regarding the collection of property taxes for tax years 2002, 2003, and 2004 involved a mutual mistake of fact made by the assessing officer and the taxpayer such that the three-year limitations period of MCL 211.53a applies to the petitioner's claims.

Persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 282 Mich App 29.

PEOPLE v FLICK and PEOPLE v LAZARUS, Nos. 138258 and 138261. The parties shall address: (1) whether intentionally accessing and viewing

child sexually abusive material on the Internet constitutes "knowing possession" of such material under MCL 750.145c(4); and (2) whether the presence of automatically created "temporary internet files" on a computer hard drive may amount to "knowing possession" of child sexually abusive material or may be circumstantial evidence that defendant "knowingly possessed" such material in the past.

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 issue presented in this case may move the Court for permission to file briefs amicus curiae. Court of Appeals Nos. 278531 and 277925.

*Leave to Appeal Denied May 29, 2009:*

PEOPLE v FULLER, No. 137121; Court of Appeals No. 285610.

KELLY, C.J., and MARKMAN and HATHAWAY, JJ. We would grant leave to appeal to consider whether *People v Gubachy*, 272 Mich App 706 (2006), was correctly decided and, if so, whether it controls the outcome of this case.

BEASLEY v STATE OF MICHIGAN, No. 137414; Court of Appeals No. 283725.

KELLY, C.J. (*concurring*). Plaintiff was injured in an automobile accident involving a state-owned vehicle driven by a state employee. The employee reported the accident to the state, which assigned the matter to its contractual insurance administrator, Crawford and Company. James Turner, who worked for Crawford, contacted plaintiff and gave him the claim number assigned to the accident.

Turner obtained information from plaintiff about the accident and his injuries. Later, plaintiff's attorney advised Crawford to forward all future correspondence and inquiries to him. Over the next few months, plaintiff's attorney and Crawford exchanged letters and medical records about plaintiff's injuries. Turner eventually advised plaintiff's attorney that the state would not settle.

Plaintiff then sued both the driver and the state. Defendant sought summary disposition relying on *Rowland v Washtenaw Co Rd Comm*,[1] claiming that plaintiff had failed to comply with the six-month notice requirement of MCL 600.6431(3). The Court of Claims denied the motion, and the Court of Appeals denied leave to appeal.

Defendant here renews its argument that plaintiff failed to comply with the notice requirement in MCL 600.6431(3). It contends that the reasoning in *Rowland* is directly applicable to this case. However, it is not. *Rowland* interpreted the notice provision of MCL 691.1404(1). This case is governed by an entirely different provision—MCL 600.6431(3). Therefore, although *Rowland* may be similar to this case, it is distinguishable. *Rowland* does not dictate the outcome here because it involves a different statutory provision.

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[1] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007).

Justice CORRIGAN asserts that the Court "simply ignores precedents with which it disagrees." She is mistaken. In each of the cases in which Justice CORRIGAN claims the Court has ignored precedent, including this one, the Court has simply denied leave to appeal. When the Court denies leave to appeal, it does not comment on the merits of a case. Likewise, it is "well-settled that nothing of precedential significance should be deduced from an order of this Court denying leave [to appeal]."[2]

Nor would it be accurate to assert that, by denying leave, the Court implicitly ignored precedent in these cases. For example, Justice CORRIGAN claims that in *Vanslembrouck v Halperin*,[3] the Court ignored *Vega v Lakeland Hosps*.[4] However, *Vanslembrouck* is distinguishable from *Vega* because *Vega* determined that MCL 600.5851(1) is a saving provision, whereas *Vanslembrouck* held that MCL 600.5851(7) is a statute of limitations. Thus, these cases examined the effect of altogether different statutory provisions.

Justice CORRIGAN also claims that in *Hardacre v Saginaw Vascular Services*,[5] the Court failed to follow *Boodt v Borgess Med Ctr*.[6] However, in *Hardacre*, the Court denied leave to appeal because the allegations in the plaintiff's notice of intent to file an action did not need to comply with *Boodt*. In *Hardacre*, the burden of explication of the standard of care was minimal.[7]

Nor did the Court "ignore precedents with which it disagrees" in *Sazima v Shepherd Bar & Restaurant*.[8] Justice CORRIGAN claims that the Court failed to follow *Chrysler v Blue Arrow Transport Lines*.[9] However, *Sazima* involved exceptions to the "going and coming" rule as set forth in *Camburn v Northwest School Dist.*[10] Thus, the Court was not bound by *Chrysler*.

Finally, Justice CORRIGAN claims the Court ignored *Smith v Khouri*[11] when it decided *Juarez v Holbrook*.[12] However, in *Juarez*, it was undis-

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[2] *Forton v Laszar*, 463 Mich 969, 971 (2001) (KELLY, J., concurring), citing *Tebo v Havlik*, 418 Mich 350, 363 n 2 (1984); see also MCR 7.321.

[3] *Vanslembrouck v Halperin*, 483 Mich 965 (2009).

[4] *Vega v Lakeland Hosps*, 479 Mich 243 (2007).

[5] *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009).

[6] *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008).

[7] *See Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 694 n 12 (2004).

[8] *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009).

[9] *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940).

[10] *Camburn v Northwest School Dist*, 459 Mich 471, 478 (1999).

[11] *Smith v Khouri*, 481 Mich 519 (2008).

[12] *Juarez v Holbrook*, 483 Mich 970 (2009).

puted that the trial court performed a reasonableness analysis in calculating the proper attorney fee award. Therefore, a remand in light of *Smith* was unnecessary.

Simply put, Justice CORRIGAN would prefer that the Court extend precedent to facts and circumstances that the precedent does not reach. She erroneously contends that, by denying leave to appeal and not extending the precedent, the Court is undermining predictability in the law.[13]

In summary, I concur in the Court's order denying defendant's application for leave to appeal in this case. I also reject as inaccurate Justice CORRIGAN's contention that the Court has been ignoring precedent.

CORRIGAN, J. (*dissenting*). In this personal injury case arising from a motor vehicle collision with a state-owned vehicle driven by a state employee, I would remand to the Court of Appeals for consideration as on leave granted. Defendant, the state of Michigan, argues with some force that plaintiff's claim may not be maintained because he did not file the statutorily required notice of his claim within six months of his accident.

The notice provision in MCL 600.6431 provides:

> (1) *No claim may be maintained against the state* unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
>
> (3) *In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action*. [Emphasis added.]

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[13] Justice CORRIGAN wishes to extend the Court's reasoning in *Rowland* to MCL 600.6431(3) based on her belief that to hold otherwise would "subvert[] both the language and the purpose of the statutory directive." *Post* at 1028. I reiterate that, unless this case involves MCL 691.1404(1), which it most clearly does not, our decision to deny leave to appeal is not an "apparent detour[] from stare decisis." *Post* at 1030.

The statutory language is clear. Subsections 1 and 3 together provide that in all actions for personal injuries, "[n]o claim may be maintained against the state" unless the claimant files the required notice of the claim or the claim itself within 6 months of the accrual of the claim. Here, it is undisputed that plaintiff filed no notice whatsoever and that he did not file his claim until approximately three years after the accident.

Plaintiff's failure to file the required notice in the Court of Claims bars his action regardless whether, as the Court of Claims found, the state's "insurance carrier was put on notice regarding this claim." Statutory notice provisions must be enforced as written. In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), the plaintiff filed a written notice after 140 days, thus failing to meet the 120-day deadline of the notice provision in the highway exception to governmental immunity, MCL 691.1404(1). This Court rejected earlier caselaw[1] that had assumed notice provisions are unconstitutional if they do not contain a prejudice requirement. *Rowland*, *supra* at 210. This Court agreed with Justice RILEY's dissent in *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), that the notice provision is social legislation that has a rational basis. " 'Notice provisions rationally and reasonably provide the state with the opportunity to investigate and evaluate a claim.' " *Rowland*, *supra* at 210, quoting *Brown*, *supra* at 370 (RILEY, J., dissenting). Other reasons for requiring notice include "allowing time for creating reserves for the [Motor Vehicle Accident Claims] Fund, reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed." *Rowland*, *supra* at 212, citing the dissent in the consolidated cases of *Lisee v Secretary of State* and *Howell v Lazaruk*, 388 Mich 32 (1972). All these reasons provided a rational basis that assured the constitutionality of the notice provision. *Rowland*, *supra* at 212.

The notice provision at issue here is substantively identical to the provision in *Rowland*. It provides that "[n]o claim may be maintained against the state" unless the notice is filed in the Court of Claims within the prescribed time. Plaintiff did not file any notice. The Court of Claims holding that the state had notice "because the [state's] insurance carrier was put on notice regarding this claim" is completely at odds with this Court's holding in *Rowland*.

The failure of the Court of Claims to enforce the notice requirement subverts both the language and the purpose of the statutory directive. MCL 600.6431, by requiring the filing in the Court of Claims of a signed and verified notice "stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained," ensures that the notice will afford the state an opportunity to evaluate the claim and prepare for potential litigation. It also forces the claimant to specify "in detail" the nature of the claim and the types of damages alleged. By contrast, a mere informal communication with an insurance representative does not provide notice in the statutorily required manner that

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[1] See *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357 (1996).

would assist the state in its evaluation and preparation of the case, nor does it force the claimant to make an early choice on how to proceed in the same way as does the signed and verified written notice required by MCL 600.6431.

In short, the statute requires the claimant to file a particular type of notice in a particular place, the Court of Claims. Nothing in the statute permits notice to be communicated informally through an insurance representative. The judicial branch does not possess the authority to override the Legislature's chosen method of providing notice.

Finally, the new majority's failure to abide by *Rowland* continues a growing and troubling trend. Rather than forthrightly overruling that decision, it is increasingly becoming the practice of this Court to simply ignore precedents with which it disagrees. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), in which the new majority ignored *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), in which it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), in which it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940); and *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471 (1999), and *Juarez v Holbrook*, 483 Mich 970 (2009), in which it failed to follow *Smith v Khouri*, 481 Mich 519 (2008).

In her concurrence, Chief Justice KELLY attempts to explain away the new majority's actions by sharing her views regarding the prior caselaw that the new majority has otherwise chosen to ignore. But Chief Justice KELLY's interpretation of a prior case in a concurring statement is not a decision of the Court. More importantly, her argument overlooks the fundamental problem: the new majority's continuing failure to explain its apparent disregard of this Court's precedent undermines the predictability and stability of the rule of law.

In *Van Orden v Perry*, 545 US 677, 697 (2005), a concurring justice similarly criticized the United States Supreme Court's Establishment Clause precedents as being so flexible that they were "incapable of consistent application." The concurring justice explained that "[t]he unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Id*. (Thomas, J., concurring).

The concerns expressed in *Van Orden* find ample support in United States Supreme Court caselaw, which has long recognized the importance of a coherent body of law. See, e.g., *Hilton v South Carolina Pub Railways Comm*, 502 US 197, 202 (1991) (stating that adherence to precedent promotes stability and predictability). Legal principles should not change erratically; rather, the law should "develop in a *principled and intelligible* fashion." *Vasquez v Hillery*, 474 US 254, 265 (1986) (emphasis added). "While *stare decisis* is not an inexorable command, the careful observer

will discern that any detours from the straight path of *stare decisis* in our past have occurred for *articulable* reasons . . . ." *Id*. at 266 (emphasis added).

On this Court, the new majority offers no articulable reasons whatsoever for its apparent detours from stare decisis. Instead, the majority declines to explain whether—and, if so, why—it is overruling precedent despite the obvious appearance that it is doing so. If it intends to alter legal principles embedded in this Court's decisions, then the new majority should explain its reasons clearly and intelligibly. Instead, the new majority overrules by indirection, or at least leaves the impression that it is doing so, thereby sowing the seeds of confusion and making it difficult for the citizens of this state to comprehend precisely what our caselaw requires. This appears to be an unfortunate return to our predecessors' past practice of "frequently pa[ying] little attention to the inconsistencies among its cases and declin[ing] to reduce confusion in [the Court's] jurisprudence by overruling conflicting decisions." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 571 n 19 (2005).

Accordingly, I would remand this case to the Court of Appeals for consideration as on leave granted. Defendant advances a compelling argument that because plaintiff did not file the statutorily required notice in the Court of Claims within six months of his accident, his claim may not be maintained under the plain language of MCL 600.6431.

YOUNG and MARKMAN, JJ. We join the statement of Justice CORRIGAN.

PEOPLE v IAN ANDERSON, No. 137879; Court of Appeals No. 277370.

CORRIGAN, J. (*dissenting*). I would grant leave to appeal to consider the Court of Appeals interpretation of MCL 750.85. Enacted as 2005 PA 335, effective March 1, 2006, MCL 750.85 established torture as a new felony in Michigan. An assailant commits torture if, "with the intent to cause cruel or extreme physical or mental pain and suffering, [he or she] inflicts great bodily injury or severe mental pain or suffering upon another person within his or her custody or physical control . . . ." MCL 750.85(1). MCL 750.85(2)(b) provides: " 'Custody or physical control' means the forcible restriction of a person's movements or forcible confinement of the person so as to interfere with that person's liberty, without that person's consent or without lawful authority." The Court of Appeals interpreted the final clause of this definition to require a prosecutor to prove that the victim was confined *either* "without that person's consent" *or* "without lawful authority," but not both. Defendant argues that the statute requires proof of *both* lack of consent *and* lack of lawful authority. He states that, otherwise, the distinction would be largely meaningless because those with lawful authority to restrain others—such as parents or prison guards—will rarely have the consent of their charges. He further claims that the Legislature intended to exempt from the statute those with lawful authority to restrain others. Accordingly, he argues that the statute's use of the word "or" is ambiguous in this context and was misused as a conjunctive. See *People v Gatski*, 260 Mich App 360, 365 (2004) ("It is well-established that the word 'or' is often misused in statutes and it gives rise to an ambiguity in the statute because it can be read as meaning either 'and' or 'or.' "). He claims that the context here suggests that the Legislature meant the statute to apply

only to those who restrain another "without that person's consent *and* without lawful authority." In light of defendant's arguments, I would grant leave to appeal to consider the meaning of the statute. Indeed, although the prosecution favors the result reached by the Court of Appeals, it appears to concede that the statute is difficult to interpret. Because a majority of this Court has denied leave in this case, I urge the Legislature to provide guidance to the courts concerning the proper application of this relatively new statute, perhaps by reconsidering the statute's wording.

*Summary Disposition June 3, 2009:*

GAINFORTH v BAY HEALTH CARE, No. 137907. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals, which shall hold this case in abeyance pending its decision in *Farley v Carp* (Court of Appeals Docket Nos. 283405, 283418, and 284681). After *Farley* is decided, the Court of Appeals shall reconsider this case in light of that case. Court of Appeals No. 284972.

BENNETT v MACKINAC BRIDGE AUTHORITY, No. 138204. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. Court of Appeals No. 287628.

*In re* HALL (DEPARTMENT OF HUMAN SERVICES v FILBRANDT), No. 138312. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we reinstate the May 15, 2008, order of the Kalkaska Circuit Court, Family Division, terminating the respondent-mother's parental rights to the minor children. The Court of Appeals misapplied the clear error standard by substituting its judgment for that of the trial court, MCR 2.613(C), *In re Miller*, 433 Mich 331 (1989), and rendered a decision that was contrary to the clear and convincing evidence supporting termination of the respondent-mother's parental rights pursuant to MCL 712A.19b(3)(b)(*ii*) and (j). We remand this case to the Kalkaska Circuit Court, Family Division, for further proceedings not inconsistent with this order. We do not retain jurisdiction. Court of Appeals No. 285683.

*In re* GRIFFIN (NACOVSKY v HALL), No. 138381. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion and remand this case to the Shiawassee County Probate Court for entry of an order granting the trustee's petition to enforce the *in terrorem* clause and for further proceedings not inconsistent with this order. The motion to stay the trial court proceedings is denied as moot. Reported below: 281 Mich App 532.

*Leave to Appeal Denied June 3, 2009:*

PEOPLE v KEY, No. 137294; Court of Appeals No. 277762.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

THERIAULT v AL BORDEAU INSURANCE SERVICE, INC, No. 137706; Court of Appeals No. 278643.

GRAND RAPIDS EMPLOYEES INDEPENDENT UNION v CITY OF GRAND RAPIDS, No. 137756; Court of Appeals No. 280360.

KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

MARKHAM v SUNOCO OIL COMPANY, No. 137772; Court of Appeals No. 272163.

PEOPLE v REGINALD JOHNSON, No. 137915; Court of Appeals No. 278955.

SHAHEEN v MICHIGAN PUBLIC SCHOOL EMPLOYEES RETIREMENT BOARD, No. 137950; Court of Appeals No. 278751.

KELLY, C.J. I would grant leave to appeal.

PROKES v AUTO-OWNERS INSURANCE COMPANY, No. 137953; Court of Appeals No. 278321.

PAL PROPERTIES, LLC v TICOR TITLE INSURANCE COMPANY, No. 138096; Court of Appeals No. 280389.

PEOPLE v TRACEY ROBERTSON, No. 138135; Court of Appeals No. 280587.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

ROBINSON v TAN, No. 138139; Court of Appeals No. 281551.

WHITMAN v BOYNE CITY, No. 138158; Court of Appeals No. 280212.

PEOPLE v NATHANIEL JONES, No. 138216; Court of Appeals No. 280589.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v TOMMY ROBERTSON, No. 138235; Court of Appeals No. 280588.

KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

*Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 5, 2009:*

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY v HUDSON, No. 137698. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. Court of Appeals No. 277300.

*Reconsideration Granted June 5, 2009:*

SCOTT v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 136502. We vacate our order dated December 3, 2008. On reconsideration, the application for leave to appeal the judgment of the Court of Appeals is denied, because we are not persuaded that the question

presented should be reviewed by this Court. Summary disposition entered at 482 Mich 1074. Reported below: 278 Mich App 578.

KELLY, C.J. (*concurring*). I concur in this Court's order granting reconsideration and vacating our December 3, 2008 order.[1] Our prior order improperly vacated the portion of the Court of Appeals opinion stating that "[a]lmost any causal connection or relationship will do."[2]

This case involves an interlocutory appeal by defendant, State Farm Mutual Automobile Insurance Company, from the probate court's denial of summary disposition. Plaintiff's claim was made under the no-fault insurance act,[3] and the issue on appeal is the level of causation required to support a claim under the act.

Plaintiff was injured in an automobile accident in 1981 that left her impaired and legally incapacitated. Because of skeletal and brain trauma from the accident, she has been unable to lead a normal active life and, as a result, has gained some 80 pounds.[4] This, in turn, has caused her cholesterol to skyrocket, causing hyperlipidemia. She now requires medication to control it. Defendant State Farm originally paid for plaintiff's medication, but has since terminated her benefits.[5] Plaintiff sued to reinstate the benefits, and when State Farm moved to dismiss her claim, the probate court denied the motion. The circuit court denied leave to appeal, and the Court of Appeals affirmed the probate court's decision in a published opinion per curiam.[6]

Previously, this Court partially vacated the Court of Appeals judgment. In so doing, the Court ignored a line of Michigan caselaw that has existed and been followed since 1979. It concerns the threshold level of causation a plaintiff must establish to proceed in no-fault cases. Current law holds that evidence establishing "almost any causal connection or relationship will do,"[7] as the Court of Appeals indicated. The causal connection must also be "more than incidental, fortuitous or 'but for.' "[8]

Contrary to the dissent's conclusion, the Court of Appeals correctly followed and applied the law. As the Court of Appeals held in *Kangas v Aetna Cas & Surety Co*, "while the automobile need not be the proximate cause of the injury, there still must be a causal connection

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[1] 482 Mich 1074 (2008).

[2] *Scott v State Farm Mut Automobile Ins Co*, 278 Mich App 578, 586 (2008) (citations and quotation marks deleted).

[3] MCL 500.3101 *et seq*.

[4] She weighed 120 pounds before the accident.

[5] State Farm's own independent medical examiner acknowledged a causal link between plaintiff's hyperlipidemia and the automobile accident.

[6] *Scott*, *supra*.

[7] *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34, 42 (1983) (citation and quotation marks deleted).

[8] *Thorton v Allstate Ins Co*, 425 Mich 643, 659 (1986).

between the injury sustained and the ownership, maintenance or use of the automobile and which *causal connection is more than incidental, fortuitous or but for*."[9]

Four years later, the Court of Appeals, in *Shinabarger v Citizens Mut Ins Co*, again examined the causation element of no-fault insurance claims:

> The term "arising out of" does not mean proximate cause in the strict legal sense, nor require a finding that the injury was directly and proximately caused by the use of the vehicle . . . . [A]*lmost any causal connection or relationship will do* . . . . [T]he injury need not be the proximate result of "use" in the strict sense, but it cannot be extended to something distinctly remote. Each case turns on its precise individual facts. The question to be answered is whether the injury "originated from", "had its origin in", "grew out of", or "flowed from" the use of the vehicle. [Citations and quotation marks deleted; emphasis added.][10]

In 1983, in *Bradley*, the Court of Appeals repeated the language from *Shinabarger*, stating that "almost any causal relationship or connection will do."[11] However, *Bradley* also quoted the *Kangas* holding that " 'there still must be a causal connection between the injury sustained and the ownership, maintenance or use of the automobile and which causal connection is more than incidental, fortuitous or but for.' "[12] It is noteworthy that *Bradley* used both the *Kangas* and *Shinabarger* standards, indicating that they are compatible.

In *Thornton*, this Court repeated the "incidental, fortuitous, or 'but for' " language of *Kangas*.[13] *Thornton* did not discuss the "almost any causal connection will do" language. Recently, in *Putkamer v Transamerica Ins Corp of America*, this Court affirmed that the causal connection between an injury and the use of the motor vehicle must be more than incidental, fortuitous, or "but for."[14]

The Court of Appeals did not err in relying on these cases to interpret the causal nexus required in a no-fault case involving injury. Precedent makes clear that an injury requires more than a fortuitous, incidental, or "but for" causal connection, but does not require proximate causation. As *Bradley* states, "almost any causal connection will do." Nothing suggests that these two standards are in opposition or cannot be applied together.

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[9] *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17 (1975) (emphasis added).

[10] *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314 (1979).

[11] *Bradley*, *supra* at 42 (citation and quotation marks deleted).

[12] *Id.* at 41-42.

[13] *Thornton*, *supra* at 659.

[14] *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 634 (1997).

They logically build on one another and stand for the same basic proposition. Taken together, they mean that evidence establishing almost any causal connection will suffice when it is more than merely fortuitous, incidental, or but for. But it need not be much more; almost any causal connection or relationship will do. The Court in *Bradley* recognized this when it cited both standards to render its decision, just as the Court of Appeals did in this case.

The Court of Appeals undertook a thorough analysis of no-fault law and applied it correctly. Rather than apply no-fault law as it has been understood for nearly 30 years, the dissent appears to want to extend the scope of *Putkamer.* It appears intent on silencing the valid and applicable law of *Bradley* and *Shinabarger*, law that forms the contours of the *Putkamer* rule and aids in its application. I am unwilling to push *Putkamer* down a road it was never intended to travel by brushing *Bradley* and *Shinabarger* aside to become debris on the legal landscape.

In addition, the dissent asserts that this Court has been ignoring precedents. It is mistaken. For example, the dissent claims that in *Vanslembrouck v Halperin*,[15] the Court ignored *Vega v Lakeland Hosps*.[16] However, *Vanslembrouck* is distinguishable from *Vega* because *Vega* determined that MCL 600.5851(1) is a saving provision, whereas *Vanslembrouck* held that MCL 600.5851(7) is a statute of limitations. Thus, these cases examined the effects of altogether different statutory provisions.

The dissent also claims that in *Hardacre v Saginaw Vascular Services*,[17] the Court failed to follow *Boodt v Borgess Med Ctr*.[18] However, in *Hardacre*, the Court denied leave to appeal because the allegations in the plaintiff's notice of intent did not need to comply with *Boodt.* In *Hardacre*, the burden of explication of the standard of care was minimal.[19]

Nor did the Court ignore precedent in *Sazima v Shepherd Bar & Restaurant*.[20] The dissent claims that the Court failed to follow *Chrysler v Blue Arrow Transport Lines*.[21] However, *Sazima* involved exceptions to the "going and coming" rule as set forth in *Camburn v Northwest School Dist.*[22] Thus, the Court was not bound by *Chrysler*.

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[15] *Vanslembrouck v Halperin*, 483 Mich 965 (2009).

[16] *Vega v Lakeland Hosps*, 479 Mich 243 (2007).

[17] *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009).

[18] *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008).

[19] See *Roberts v Mecosta Co Gen Hosp* (*After Remand*), 470 Mich 679, 694 n 12 (2004).

[20] *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009).

[21] *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940).

[22] *Camburn v Northwest School Dist*, 459 Mich 471, 478 (1999).

Finally, the dissent claims that the Court ignored *Smith v Khouri*[23] when it decided *Juarez v Holbrook*.[24] However, in *Juarez*, it was undisputed that the trial court performed a reasonableness analysis in calculating the proper attorney fee award. Therefore, a remand in light of *Smith* was unnecessary.

Justice CORRIGAN would have the Court ignore three decades of no-fault jurisprudence in an effort to select and silence what she finds to be disagreeable portions of precedent in the Court of Appeals opinion. In addition, she reproaches the Court for refusing to extend precedent to new areas, claiming that refusing to extend precedent confuses the law and injects whimsy into it. I reject these claims as unpersuasive when weighed objectively. Accordingly, I respectfully concur in the order granting reconsideration and vacating this Court's prior order in this case.

CORRIGAN, J. (*dissenting*). I dissent from this Court's order granting reconsideration and vacating our December 3, 2008, order. 482 Mich 1074 (2008). The Court of Appeals judgment in this case stated, with respect to the causal connection required under MCL 500.3105(1), that "almost any causal connection or relationship will do." *Scott v State Farm Mut Auto Ins Co*, 278 Mich App 578, 586 (2008). Our prior order properly vacated that portion of the Court of Appeals judgment as inconsistent with *Thornton v Allstate Ins Co*, 425 Mich 643 (1986), and *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626 (1997).

Plaintiff was severely injured in an automobile accident in 1981. She suffered a traumatic brain injury, as well as injuries to her legs. Within seven years of the accident, plaintiff gained a significant amount of weight. She was diagnosed with high cholesterol in 1991. She controlled her cholesterol level with a diet and exercise program until 1997, when her physician prescribed Zocor for high cholesterol. Defendant paid for the medication for approximately seven years, but then terminated payment following an independent medical evaluation. Defendant concluded, on the basis of the independent expert's report, that plaintiff's high cholesterol (hyperlipidemia) did not arise from the 1981 motor vehicle accident.

Plaintiff's representatives filed suit in probate court, seeking to compel defendant to pay for the medication. The probate court denied defendant's motion for summary disposition, finding a question of fact concerning whether the necessary causal connection existed between plaintiff's high cholesterol and the accident. The circuit court denied defendant's application for leave to file an interlocutory appeal. The Court of Appeals affirmed the decision of the probate court. *Scott*, *supra*. After discussing the caselaw construing MCL 500.3105(1), the Court of Appeals concluded:

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[23] *Smith v Khouri*, 481 Mich 519 (2008).

[24] *Juarez v Holbrook*, 483 Mich 970 (2009).

> Plaintiffs presented testimony indicating that the accident caused brain and skeletal injuries, which make it difficult for plaintiff to exercise, and which contribute to poor judgment regarding diet. Plaintiffs also presented evidence that this difficultly in exercising, and poor diet, contribute to hyperlipidemia. Plaintiffs are not required to establish direct or proximate causation. *Almost any causal connection will do*. Although a genetic predisposition to hyperlipidemia is apparently present, there is no authority that, for purposes of personal protection insurance, a plaintiff must exclude other possible causes (as there is, for instance, when proximate causation is at issue, in a traditional tort context). Plaintiffs have presented evidence to raise a genuine issue of material fact. [*Scott*, *supra* at 586 (citations omitted; emphasis added).]

Under MCL 500.3105(1), "an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle." In concluding that "almost any causal connection or relationship will do" for purposes of establishing causation under MCL 500.3105(1), the Court of Appeals in this case relied on *Shinabarger v Citizens Mut Ins Co*, 90 Mich App 307, 313-314 (1979), and *Bradley v Detroit Automobile Inter-Ins Exch*, 130 Mich App 34, 42 (1983), which used that language to describe the required causal connection. *Scott*, *supra* at 585-586. This Court has subsequently considered the required showing under MCL 500.3105(1). We have never adopted so expansive a test. Instead, in *Thornton*, *supra* at 659-660, we concluded:

> In drafting MCL 500.3105(1); MSA 24.13105(1), the Legislature limited no-fault [personal protection insurance] benefits to injuries arising out of the "use of a motor vehicle *as a motor vehicle*." In our view, this language shows that the Legislature was aware of the causation dispute and chose to provide coverage only where the causal connection between the injury and the use of a motor vehicle as a motor vehicle is more than incidental, fortuitous, or "but for." The involvement of the car in the injury should be "directly related to its character as a motor vehicle." Therefore, the first consideration under MCL 500.3105(1); MSA 24.13105(1)[] must be the relationship between the injury and the vehicular use of a motor vehicle. Without a relation that is more than "but for," incidental, or fortuitous, there can be no recovery of [personal protection insurance] benefits. [Emphasis in original; citation omitted.]

In reaching this conclusion, we discussed *Kangas v Aetna Cas & Surety Co*, 64 Mich App 1, 17 (1975), which adopted the "more than incidental, fortuitous or but for" causation test. *Thornton*, *supra* at 650-651. We noted that "[w]hile the *Kangas* opinion was not available at the time the Michigan no-fault program was enacted, the bulk of the case

law upon which *Kangas* relied was extant. This case law generally required more than 'but for,' incidental or attenuated causation." *Id*. at 651.

In *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 634 (1997), we reiterated the test adopted in *Thornton*:

> In reviewing the requirement of subsection 3105(1) that the injury arise out of the "use of a motor vehicle as a motor vehicle," this Court concluded that the Legislature has provided that there should only be coverage where the causal connection between the injury and the use of the motor vehicle was more than incidental, fortuitous, or "but for." [Citations omitted.]

The Court of Appeals was compelled to follow *Thornton* and *Putkamer*, which provide the controlling statement of the causal connection required under MCL 500.3105(1). In resorting to the "almost any causal connection or relationship will do" language of *Shinabarger* and *Bradley*, which this Court has never adopted, the Court of Appeals failed to do so.[1] Our prior order properly corrected the Court of Appeals' misstatement of the law. Accordingly, I respectfully dissent from the order vacating our prior order in this case.

The new majority's failure to enforce *Thornton* and *Putkamer* continues a growing and troubling trend. Rather than forthrightly overruling decisions with which it disagrees, it is increasingly becoming the practice of this Court to simply ignore these precedents. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where the new majority ignored *Vega v Lakeland Hosps*, 479 Mich 243, 244 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist (After Remand)*, 459 Mich 471 (1999); and *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008).

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[1] Chief Justice KELLY characterizes the "almost any causal connection" language of *Bradley* and *Shinabarger* as "no-fault law as it has been understood for nearly 30 years." No decision of this Court bears out such an understanding of no-fault law. In addition, Chief Justice KELLY's suggestion that the "almost any causal connection" standard could be applied with the "more than incidental, fortuitous, or but for" standard is irrelevant and inaccurate. We implicitly rejected that idea by not adopting the "almost any causal connection" language when we considered the extent of the causal connection required under MCL 500.3105(1) in *Thornton* and *Putkamer*. Moreover, the "almost any causal connection" language naturally suggests that the requisite causal connection may be established on weaker evidence than the more specific and narrowly drawn "more than incidental, fortuitous, or but for" standard.

In her concurrence, Chief Justice KELLY attempts to explain away the new majority's actions by sharing her views regarding the prior caselaw that the new majority has otherwise chosen to ignore. But Chief Justice KELLY's interpretation of a prior case in a concurring statement is not a decision of the Court. More importantly, her argument overlooks the fundamental problem: the new majority's continuing failure to explain its apparent disregard of this Court's precedent undermines the predictability and stability of the rule of law. What distinguishes governance by the rule of law from governance by whim is the application across all cases of a body of clear and intelligible principles. Inconsistent application converts the rule of law into rule by whim.

In *Van Orden v Perry*, 545 US 677, 697 (2005), a concurring justice similarly criticized the United States Supreme Court's Establishment Clause precedents as being so flexible that they were "incapable of consistent application." The concurring justice explained that "[t]he unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections. . . . The outcome of constitutional cases ought to rest on firmer grounds than the personal preferences of judges." *Id*. (Thomas, J., concurring).

The concerns expressed in *Van Orden* find ample support in United States Supreme Court caselaw, which has long recognized the importance of a coherent body of law. See, e.g., *Hilton v South Carolina Pub Railways Comm*, 502 US 197, 202 (1991) (stating that adherence to precedent promotes stability and predictability). Legal principles should not change erratically; rather, the law should "develop in a *principled and intelligible* fashion." *Vasquez v Hillery*, 474 US 254, 265 (1986) (emphasis added). "While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for *articulable* reasons . . . ." *Id*. at 266 (emphasis added).

On this Court, the new majority offers no articulable reasons whatsoever for its apparent detours from stare decisis. Instead, the majority declines to explain whether—and, if so, why—it is overruling precedent despite the obvious appearance that it is doing so. If it intends to alter legal principles embedded in this Court's decisions, the new majority should explain its reasons clearly and intelligibly. Instead, the new majority overrules by indirection, or at least leaves the impression that it is doing so, thereby sowing the seeds of confusion and making it difficult for the citizens of this state to comprehend precisely what our caselaw requires. This appears to be an unfortunate return to our predecessors' past practice of "frequently pa[ying] little attention to the inconsistencies among its cases and declin[ing] to reduce confusion in [the Court's] jurisprudence by overruling conflicting decisions." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 571 n 19 (2005).

YOUNG and MARKMAN, JJ. We join the statement of Justice CORRIGAN.

*Leave to Appeal Denied June 5, 2009:*

PEOPLE v PARKS, No. 126509; Court of Appeals No. 244553.

YOUNG, J. (*concurring*). I concur in the decision to deny leave to appeal and write to respond to what I believe is Justice MARKMAN's artificially narrow definition of "conduct"—one that ultimately and ironically would give rape victims fewer privacy interests than prostitutes under the rape shield statute. I do not believe that the statute requires this result. I also write to respond to Chief Justice KELLY's constitutional argument.

## I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Because the dissenting statements offered by Chief Justice KELLY and Justice MARKMAN contain significant gaps that fail to capture the ambulatory nature of the defendant's claims of error, I offer the following complete and chronological recitation of the facts and the relevant procedural history of this case.

The complainant child, D.W., has experienced a troubled childhood. When she was three or four years old, her step-grandfather allegedly sexually abused her by fondling her and requiring her to perform fellatio on him. When she was five years old, she moved to Michigan to live with her mother and stepfather (defendant Ricky Allen Parks). There, she admitted to them that she had been sexually abused by her step-grandfather. Defendant recalled:

> She had told us the stories about how her grandfather would have her in his bed at night and how he would touch her vaginal areas and then how he would make her touch his—what she called the weenie and how he had . . . her put it in her mouth and talked about it getting sick on her belly and giving her medicines . . . .

D.W.'s mother immediately contacted the Family Independence Agency (FIA)[1] in Owosso, which referred her to a physician. The physical examination conducted by the physician did not rule out fondling. The FIA investigator concluded that D.W. "has either been exposed to an extreme amount of sexual activity or that she has been abused in the past, possibly with threats of physical harm were she to reveal what has taken place." No charges were ever brought against D.W.'s step-grandfather.

By November 2001, D.W. was 10 years old and living with defendant, his then-girlfriend, and five other children.[2] After D.W. exhibited age-

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[1] The FIA is now known as the Department of Human Services.

[2] Defendant had custody of three children, including D.W., while his then-girlfriend had three other children of her own. As Justice MARKMAN's dissenting statement indicates, D.W.'s mother had moved out of state and left her children with defendant after she was apparently charged with drug offenses.

inappropriate sexual knowledge and behavior at school, the school's social worker interviewed her. During that interview, D.W. stated that defendant had touched her in her vaginal area. The social worker then contacted Child Protective Services (CPS) regarding the allegations of sexual abuse. Although defendant denied the allegations, CPS placed D.W. in foster care. Further investigation led to additional details: D.W. claimed that defendant twice followed her into the bathroom at their house and penetrated her, once with one of his fingers into her vagina and the other time with his penis into her mouth. Pursuant to MCL 750.520b, defendant was subsequently charged with two counts of first-degree criminal sexual conduct (CSC-I).[3]

At a motion in limine hearing, the prosecution sought to exclude evidence of the prior allegation that D.W. made against her step-grandfather. Defense counsel opposed the prosecutor's motion, but on narrow grounds—he sought to use the prior allegation "solely for impeachment purposes." He explained that he anticipated asking D.W. whether "she had ever made any reports of any other types of activity . . . ." He expected "that [D.W.] would say no," as she did at a preliminary hearing, and he would then call other witnesses to testify that she had, in fact, previously made an allegation of sexual abuse. Thus, the then-11-year-old complainant would be impeached. The trial court agreed with the prosecution and excluded the evidence under the rape shield statute.[4] Trial proceeded without evidence of D.W.'s previous abuse, and the jury convicted defendant on both charged counts of CSC-I. He was subsequently sentenced to a term of 7 to 15 years' imprisonment.

On appeal, defendant argued that he should have been allowed to question D.W. to show that she had made similar *false* allegations in the

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[3] MCL 750.520b(1) provides: "A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person . . . if . . . (a) [t]hat other person is under 13 years of age." MCL 750.520a(o) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

[4] MCL 750.520j provides, in pertinent part:

> (1) Evidence of specific instances of the victim's sexual conduct . . . shall not be admitted under [MCL 750.520b to 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

past.[5] The Court of Appeals, in an unpublished opinion per curiam, issued May 18, 2004 (Docket No. 244553), affirmed defendant's convictions and held that defendant failed to make an offer of proof with respect to the falsity of D.W.'s prior allegation, as required under MRE 103(a)(2).[6] Undeterred by the defendant's failure to offer proof at the appropriate time, this Court accepted his argument and remanded to the Shiawassee Circuit Court for an evidentiary hearing to determine whether D.W. had, in fact, made a false accusation of sexual abuse against another person.[7]

On remand, the trial court affirmed defendant's convictions, ruling that there was "absolutely no evidence, zero evidence[,] of any prior false accusations made by the child. . . ." This finding was based on the FIA investigator's determination, contemporaneous with D.W.'s allegation of abuse against her step-grandfather, that the young child "ha[d] either been exposed to an extreme amount of sexual activity or . . . ha[d] been abused in the past." Moreover, it was underscored by defendant's own testimony that he believed D.W.'s allegations against her step-grandfather to be true both at the time they were made *and presently*.

Defendant has abandoned his prior argument and, hoping that his third theory would be the charm, sought to introduce the evidence for yet *another* purpose: as an alternative explanation for D.W.'s age-inappropriate sexual knowledge and behavior. Under this theory, defen-

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[5] Under both the plain meaning of the statute and this Court's precedent in *People v Jackson*, 477 Mich 1019 (2007), the rape shield statute does not encompass *false* allegations of sexual abuse made by a complainant, because false allegations of sexual abuse are not "sexual conduct."

[6] MRE 103(a) provides, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . (2) . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked."

[7] *People v Parks*, 478 Mich 910 (2007). I joined in Justice CORRIGAN's dissenting statement, which is worth repeating here, in pertinent part:

> I respectfully dissent from the majority's decision to remand this case to the trial court for an evidentiary hearing, and to thereby give defendant a *second* chance to offer proof that the complainant made a prior false accusation of sexual abuse against another person. The majority ignores the fact that defendant *already* had an opportunity to offer proof of the alleged falsity of the prior accusation, and that he failed to do so. Under the plain language of MRE 103(a), error may not be predicated on the exclusion of evidence where no offer of proof was made. Yet the majority, for reasons that it wholly fails to explain, now gives defendant a second bite at the apple, in contravention of MRE 103(a). [*Id.* at 912 (CORRIGAN, J., dissenting) (emphasis in original).]

dant now claims that he is entitled to present evidence of the previous abuse D.W. suffered to show that she obtained her age-inappropriate sexual knowledge and behavior from a source other than defendant.

Obviously, at the time of trial, defendant did not offer this third basis for the admission of D.W.'s alleged prior sexual abuse. Accordingly, this issue is unpreserved. Neither Justice MARKMAN nor Chief Justice KELLY explains why the defendant should be allowed to maintain a theory of innocence that was neither articulated at the time of trial nor at the time of the defendant's first appeal to this Court. Indeed, the tortuous procedural history of this case—including the defendant's seriatim efforts to introduce the excluded evidence—is conspicuously absent from either of their dissenting statements. The failure to preserve the appropriate claim of error is, by itself, a sufficient—and my primary—basis for denial.

## II. ANALYSIS

### A. RAPE SHIELD STATUTE

Michigan's rape shield statute,[8] enacted in 1974 as part of a comprehensive reform of Michigan's criminal sexual assault statutes,[9] is a broad exclusionary rule that prohibits the introduction of evidence of a sexual assault victim's previous sexual conduct, with certain narrow exceptions. Before the rape shield statute was enacted, sexual assault trials often focused on a *victim's* sexual history rather than on the defendant's alleged actions.[10] Thus, as this Court has previously explained, the enactment of rape shield laws across the country was "a reflection of a nationwide concern about the prosecution of sexual conduct cases."[11]

The rape shield statute, MCL 750.520j, provides in part:

> (1) Evidence of specific instances of the victim's sexual conduct . . . shall not be admitted under [MCL 750.520b to 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

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[8] MCL 750.520j.

[9] MCL 750.520a *et seq*.

[10] See, e.g., *People v McLean*, 71 Mich 309, 312 (1888) ("Evidence that the prosecutrix is a common prostitute, or that her character for chastity is bad, is admissible."). The rape shield statute was aimed at putting to rest the mindset expressed by Chief Justice COOLEY in another context, that "[t]he probability that a woman who conducts herself properly will be frequently assaulted is very small . . . ." *Derwin v Parsons*, 52 Mich 425, 427 (1884).

[11] *People v Arenda*, 416 Mich 1, 8 (1982).

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

At issue in this case is whether prior *involuntary* sexual activity—the sexual abuse D.W. allegedly suffered by her step-grandfather—constitutes "sexual conduct" for the purposes of the statute's exclusionary rule. If such involuntary sexual activity does constitute "sexual conduct," then the defendant is not entitled to question the complainant about such conduct. This includes a complainant's previous *allegations* of sexual abuse not proven to be false.[12]

The Legislature did not specifically define the term "conduct." Therefore, it is appropriate to look to the dictionary definition to discern the term's meaning.[13] "Conduct" is relevantly defined as one's "personal behavior."[14] This definition is silent about whether "conduct" encompasses only *voluntary* "personal behavior" or both voluntary *and involuntary* "personal behavior." The term's plain meaning in the criminal context, however, implies that *both* voluntary behavior *and* involuntary behavior are "conduct." Justice MARKMAN's understanding of the term "conduct" artificially restricts the term to one's voluntary behavior only. Instead, it encompasses *all* of one's "personal behavior."[15]

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[12] See *People v Jackson*, 477 Mich at 1019.

[13] *People v Thompson*, 477 Mich 146, 151-152 (2007).

[14] *Random House Webster's College Dictionary* (1997). This is the long-standing definition of the term. See Webster, *A Compendious Dictionary of the English Language* (New York, NY: Crown Publishers, 1970 facsimile of 1806 edition), p 61 ("behavior").

[15] The criminal defense of duress aptly illustrates why Justice MARKMAN's construction is underinclusive. Someone who maintains a duress defense admits that otherwise criminal acts are part of his "conduct," but seeks to excuse it as *involuntary.* Thus, though involuntary, the act remains a person's conduct. *People v Merhige*, 212 Mich 601, 610-611 (1920), states the rule of duress: "An act which would otherwise constitute a crime may also be excused on the ground that it was done under compulsion or duress. The compulsion which will excuse a criminal act, however, must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done." (Quotation marks and citation omitted.) Particularly telling is the Court's subsequent discussion: "*Whether the defendant was responsible for his conduct* on September 19th and *whether his actions on that occasion were voluntary*, would be a fair question for a jury under all the circumstances of the case." *Id.* at 611 (emphasis added). Rather than being "a single, stray reference to [conduct]," as Justice MARKMAN indicates, *post* at 1064, this understanding of "conduct" as encompassing *all* of one's "personal behavior," not just volitional behavior, illustrates a foundation of our criminal law.

An examination of the statutory scheme as a whole underscores why Justice MARKMAN's construction of "conduct" is too limited. MCL 750.520a provides definitions for Chapter LXXVI of the Michigan Penal Code, which encompasses the rape shield statute (MCL 750.520j). Although the section does not define the word "conduct," it does define both "actor" and "victim" with reference to their "conduct." An "actor" is someone "accused of criminal sexual conduct," MCL 750.520a(a), while a "victim" is someone "subjected to criminal sexual conduct," MCL 750.520a(p). By including these definitions, the Legislature expressed its understanding that "sexual conduct" is something that *both* "actors" *and* "victims" take part in—"actors" voluntarily and "victims" involuntarily. The protections of the rape shield statute, therefore, do not distinguish involuntary "sexual conduct" experienced as a victim of sexual abuse from voluntary "sexual conduct" engaged in as a consenting adult. To hold otherwise would presume that the Legislature intended to give prostitutes more protection than rape victims. I do not think the plain meaning of the term "conduct" within the context of the statute conveys *that* particular legislative intent.

Moreover, a discarded draft of this provision supports this natural construction of the phrase "sexual conduct." "[B]y comparing alternate legislative drafts, a court may be able to discern the intended meaning for the language actually enacted."[16] The bill, as introduced in the Senate on February 28, 1974, originally provided that "[p]rior *consensual* sexual activity between the victim and any person other than the actor shall not be admitted into evidence in prosecutions under sections 520B to 520I."[17] The House subsequently amended the bill and passed a substitute bill that *deleted* the word "consensual."[18] It is that House substitute bill that was enacted into law *instead of* the bill that was initially proposed.[19] Therefore, the fact that the Legislature *specifically deleted* the word "consensual" provides additional support for the conclusion that the rape shield statute applies to both consensual and nonconsensual sexual conduct.[20]

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Moreover, the alleged criminal sexual conduct that took place between D.W. and her step-grandfather—fondling and fellatio—*requires* (at least) two participants. The fact that, with respect to D.W., this alleged sexual conduct was forced is not relevant to whether it was "conduct" within the meaning of the statute.

[16] *In re Certified Question (Kenneth Henes Special Projects v Continental Biomass Industries, Inc)*, 468 Mich 109, 115 n 5 (2003).

[17] SB 1207, § 520J(2). (Emphasis added.)

[18] 1974 Journal of the House 4356-4363.

[19] 1974 Journal of the Senate 1495-1499. See also 1974 PA 266.

[20] Justice MARKMAN correctly states that the enacted version of the bill replaced the phrase "consensual sexual activity" with the phrase "sexual conduct." Nevertheless, his argument that the two terms are identical

This is consistent with our caselaw applying the rape shield statute to victims of prior sexual abuse. In *Arenda*, this Court prohibited the admission, under the rape shield statute, of "*any* evidence of sexual conduct between the victim [an eight-year-old boy] and any person other than defendant."[21] Likewise, *People v Morse* articulated a specific test for admitting evidence of a complainant's prior sexual abuse *notwithstanding* the applicability of the rape shield statute.[22]

While not controlling the interpretation of this state's statute, it is nevertheless reassuring that nearly all states ruling on this question have

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does not take into account the fact that amendments of the definitional provisions in the statute provide additional support for a distinction between "consensual sexual activity" and "sexual conduct." The enacted version of the definitional provisions relating to criminal sexual conduct defined "actor" and "victim" as participants in "sexual conduct." In the original SB 1207, however, the provisions defined "actor" and "victim" without reference to their "sexual conduct." "Actor" was defined as "a person accused of sexual assault," SB 1207, § 520A(A), while "victim" was defined as "the person alleging to have been sexually assaulted," § 520A(J). When the word "consensual" was deleted from the statute, those definitions were amended to reference the parties' participation in "sexual conduct," the "actor" as someone "accused of criminal sexual conduct," MCL 750.520a(a), and the "victim" as someone "subjected to criminal sexual conduct," MCL 750.520a(p). Thus, even if Justice MARKMAN's distinction between "conduct" and "activity" were valid, the amendment of the definitional provision that contemplates an expansive understanding of "sexual conduct" puts his distinction to rest and incorporates both consensual sexual conduct and nonconsensual sexual conduct.

[21] *Arenda*, 416 Mich at 6 (emphasis added). While Justice MARKMAN correctly notes that *Arenda* primarily dealt with the constitutionality of the rape shield statute, its application of the rape shield statute is *very* relevant to this case. The victim in that case was an eight-year-old boy, and the defendant sought to cross-examine the victim regarding whether he had engaged in any previous sexual activity. Moreover, the defendant sought to introduce the evidence to explain an alternative basis for the victim's age-inappropriate sexual knowledge. The Court excluded evidence of *all* instances of sexual conduct between the eight-year-old victim and any person other than the defendant. The Court did not make *any* distinction between voluntary sexual conduct and involuntary sexual conduct.

[22] 231 Mich App 424 (1998). The *Morse* panel specifically discussed the applicability of the statute: "In Michigan, as in our sister states, rape-shield statutes are typically invoked where the victim is an adult. However, our courts and others have ruled on the applicability of rape-shield statutes in cases of child sexual abuse." *Id.* at 430, citing *Arenda*, 416 Mich at 6.

read their rape shield protections as encompassing both voluntary sexual conduct and involuntary sexual conduct. Twenty other states specifically hold that sexual abuse falls under rape shield protections.[23] Only three

[23] See *State v Townsend*, 366 Ark 152, 160 (2006) ("[E]vidence of the prior sexual abuse of a minor is within the ambit of the rape-shield statute."); *People v Aldrich*, 849 P2d 821, 824 (Colo App, 1992) ("[T]he rape shield statute encompasses involuntary acts within the meaning of prior sexual conduct . . . ."); *Baughman v State*, 528 NE2d 78, 79 (Ind, 1988) ("Appellant contends that the trial court erred by preventing him from presenting evidence that [the victim] had been sexually molested by her step-father . . . . The evidence sought to be introduced was of the type which the legislature deemed should be excluded in a case of this nature. It falls clearly within the parameters of the statute . . . ."); *State v Jones*, 490 NW2d 787, 790 (Iowa, 1992) ("We think the term [']past sexual behavior[']as it is used in the rule clearly encompasses prior sexual abuse perpetrated upon the victim."); *State v Michel*, 633 So 2d 941, 944 (La App, 1994) ("[Louisiana's rape shield law] was correctly applied in this case to prevent any exploration of a possible sexual molestation of the victim in 1988."); *State v Jacques*, 558 A2d 706, 708 n 2 (Me, 1989) ("We reject, as providing insufficient protection to victims, the defendant's proposed interpretation of 'sexual behavior' to apply only to a victim's 'volitional sexual behavior.' "); *Commonwealth v Hynes*, 40 Mass App 927, 929 (1998) ("Evidence of sexual abuse by a third party is generally excluded under the rape-shield statute."); *State v Carpenter*, 459 NW2d 121, 125-126 (Minn, 1990) ("The excluded evidence at issue here [is] the alleged prior digital penetration of [the victim] . . . . We find, as did the trial court, the evidence of previous sexual conduct defense counsel sought to introduce to be inadmissible under [Minnesota's rape shield law]."); *Peterson v State*, 671 So 2d 647, 657 (Miss 1996) ("[Mississippi's rape shield law] prohibits the introduction of evidence of a victim's past sexual behavior unless it falls under one of the three exceptions . . . . The question [at issue] was not whether she had made any false allegations of a past sexual offense [which are admissible] . . . , rather it was whether she had made any allegations at all of such an offense and is therefore improper."); *State v Kelley*, 83 SW3d 36, 40 (Mo App, 2002) ("The offer included evidence that the sexual [abuse] actually occurred and, therefore, must be presumed inadmissible under the rape shield statute."); *State v Rhyne*, 253 Mont 513, 519 (1992) ("[U]nder [Montana's rape shield law], sexual conduct of the victim which is inadmissible includes prior sexual abuse."); *State v Bass*, 121 NC App 306, 309-310 (1996) ("We conclude that the prior abuse alleged here is "sexual activity" within the ambit of [North Carolina's rape shield law]."); *State v Budis*, 125 NJ 519, 532-533

states concur with Justice MARKMAN in denying the applicability of rape shield provisions to involuntary sexual abuse.[24] A fourth, New Hampshire,

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(1991) ("When a defendant seeks to elicit evidence of the prior sexual abuse of a child, the Rape Shield Statute directs trial courts to conduct a pre-trial *in camera* hearing."); *State v Montoya*, 91 NM 752, 753 (NM App, 1978) ("Sexual intercourse is sexual conduct whether by consent or force. [New Mexico's rape shield law] is not limited to sex by consent; rather, by its unlimited wording, it applies to all forms of past sexual conduct."); *State v Smelcer*, 89 Ohio App 3d 115, 122 (1993) ("The trial court refused to allow the admission of the evidence, stating that the rape shield law precluded evidence concerning prior sexual abuse of [the victim]. We find that this evidence was properly excluded."); *State v Wright*, 97 Or App 401, 406 (1989) ("We hold that 'past sexual behavior' means a volitional or non-volitional physical act that the victim has performed for the purpose of the sexual stimulation or gratification of either the victim or another person or an act that is sexual intercourse, deviate sexual intercourse or sexual contact, or an attempt to engage in such an act, between the victim and another person."); *Commonwealth v Johnson*, 389 Pa Super 184, 188 (1989) ("[A]ssaultive sexual activity is covered by the Rape Shield Law . . . ."); *Ex parte Rose*, 704 SW2d 751, 756 (Tex Crim App, 1984) ("Reading the phrase or term 'sexual conduct' in the context in which it is used in [Texas's rape shield law] and in accordance with common usage, we hold that it encompasses sexual activity or conduct whether willingly engaged in or not . . . ."); *State v Quinn*, 200 W Va 432, 438 (1997) ("[E]vidence that the alleged victim of a sexual offense has made statements about being the victim of sexual misconduct, other than the statements that the alleged victim has made about the defendant and that are at issue in the state's case against the defendant, is evidence of the alleged victim's 'sexual conduct' and is within the scope of West Virginia's rape shield law . . . unless the defendant establishes to the satisfaction of the trial judge outside of the presence of the jury that there is a strong probability that the alleged victim's other statements are false."); *State v Pulizzano*, 155 Wis 2d 633, 643 (1990) ("The prior sexual assault [the victim] experienced clearly constitutes 'sexual conduct' as that term is defined in [Wisconsin's rape shield law].").

[24] *Raines v State*, 191 Ga App 743, 744 (1989) ("[A] prior rape committed against the victim has nothing whatsoever to do with *her* past sexual behavior."); *Chapman v State*, 117 Nev 1, 5 (2001) ("A child-victim's prior sexual experiences may be admissible to counteract the jury's perception that a young child would not have the knowledge or experience necessary to describe a sexual assault unless it had actually happened."); *State v Markle*, 118 Wash 2d 424, 438 (1992) ("[The] rape shield statute does not provide a basis for excluding evidence of prior sexual abuse of the complaining witness . . . .").

has enacted a statute expressly limiting exclusion to consensual sexual conduct.[25]

Ultimately, there is a strong textual basis for concluding that the term "conduct," as it is used in the rape shield statute, encompasses both voluntary and involuntary behavior. The Legislature's decision to enact a broad exclusionary rule containing limited and specific exceptions is *itself* a policy decision,[26] which must be respected unless it is unconstitutional.

### B. CONSTITUTIONAL CHALLENGE TO THE RAPE SHIELD STATUTE

Notwithstanding the requirements of the rape shield statute, a criminal defendant has the constitutional right to present a defense. The Sixth Amendment of the United States Constitution and art 1, § 20, of the Michigan Constitution contain identical provisions giving a criminal defendant the right to "be confronted with the witnesses against him . . . ."[27] In interpreting the Confrontation Clause, the United States Supreme Court maintains that the right to present a defense is a fundamental right afforded to criminal defendants.[28] Nevertheless, it is not absolute. The protections of the Sixth Amendment may "bow to accommodate other legitimate interests in the criminal trial process."[29] Indeed, courts have " 'wide latitude' to limit reasonably a criminal defendant's right to cross-examine a witness 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.' "[30]

This Court's decision in *People v Hackett* requires a court to determine the constitutionality of exclusion of evidence under the rape shield statute on a case-by-case basis,[31] as long as "[t]he defendant . . . make[s] an offer of proof as to the proposed evidence and . . . demonstrate[s] its

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[25] NH Rev Stat Ann 632-A:6(II) provides that "[p]rior consensual sexual activity between the victim and any person other than the actor shall not be admitted into evidence in any prosecution under this chapter."

[26] See Nelson, *What is textualism?*, 91 Va L R 347, 398-403 (2005).

[27] The Sixth Amendment of the United States Constitution was held applicable to the states through the Fourteenth Amendment in *Pointer v Texas*, 380 US 400, 406 (1965).

[28] *Crane v Kentucky*, 476 US 683, 690 (1986). Additionally, art 1, § 13, of the Michigan Constitution provides that "[a] suitor in any court of this state has the right to . . . defend his suit, either in his own proper person or by an attorney." See also *People v Hayes*, 421 Mich 271, 278 (1984).

[29] *Michigan v Lucas*, 500 US 145, 150 (1991) (quotation marks and citations omitted).

[30] *Id.* at 149, quoting *Delaware v Van Arsdall*, 475 US 673, 679 (1986).

[31] *People v Hackett*, 421 Mich 338 (1984).

relevance to the purpose for which it is sought to be admitted."[32] Only then does a trial court possess the relevant information to decide whether a defendant is constitutionally entitled to present particular evidence excluded under the rape shield statute.

Here, defendant has only offered proof that the prior allegations were relevant to D.W.'s *credibility*. The Constitution does not require evidence of sexual conduct, such as these prior allegations, to be introduced when the defendant's *only* proffered reason for introducing such evidence is to wage a general attack on a witness's credibility, as opposed to a specific attack on a witness's "possible biases, prejudices, or ulterior motives . . . ."[33] The Sixth Circuit Court of Appeals decision in *Boggs v Collins* is instructive on this point:

> No matter how central an accuser's credibility is to a case—indeed, her credibility will almost always be the cornerstone of a rape or sexual assault case, even if there is physical evidence—the Constitution does not require that a defendant be given the opportunity to wage a general attack on credibility by pointing to individual instances of past conduct.[34]

Our Legislature has determined that the fact that a complainant had been abused in the past is simply irrelevant to her present credibility. This would seem to be an especially important policy when such prior sexual abuse occurred when D.W. could have been as young as three years old and when D.W. made her prior allegations of abuse when she was five years old.

Defendant's latest and third argument for introducing the evidence —explaining D.W.'s age-inappropriate sexual knowledge and behavior—is somewhat more compelling.[35] By failing to introduce this theory of admissibility at trial, however, defendant has forfeited it and

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[32] *Id.* at 350.

[33] *Davis v Alaska*, 415 US 308, 316 (1974).

[34] *Boggs v Collins*, 226 F3d 728, 740 (CA 6, 2000).

[35] Defendant's new theory, however, is not without its holes: because D.W. was abused as a very young child, she might be especially able to recognize and describe the abuse she is alleged to have suffered from defendant. Indeed she had her own childishly graphic terms for a penis ("weenie"), ejaculation ("[the weenie] got sick"), and ejaculate ("medicine"). Chief Justice KELLY, however, struggling to bolster the relevance of the evidence, suggests that D.W. cannot use similar language to describe similar events that happened to her. Her explanation fails to persuade. The graphic terms that D.W. used to describe the alleged instances of sexual abuse were part of *her own* vocabulary. The mere fact that she has this unique vocabulary to describe *all* the alleged instances of sexual abuse does not make it "extremely unlikely" for D.W. to have been abused both by her step-grandfather and by defendant. *Post* at 1056. If Chief Justice KELLY "[does] not suggest[] that D.W.'s behavior encouraged someone to sexually abuse her," *id.* at

bears the burden to show: "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights."[36] And, if defendant can meet his burden, this Court must exercise its discretion to reverse only when "the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings."[37]

Defendant has failed to show that error occurred, much less that it was clear or obvious. As noted earlier, the constitutional right to present a defense must be balanced against the state's interest in protecting the integrity of criminal sexual conduct trials and the privacy of complainants. *Hackett* expressed that constitutional concerns might trump the rape shield statute when showing (on a proper offer of proof) that the complainant's prior victimization is probative of her bias or ulterior motive against the criminal defendant.[38] Defendant does not make such a claim here.

The Court of Appeals decision in *People v Morse* held that, before a jury may hear evidence of prior sexual abuse against a complainant, the trial judge must determine (at an in camera hearing): (1) that the proffered evidence is relevant, (2) that another person was *convicted* of criminal sexual conduct (CSC) involving the complainant, and (3) that the facts underlying the previous conviction are significantly similar to the case before it.[39]

Because D.W.'s step-grandfather was not charged with CSC, let alone convicted of such a crime, evidence of previous abuse is not eligible for introduction at trial under *Morse*. *Morse* appropriately balanced the defendant's necessity for introducing a defense with the state's interests in protecting the integrity of CSC trials and the privacy of complainants. It is much less invasive to a complainant if the previous abuse suffered is *already* a matter of public record that had previously been examined in

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1056 n 14, she nevertheless *does* suggest that, in order to be believed, a victim of sexual abuse had better come up with a different way to describe any subsequent abuse she suffers. I see little to effectively distinguish this "one and done" rule for sexual assault victims, that "[i]t is extremely unlikely that both defendant and D.W.'s [step-]grandfather abused D.W. in the same manner," *id.*, from the nineteenth-century sensibility that the rape shield statute intended to put to rest: that "[t]he probability that a woman who conducts herself properly will be frequently assaulted is very small . . . . " *Derwin*, 52 Mich at 427.

[36] *People v Carines*, 460 Mich 750, 763 (1999).

[37] *Id.* at 774.

[38] *Hackett*, 421 Mich at 348.

[39] *Morse*, 231 Mich App at 437. Like defendant's latest argument, the defendant in *Morse* sought to introduce the evidence in order to provide an alternate source for the complainant's age-inappropriate sexual knowledge.

open court. Accordingly, there is no compelling justification for extending this test to previous acts of CSC committed against a complainant that have not already withstood the publicity of a trial.[40]

Defendant is, therefore, not constitutionally entitled to introduce evidence of the previous abuse D.W. suffered. Accordingly, he is not entitled to a new trial.

## III. CONCLUSION

For the reasons stated, I concur in this Court's decision to deny leave to appeal. D.W.'s prior sexual victimization is covered under the plain meaning of the rape shield statute, and the exclusion of that evidence pursuant to the statute did not violate defendant's constitutional rights. Accordingly, he is not entitled to a new trial.

CORRIGAN, J. I join the statement of Justice YOUNG.

KELLY, C.J. (*dissenting*). I respectfully dissent from the majority's decision to deny leave to appeal in this case. Defendant sought to introduce at trial evidence that it was equally likely that another person committed the crime with which he was charged. The trial court's refusal of his request violated defendant's Sixth Amendment right of confrontation.[1]

Because the excluded evidence was so important and its exclusion undoubtedly tainted the verdict, I would reverse the conviction and remand the case for a new trial.

## FACTS

Defendant, Ricky Parks, was convicted of two counts of first-degree criminal sexual conduct (CSC-I)[2] for molesting his nine-year-old stepdaughter, D.W.[3] The allegations against defendant arose when D.W. told a school social worker that defendant had sexually abused her. D.W., a mentally challenged child, had been abandoned by her mother and left with defendant. She had suffered a closed head injury when she fell from a golf cart while living with her grandparents and was left with serious developmental problems.

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[40] Justice MARKMAN implies that defendant had no way of defending against the medical expert's conclusion that D.W. had likely been abused. This is simply incorrect. There was nothing to prevent the defendant from questioning the causal relationship between the witness's conclusion and *the abuse that defendant was charged with committing*; he simply was barred from exploring the causal relationship between the witness's testimony and D.W.'s alleged previous abuse.

[1] US Const, Am VI.

[2] MCL 750.520b(1)(a).

[3] I refer to the complainant as D.W. to protect her identity.

Some years later, when D.W. was living with defendant, locks had to be put on the doors because she would leave the house naked. Her behavior at school had sexual overtones. When asked at home why she was misbehaving, D.W. answered that her grandfather used to bring her to his bed, touch her vaginal area, and have her touch his penis. She claimed that he put his penis in her mouth, as well as his fingers in her vagina. She referred to her grandfather's penis as his "weenie" and described how, when she put it in her mouth, it "got sick on her belly." D.W. made some of the allegations against her grandfather after she was caught inappropriately fondling her brother. She then said that she was "trying to make medicine to wash his weenie off."

Defendant and D.W.'s mother obtained counseling for D.W. at school. They also reported the allegations D.W. made against her grandfather to the Department of Social Services,[4] but no charges were ever brought against the grandfather. Records show that a protective services case was opened in 1996, prompted by allegations that D.W.'s grandfather abused her. However, it was closed because D.W. failed to disclose any abuse while talking to agency personnel.

Nonetheless, the social service caseworker concluded in 1996 that "the statements made to mother and step-father with detail indicate that this child has either been exposed to an extreme amount of sexual activity or that she has been abused in the past." Also in 1996, an examining physician, Dr. Stephen Guertin, stated that the results of his examination of D.W. were normal, although he could not rule out fondling. That year, a complaint from the Department of Social Services revealed that D.W. "made a statement alleging that she touched her [grandfather's] weenie when it got sick." Following the 1996 investigation, defendant attempted to enroll D.W. in counseling.

In 1998, D.W.'s mother abandoned her and moved to the West Coast. Defendant took care of D.W. In time, his girlfriend, Julie Sutliff, moved into his home. She observed D.W. touching herself in the vaginal area, making inappropriate sexual comments, and misbehaving. D.W. told Sutliff that touching herself was no big deal because her grandfather used to do it to her. She also told Sutliff that her grandfather used to molest her and that she would suck on his penis hard enough to "get medicine out of it." Sutliff said that she did not contact law enforcement personnel because defendant told her that he had attempted earlier to get help from them with no result.[5]

At a preliminary examination in 2002, D.W. alleged that defendant had abused her. Her accusations were very similar to those she had made against her grandfather. She asserted that defendant had "put his weenie in my mouth" and then "[it] got sick."

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[4] The Department of Social Services no longer exists. Its present equivalent is the Department of Human Services.

[5] D.W.'s grandfather lived out-of-state when the 1996 investigation took place, which may explain why nothing ultimately came of the investigation.

The prosecution presented no physical evidence of sexual abuse at trial. Defendant testified and maintained his innocence throughout the proceedings. D.W.'s testimony was the only direct evidence of molestation brought against him. The prosecution bolstered D.W.'s testimony by presenting evidence of her age-inappropriate knowledge of sexual matters and her continuous sexual behavior. The trial court prohibited defense counsel from cross-examining D.W. about her prior allegations of assault by her grandfather.

The prosecution's theory throughout trial was that D.W.'s abnormal behavioral problems and age-inappropriate sexual knowledge was a "cry for help" for someone to save her from defendant's molestation. In her opening statement, the prosecutor told the jury, "I don't have a smoking gun or DNA evidence, but I do have D.W. crying out for help," demonstrated by her "inappropriate sexual knowledge" and "inappropriate sexual behavior." The prosecution continued the theme of a cry for help by calling witnesses for the sole purpose of detailing D.W.'s erratic behavior.

The prosecution called an expert qualified in the area of pediatrics with an emphasis on sexual abuse, Dr. Guertin, who examined D.W. after the alleged abuse by defendant.[6] Dr. Guertin testified that his examination of D.W. showed no physical evidence of molestation, but, given D.W.'s "history," it was his opinion that she had likely been "fondled."[7] Significantly, Dr. Guertin never gave an opinion about who had fondled D.W. or what her "history" entailed.

The prosecution also called D.W.'s former elementary school teachers to testify about her disruptive behavior. The teachers recounted how D.W. was "a handful" at school. She would throw temper tantrums so severe that all the other students had to be removed from the classroom until she calmed down. Sometimes she hit her head against the floor and screamed "I want to die." She wrote letters to a boy in the class telling him she would have sex with him and "if you live with me I will have a baby."

Other students were reluctant to be in the same room with D.W. Once, D.W. gyrated against a desk in a "humping" motion like a "dog in heat." Another time, she took off her overalls and stood in the classroom in her underwear. One teacher recalled a time when D.W. screamed "don't fuck me" when the teacher tried to restrain her. In closing argument, the prosecution reminded the jury of D.W.'s behavior, claiming that D.W. was crying for help because of what was going on in her house. The prosecutor argued that, through her behavior, D.W. was yelling out "make this stop." The prosecutor systematically used D.W.'s behavior as proof that it was defendant who molested her.

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[6] The jury was never permitted to hear that Dr. Guertin had examined D.W. four years earlier for signs of sexual abuse allegedly committed by her grandfather.

[7] When eliciting testimony, the prosecutor specifically instructed Dr. Guertin not to explain the "history" of abuse on which he based his opinion.

THE RAPE-SHIELD ACT vs
THE CONSTITUTIONAL RIGHT OF CONFRONTATION

In limited situations, the admission of evidence of a victim's past sexual conduct may be not only relevant but required to preserve a defendant's constitutional right to confrontation.[8] The trial court must balance the legitimate competing interests of the state and the accused on a case-by-case basis.[9] The United States Supreme Court has identified specific factors that need to be considered: (1) the strength vel non of state interests weighing against admission of the evidence,[10] (2) the importance of the evidence to an effective defense,[11] and (3) the scope of the ban on the evidence.[12]

In this case, the importance of the proposed evidence to an effective defense overwhelmed any state interest. Defendant was charged with two counts of first-degree criminal sexual conduct (CSC-I), a very serious crime.[13] A determination of his guilt hinged on whether the jury believed D.W. or him; it came down to a credibility contest between the two.

Beginning with her opening statement, the prosecutor used D.W.'s age-inappropriate knowledge and sexual behavior as proof that D.W. was telling the truth. Almost all the state's witnesses testified for the purpose of establishing D.W.'s abnormal behavior. By not allowing defendant to offer an alternative plausible explanation for D.W.'s behavior, he was left without a defense. By barring evidence that D.W. had been abused by her grandfather, the trial court kept from the jury a critical piece of the puzzle necessary for the jury to render a fair decision. There was no direct physical evidence tying defendant to the alleged assaults, and D.W. was inconsistent in describing the details of the alleged assaults. Yet, without an alternative explanation for D.W.'s age-inappropriate sexual knowledge and abnormal behavior, the jury was led directly to the conclusion that defendant was the one who committed the acts.

Furthermore, the evidence was pertinent and necessary to the defense because of the similarity between D.W.'s description of the alleged sexual abuse by defendant and her grandfather. D.W. testified at the preliminary

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[8] *People v Hackett*, 421 Mich 338, 348 (1984).

[9] *Id.* at 349. *Hackett* instructs that the trial court should use the in camera hearing process to evaluate Confrontation Clause problems involving the rape-shield act's bar of normally relevant evidence. This process is found at MCL 750.520j(2); see also *Michigan v Lucas*, 500 US 145, 153 (1991).

[10] *Chambers v Mississippi*, 410 US 284, 295 (1973).

[11] *Davis v Alaska*, 415 US 308, 319 (1974).

[12] *Delaware v Van Arsdall*, 475 US 673, 679 (1986). See *White v Coplan*, 399 F3d 18, 24 (CA 1, 2005) (listing factors to be considered); see also *Barbe v McBride*, 521 F3d 443, 458 (CA 4, 2008).

[13] CSC-I carries a maximum sentence of life in prison. MCL 750.520b(2).

examination that defendant "put his weenie in my mouth" and then "[i]t got sick." This language is nearly identical to the statements she allegedly made against her grandfather. The 1996 social services report indicated that D.W. said that she "touched her [grandfather's] weenie when it got sick." This is similar to D.W.'s telling defendant's girlfriend that her grandfather made her perform oral sex on him until "medicine" came out. It is extremely unlikely that both defendant and D.W.'s grandfather abused D.W. in the same manner and used the same peculiar language to describe the incidents.[14]

Moreover, the initial abuse had to have occurred before 1996. Because, by 1996, D.W. had already described acts of oral sex and a "weenie" getting "sick," with a liquid being ejaculated, which she referred to as "medicine." However, defendant was charged with abuse that allegedly occurred sometime between 1999 and 2000. At trial, D.W. could not remember the time of year, time of day, or day of the week of the first assault. Evidence that D.W. was molested before 1996 was relevant to show that D.W. may not have been abused in 1999 or 2000. If that is the case, defendant is innocent of the charges brought against him in this case.

Finally, the evidence of prior sexual abuse was essential to put Dr. Guertin's testimony in proper context. Dr. Guertin was the only expert in child sexual assaults to testify at trial. He stated that, on the basis of D.W.'s "history," she had likely been fondled. The evidence at trial suggested to the jury that the only person who might have fondled D.W. was defendant. Hence, it was essential for defendant to be able to show that the "history" on which Dr. Guertin based his conclusion included sexual abuse by another person. Without that knowledge, the jury was left with no viable explanation for Dr. Guertin's testimony that did not implicate defendant. Other courts reviewing applications of a rape-shield act have found a defendant's constitutional rights to have been impermissibly violated in similar circumstances.[15]

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[14] In his concurring statement, Justice YOUNG appears to misunderstand the point I make here. I am not suggesting that D.W.'s behavior encouraged someone to sexually abuse her. Far from it. I am suggesting that D.W.'s description of the alleged abuse was first made before the dates on which defendant is alleged to have abused her. Hence, the abuser, if there was indeed one abuser, was not defendant, and the jury was never allowed to learn the facts that lead to that conclusion. Unless defendant abused D.W. in the same manner and using the same peculiar language as a prior abuser employed, D.W.'s age-inappropriate sexual acting out could have been occasioned solely by abuse she suffered by someone other than defendant.

[15] See, e.g., *McBride*, 521 F3d 443 (concluding that the defendant had a constitutional right to introduce evidence of past sexual abuse of the child-victim to provide an alternative explanation for the child's psychological profile); *United States v Bear Stops*, 997 F2d 451, 457 (CA 8, 1993) (holding that the defendant's constitutional rights were violated when he

Defendant's guilt was a question of fact to be decided by an informed jury. If the jury had disbelieved D.W.'s testimony, the prosecution would have had no case. No other evidence linked defendant to the crimes. The jury was left without critical pieces of evidence to evaluate D.W.'s testimony, and this effectively rendered defendant defenseless. The trial court erred by refusing to allow defendant to develop evidence about the prior allegations of sexual abuse by D.W.'s grandfather. The error was not harmless beyond a reasonable doubt.

## CONCLUSION

There are limited situations where the rape-shield act is irreconcilable with a defendant's Sixth Amendment rights. In those situations, the statute must yield to a defendant's constitutional rights of confrontation and to a fair trial. When the rape-shield act and a defendant's rights of confrontation conflict, the trial court must balance the state's interest in protecting the victim against the importance of the evidence to the defense.

In this case, the trial court violated defendant's rights by barring all evidence that D.W.'s grandfather had previously sexually abused her. Defendant's defense was critically impaired when he was prevented from showing an equally plausible alternative explanation—that the child's grandfather had abused her in the past. Defendant is entitled to a new trial. Therefore, I dissent from the denial of leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent and would reverse defendant's convictions and remand for a new trial. I believe that the trial court seriously erred in relying on the rape-shield statute to preclude defendant from introducing evidence concerning past sexual abuse of the complainant. As a result, the jury was presented with an incomplete and distorted picture of what had occurred, the truth-seeking process of the criminal justice system was compromised, and defendant, in my judgment, was denied a fair trial. By denying leave to appeal, this Court upholds defendant's convictions while depriving him of substantial relevant evidence with which to defend himself.

## I. HISTORY

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC-1) pursuant to MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age). The charges arose out of two alleged incidents with defendant's stepdaughter, complainant DW. On the first day of trial, the prosecutor requested a ruling by the court to

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was prohibited from introducing evidence that the six-year-old complainant had been sexually assaulted previously because the evidence "provide[d] an alternative explanation for the prosecution's persuasive evidence about [the victim's] behavioral manifestations of a sexually abused child").

prohibit defense questioning regarding any previous allegations made by DW of sexual abuse.[1] The trial court determined that such testimony would be contrary to the rape-shield statute and ruled that defendant could not elicit such testimony.

During trial, DW testified that defendant performed certain acts with her. She described sexual acts that a child of her age—nine years old—typically would not have knowledge of or be able to describe. Despite this testimony, defendant was prohibited from introducing evidence that DW could have learned about such acts not only from DW's alleged abuse, but also from the abuse alleged against her step-grandfather. Dr. Stephen Guertin, the medical doctor who examined DW after her allegations against her step-grandfather, and also after her allegations against defendant, testified that DW's history led him to believe that she had been abused. Defendant, however, was again not allowed to explore DW's past allegations and how the conduct that was the subject of these allegations might have affected Dr. Guertin's opinion.

The jury subsequently convicted defendant on both counts of CSC-1, and the Court of Appeals affirmed. *People v Parks*, unpublished opinion per curiam of the Court of Appeals, issued May 18, 2004 (Docket No. 244553). We held defendant's application for leave to appeal in abeyance, pending our decision in *People v Jackson*, 477 Mich 1019 (2007). In *Jackson* we held that "testimony concerning prior false allegations does not implicate the rape-shield statute." *Id*. We remanded this case to the trial court to afford "the defendant the opportunity to offer proof that the complainant made a prior false accusation of sexual abuse against another person." 478 Mich 910 (2007).

The trial court held an evidentiary hearing in accordance with our remand order. The testimony provided a glimpse of DW's life leading up to the present allegations against defendant. DW spent the first four years of her life living with her mother, Terry, and her grandmother and step-grandfather in Missouri. During that time, when DW was around three years old, she fell off a golf cart and suffered a closed head injury. The injury has affected DW's development, and she still receives medical treatment, including drug treatment, in order to limit seizures caused by the injury.

In 1995, when DW was four years old, Terry, who was then pregnant, moved with DW to Michigan, where they met defendant, who began living with them. Terry and defendant married and had a child of their own. During this period, DW began acting out in various sexual ways, all of which were inappropriate for a child of her age. When asked why she was behaving in such a manner, DW described certain occasions on which her step-grandfather had allegedly abused her.[2]

Terry and defendant sought help in connection with DW's allegations against her step-grandfather, including contacting the Family Indepen-

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[1] Prior to her allegations against defendant, DW had alleged that her step-grandfather sexually abused her.

[2] DW told defendant that her step-grandfather had touched her vagina and put his penis in her mouth. The language DW used in relating this

dence Agency (FIA). During DW's interview with the FIA, she did not disclose any past abuse by her step-grandfather. The FIA, however, referred DW to Dr. Guertin for an examination.

In 1996, Dr. Guertin examined DW with respect to the allegations about her step-grandfather, but he did not find any physical manifestation of the molestation. DW also did not disclose to Dr. Guertin abuse by her step-grandfather. Defendant and Terry were unable to pursue the allegations any further.

In 1998, Terry left with her three children, including DW. Shortly thereafter, defendant received a call from a police officer in Oregon, inquiring about the children. Terry had apparently been charged with drug offenses, and the children were at risk of being placed in foster care. Defendant arranged for the children to come live with him, which they did in early 1999. Around that same time, defendant began living with Julie Sutliff. Sutliff testified at the evidentiary hearing that DW exhibited sexually inappropriate behavior, and when Sutliff asked DW about her behavior, DW told Sutliff about the incidents with her step-grandfather.

The trial court determined that DW's past allegations of abuse by her step-grandfather were *not* "false" and thus remained within the scope of the rape-shield statute. Defendant again sought leave to appeal in this Court, and we heard oral argument regarding, among other things, whether DW's allegations against her step-grandfather are inadmissible on the basis of the rape-shield statute. 481 Mich 860.

## II. RAPE-SHIELD STATUTE

The rape-shield statute, MCL 750.520j, reads in part:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections [MCL 750.520b to 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

This statute only excludes evidence of the "victim's sexual conduct." Thus, any inquiry into the statute's application must focus on the meaning of "conduct." The ordinary meaning of "conduct" is harmonious with the Legislature's use of "conduct" throughout the enacting legislation, 1974 PA

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abuse is similar to the language she used to describe the alleged acts by defendant and demonstrated sexual knowledge clearly inappropriate for a four- to five-year-old child.

266,[3] and with the Legislature's purposes in enacting the rape-shield statute. Each of these interpretative guides strongly suggests that "conduct" refers only to *volitional* actions by the victim and does not encompass *involuntary* acts such as those that stem from being subjected to sexual abuse.

The definition of "conduct" varies little from dictionary to dictionary. Conduct is defined as: "personal behavior; way of acting; deportment," *Random House Webster's College Dictionary* (1997); "[t]he way a person acts; behavior," *The American Heritage Dictionary of the English Language* (1981); and "[t]he manner of guiding or carrying one's self; personal deportment; mode of action; behavior," *Webster's Revised Unabridged Dictionary* (1996). The common theme of these definitions is that "conduct" pertains to an individual's own behavior, to actions initiated or set in motion *by* the individual. Being the *victim* of, or having been *subjected* to, sexual abuse by *another* does not by this definition of "conduct" constitute something within the scope of the rape-shield statute, and therefore should not be excluded from evidence under the authority of this statute.

This interpretation of "conduct" is further supported by the Legislature's use of "conduct" throughout the rape-shield statute. If "conduct" is read to include abuse perpetrated *against* the victim by *other* persons, then references in the statute, MCL 750.520j(1), to "opinion evidence of the victim's sexual conduct" and "reputation evidence of the victim's sexual conduct" make no sense. Reputation and opinion evidence are typically based on a person's character, such as the person's tendency for aggression.[4] A person's character and conduct are similar at least in the sense that they are each formed by voluntary decisions made by that individual. Actions concerning which an individual has no control cannot be said to establish a person's character, so when the Legislature extended protection from reputation and opinion evidence in MCL 750.520j(1), it likely understood that such evidence could only apply with respect to a victim's sexual history over which the victim has control. Thus, the ordinary volitional understanding of "conduct" also fits within the context in which it is used in the rape-shield statute, whereas a broader definition, encompassing non-volitional behavior, including sexual abuse by others, does not.

The statute provides additional insight on the meaning of "conduct" by distinguishing "conduct" from "activity" in paragraphs (a) and (b) of MCL 750.520j(1). These paragraphs set forth two exceptions to the general inadmissibility of evidence regarding a "victim's sexual conduct" in subsection (1). Paragraph (a) renders admissible evidence of the "victim's past sexual *conduct* with the actor," and paragraph (b) renders admissible "specific instances of sexual *activity*" concerning the "source or origin of semen, pregnancy, or disease." "Activity" does not connote the concept of

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[3] This amended the criminal code with comprehensive legislation covering criminal sexual conduct (CSC). MCL 750.520a *et seq*.

[4] This Court recognized that "sexual reputation," when presented to show that the victim consented, is "simply a variation of character evidence." *People v Hackett*, 421 Mich 338, 348 (1985).

volition to the same extent as "conduct." "Activity" in paragraph (b) pertains to conditions that directly result from the physical sex act itself—semen, pregnancy, disease—in which the concept of volition is essentially irrelevant. In contrast, "conduct" in paragraph (a) pertains to a range of interpersonal behavior that extends beyond the physical act itself, and in which the concept of volition may be quite relevant in assessing whether the victim chose to behave in such a way that the defendant should be deemed less culpable, or not culpable at all, for the alleged offense. Interpreting "conduct" to include non-volitional action blurs the Legislature's apparently careful distinction between "conduct" and "activity."

The Legislature's use of "conduct" throughout 1974 PA 266 further supports interpreting "conduct" to include only volitional actions. See, e.g., MCL 750.520b (describing first-degree criminal sexual "conduct"). It seems unlikely that the Legislature intended to punish non-volitional activity under the criminal code. Interpreting "conduct" to mean only volitional action maintains this understanding. "Identical language should receive identical construction when found in the same act." *People ex rel Simmons v Munising Twp*, 213 Mich 629, 633 (1921).

Further uses of "conduct" in 1974 PA 266 are found in MCL 750.520a, in which the Legislature defined "actor" as "a person accused of criminal sexual conduct," MCL 750.520a(a), and "victim" as "the person alleging to have been subjected to criminal sexual conduct," MCL 750.520a(s). These definitions distinguish a person who has *chosen* to perform a certain act from one who had *no* choice in performing such act. If a victim, for example, is raped by an actor, the rape is considered to be the *actor's* conduct. The victim is considered to have been "*subjected to*" the conduct, strongly suggesting that rape is not fairly characterized as the *victim's* conduct.[5] Rather, it would only be the "conduct" of the person who *chose* to perform the act.[6]

The overall purpose of the rape-shield statute also supports understanding "conduct" by its normal definition to encompass only volitional activity. MCL 750.520j was clearly enacted to prevent the introduction of embarrass-

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[5] I disagree with the concurring justice who states that a victim "take[s] part in" the sexual abuse to which he or she is subjected. *Ante* at 1045. A person who is forced to endure such abuse, or may not even be aware of it (e.g., where the victim is sleeping or unconscious), cannot in normal parlance be said to have "take[n] part in" such act.

[6] Still further support is provided by the Legislature's definitions of "mentally incapable" and "mentally incapacitated" in MCL 750.520a. The definitions refer to mental illness and altering substances that "render[] [a person] incapable of appraising the nature of his or her conduct." MCL 750.520a(i); see MCL 750.520a(j) (using language only slightly different from MCL 750.520a[i]). Here, "conduct" also retains its essence that an activity be volitional, because the gist of the definitions is that the person can no longer control his or her actions because of mental illness or the influence of drugs.

ing evidence regarding the victim's sexual history at trial.[7] Such prohibition, it was hoped, would increase the likelihood that sexual assault victims would report such assaults and not be deterred from doing so by the prospect of embarrassment. Yet, reading the rape-shield statute to exclude evidence regarding past *abuse* suffered by the victim bears no apparent relationship to this purpose. While any person may well be uncomfortable about revealing past instances in which he or she was sexually abused, such uneasiness is sharply distinct from the kind of embarrassment that rape-shield statutes were designed to foreclose—embarrassment caused as a function of one's *own* misbehavior or questionable conduct.[8]

By enacting the rape-shield statute, the Legislature also sought to eliminate the potential for a defendant to exploit a victim's sexual history to imply consent in the defendant's case.[9] What is at issue in this case—the admissibility of evidence that the victim was previously abused by a person *other* than the defendant—cannot be similarly exploited by the defendant.

## III. "SEXUAL CONDUCT"

With the understanding that the rape-shield statute only applies to volitional acts, evidence regarding DW's allegations against her step-grandfather does not qualify for exclusion as "the *victim's* past sexual conduct." The testimony at the evidentiary hearing indicates that DW's step-grandfather may have "subjected" her to various sexual acts, none of which DW chose to perform. Accordingly, defendant should have been allowed to present evidence regarding this past sexual abuse.[10]

Because of the trial court's erroneous interpretation of the rape-shield statute, rather than the jury basing its decision regarding defendant's

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[7] This Court has observed that MCL 750.520j(1) was enacted to encourage victims to report sexual assaults by reducing a complainant's fear that "the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past." *People v Arenda*, 416 Mich 1, 9 (1982), quoting *People v Khan*, 80 Mich App 605, 614 (1978) (quotation marks and citation omitted).

[8] See, e.g., *In re Michael*, 119 Ohio App 3d 112, 121 (1997) ("Although evidence of [the male victim's] prior sexual abuse would intrude on an intimate detail of his personal life, such intrusion was not to harass, degrade, or embarrass him, or to generally attack his credibility by implying that he was immoral or unchaste.").

[9] See *Hackett*, *supra* at 353-354 (affirming the trial court's decision to prohibit the defendant from trying to establish a victim's consent by introducing a previous instance in which she had met a man at a bar and left with him for consensual relations).

[10] As a result, it is unnecessary to address defendant's constitutional argument regarding his Sixth Amendment right to confrontation.

guilt on *all* the relevant information, the jury was forced to make assumptions based on incomplete information. In particular, in order to confront the unsettling fact that DW was able at nine years of age to describe certain sex acts she alleged defendant had performed on her, the jury was more likely to conclude that defendant actually *had* performed those acts. The jury was not allowed to hear and evaluate an alternative explanation that DW may have learned about such acts not from defendant, but from her step-grandfather. If the jury had been apprised of DW's allegations of previous abuse, it may well have come up with a different explanation concerning the source of DW's precocious sexual knowledge and thereby reached a different conclusion regarding defendant's guilt.[11]

Equally troubling is the void left by Dr. Guertin's testimony. Dr. Guertin testified that he had examined DW in 1996, but the jury received no information regarding what prompted that examination. Instead, Dr. Guertin testified that during his most recent examination of DW, *which followed in time the present allegations against defendant*, he discerned no physical signs of abuse but concluded on the basis of DW's history that she had been sexually abused.[12] The trial court then instructed the jury not to consider the 1996 examination as relevant to the instant charges. As a result, the jury heard that DW had likely suffered abuse and was aware of only one possible source of that abuse—defendant. Thus, by improperly expanding the purview of the rape-shield statute, the trial court left the jury with a distorted picture of defendant's potential role in previously abusing DW. Defendant had no way of presenting evidence that DW's history potentially included abuse by another individual. The court's limitation on Dr. Guertin's testimony unfairly subjected defendant to a process in which the jury heard evidence suggesting his guilt, but did not hear any testimony by defendant with which he could dispel this suggestion.

## IV. RESPONSE TO CONCURRENCE

(1) The concurring justice asserts that the interpretation of MCL

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[11] See, e.g., Buttrey, *Michigan's rape-shield statute and the admissibility of evidence that a child complainant has been previously molested*, 15 TM Cooley L R 391, 391-393 (1998) (questioning the logic of allowing a jury to assume that the defendant is the sole source of a complainant's sexual knowledge where evidence indicates additional sources).

[12] The following is the relevant exchange between the prosecutor and Dr. Guertin:

> *Q*: Okay. And without going into what history it is that she gave or what allegations she made, if you will, what was your finding?
>
> *A*: The child gave a history. The history was significant in my opinion. The examination was normal. The examination based on her history would be expected to be normal, and it was my impression based on the contents of the history that she likely had been fondled.

750.520j set forth in this dissent would "give rape victims fewer privacy interests than prostitutes under the rape-shield statute." *Ante* at 1040. Although an attention-getting observation, I fail to see how this is either relevant or true. The rape-shield statute bars evidence of volitional sexual behavior, regardless of whether the complainant is a prostitute, a rape victim, or any other person, whatever the complainant's gender, profession, race, color, creed, lifestyle, or history of sexual promiscuity. Evidence of volitional sexual behavior is barred with regard to *all* complainants. Similarly, *all* complainants are treated exactly the same with regard to non-volitional sexual behavior.

(2) The concurring justice states that defendant's "failure to preserve the appropriate claim of error is, by itself, a sufficient—and [his] primary—basis for denial." *Ante* at 1043. Yet, defendant did preserve his claim of error by arguing before the trial court that DW's allegations should not be precluded by the statute. In any event, as the concurring justice himself has stated, "addressing a controlling legal issue despite the failure of the parties to properly frame the issue is a well understood judicial principle." *Mack v Detroit*, 467 Mich 186, 207 (2002) (YOUNG, J.). A majority of this Court has *already* held that defendant's claim of error warranted a hearing by the trial court regarding the falsity of DW's allegations. Now that the trial court has determined that the allegations were not false, *the* controlling issue is whether the preclusion of evidence was proper in that it constituted the victim's "sexual conduct." Where a defendant's guilt, and resultant exposure to a sentence of imprisonment for life, potentially rests entirely upon the interpretation of a statute, I believe this Court should "set forth the law as clearly as it can, irrespective of whether the parties assist the Court in fulfilling its constitutional function." *Id.* at 209.

(3) The concurring justice also contends that my "understanding of the term 'conduct' artificially restricts the term to voluntary behavior." *Ante* at 1044. I fail to see how using an ordinary definition of an ordinary term injects anything "artificial" into the interpretative process. The beginning point of statutory interpretation is to understand what the Legislature intended by its use of a word in context. Indeed, the concurring justice seems to agree with such an approach when *he* concludes that the "longstanding definition" of "conduct" is "personal behavior." *Ante* at 1044 n 14. Yet, he never addresses what *this* definition means in the context of the victim's "sexual conduct." Instead, he concludes that "conduct" can encompass "*both* voluntary behavior *and* involuntary behavior," *ante* at 1044, and, to support this conclusion, relies on a single, stray reference to "conduct" set forth in a decision predating the rape-shield statute by 54 years, having nothing to do with the meaning of "conduct," and relating in not the slightest way to rape or sexual behavior of any kind. *Ante* at 1044-1045 n 15. Quite apart from the fact that it is "conduct," not "personal behavior," that is the subject of interpretation here, the concurring justice's invocation of "personal behavior" in support of his position disregards that this latter term *also* describes the manner in which a person acts *under his or her own will*. For example, if asked to describe a person's "driving behavior," or more specifically his or her "personal driving behavior," a response might

typically reference how fast that person chooses to drive or how that person interacts with other drivers on the road. On the other hand, "personal driving behavior" would not typically refer to a person having been rear-ended at a stop light or having been cut off by another driver. Similarly, a person's "personal sexual behavior" might typically refer to that person's promiscuity or lack thereof, or to his or her sexual preferences or inclinations. It would not, however, typically refer to instances of sexual abuse against that person in which he or she had no control.

(4) The concurring justice argues that, although the initial bill included the phrase "consensual sexual activity," the bill actually enacted included an amendment "that *deleted* the word 'consensual.' " *Ante* at 1045. This argument fails to recognize that the amendment, in fact, replaced "consensual sexual activity" with "sexual conduct," rather than merely deleting the word "consensual." If anything, this amendment suggests that the Legislature considered "conduct" to be an altogether *suitable* substitute for "consensual activity."

(5) The concurring justice's citation of *People v Arenda*, 416 Mich 1 (1982), has little bearing on the present issue because the defendant in that case did not raise any argument regarding the meaning of "conduct," and the Court did not address this issue at all. *Ante* at 1046. Instead, *Arenda* focused exclusively on the *constitutionality* of the rape-shield statute and never explored the meaning of a victim's "sexual conduct."

(6) The concurring justice would require the defendant to demonstrate that "another person was convicted of criminal sexual conduct (CSC) involving the complainant" before being allowed to reference DW's past allegations. *Ante* at 1051 (emphasis omitted), citing *People v Morse*, 231 Mich App 424 (1998). Again, I disagree. First, *Morse* only applies to "conduct" barred by the rape-shield statute and DW's prior allegations do not constitute "conduct." Second, the jury was allowed to hear Dr. Guertin's testimony, which was influenced by DW's prior allegations, even though her step-grandfather was never convicted of CSC. Defendant was denied an opportunity to explore those same allegations. Requiring defendant to first show that a CSC conviction arose out of the allegations would subject defendant to a burden *higher* than that of the prosecutor as a precondition to presenting evidence to the jury.

(7) Finally, the concurring justice states that the Legislature "has determined that the fact that a complainant had been abused in the past is simply irrelevant to her present credibility." *Ante* at 1050. Here, however, it is not the *abuse*, but the *allegations* of such abuse, that go to DW's credibility because she testified at the preliminary hearing that she never made any previous allegations. Further, although the concurring justice acknowledges that such past allegations *may* be important in "explaining D.W.'s age-inappropriate sexual knowledge and behavior," *ante* at 1050, he overlooks the importance of these allegations in also explaining Dr. Guertin's testimony. Dr. Guertin told the jury that he had concluded, based on DW's history, that DW had likely been abused. The jury, however, had no way of knowing that DW's "history" included allegations of past abuse and that these *allegations*, rather than any

*conduct* by defendant, may have contributed to Dr. Guertin's conclusion.[13] Allowing defendant to be convicted with such incomplete information seriously affects the integrity of the trial process and compromises its truth-seeking mission.

## V. CONCLUSION

For these reasons, I would remand for a new trial. Defendant should be allowed the opportunity to present evidence regarding DW's allegations against her step-grandfather and their relevance to the charges against defendant.

CAVANAGH, J. I join the statement of Justice MARKMAN.

PEOPLE v RUSSELL, No. 138201; Court of Appeals No. 264597.

WEAVER, J. (*dissenting*). I dissent from the majority's denial order in this case. I would grant plaintiff's application for leave to appeal.

CORRIGAN, J. (*dissenting*). I dissent from this Court's order denying the prosecution's application for leave to appeal. This case presents the jurisprudentially significant question whether a criminal defendant can be scored points under offense variable (OV) 10 for "predatory conduct" directed at a "vulnerable victim" when the "victim" is actually a police officer posing as a child on the Internet.

Defendant met Kelly, whom he believed was a fourteen-year-old girl, in an Internet chat room. They had several sexually explicit conversations after which defendant sent nude photographs of himself to Kelly. He eventually arranged to meet with Kelly for the purpose of engaging in sexual activity. Kelly was actually a special agent for the Attorney General. Following a jury trial, defendant was convicted of child sexually abusive activity, MCL 750.145c(2), use of the Internet to communicate with another to commit child sexually abusive activity, MCL 750.145d(1)(a), and three counts of using the Internet to distribute obscene material to a minor, MCL 750.145d(1)(a).

Over defendant's objection at sentencing, the trial court scored 15 points under OV 10. Defendant appealed his sentence, claiming error in that scoring decision. The Court of Appeals affirmed. *People v Russell*, unpublished opinion per curiam of the Court of Appeals, issued February 8, 2007 (Docket No. 264597). Defendant sought leave to appeal in this Court. We held the application pending the decision in *People v Cannon*,

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[13] The concurring justice suggests that defendant could have defended against the jury's incomplete knowledge of DW's history by questioning Dr. Guertin about the "causal relationship between [his] conclusion and the abuse that defendant was charged with committing." *Ante* at 1052 n 40. Such questioning, of course, would still have left the jury in the dark about any *alternative source* of abuse and, even more problematically, the jury may well have assumed, to the *further* detriment of defendant, that DW's history included *additional* abuse *by defendant* for which he had *previously* been charged.

481 Mich 152 (2008), then remanded to the Court of Appeals for consideration in light of *Cannon*. The Court of Appeals vacated defendant's sentence and remanded for resentencing. *People v Russell* (*On Remand*), 281 Mich App 610 (2008). The prosecutor seeks leave to appeal in this Court. Because this case presents a jurisprudentially significant issue, I would grant the application.

The instructions for scoring OV 10 are set forth in MCL 777.40, which provides, in relevant part:

> (1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Predatory conduct was involved.....15 points
>
> (b) 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.....10 points
>
> * * *
>
> (d) The offender did not exploit a victim's vulnerability...0 points
>
> (2) The mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.
>
> (3) As used in this section:
>
> (a) "Predatory conduct" means preoffense conduct directed at a victim for the primary purpose of victimization.
>
> (b) "Exploit" means to manipulate a victim for selfish or unethical purposes.
>
> (c) "Vulnerability" means the *readily apparent susceptibility* of a victim to injury, physical restraint, persuasion, or temptation. [Emphasis added.]

The Court of Appeals stated in its initial opinion:

> OV 10 scores points for "[e]xploitation of a vulnerable victim." MCL 777.40. OV 10 is scored at 15 points for "[p]redatory conduct," defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(1)(a). MCL 777.40(3)(a). Here, defendant, who believed he was dealing with a 14-year[-]old girl named "Kelly," indicated that he wanted to take "Kelly" to "someplace where you aren't going to run into people you know," and told "Kelly" to "save . . . skipping [school] for when I come to see you." Defendant also admitted to police that he had planned to take "Kelly" to a hotel in Canton until 3:30 p.m., at which time he thought "she" would have to be home. Further, defendant's intention to engage in sexual activity with "Kelly" was clear from both his online chats with "her" and his admissions to police, as well as Ondejko's discovery of condoms and personal

> lubricant in defendant's rental truck at the time of defendant's arrest. Therefore, the evidence demonstrates that defendant arranged for a situation in which he could engage in sexual activity with "Kelly" at times and places where "Kelly" would be isolated and secluded, and thus, vulnerable. Given that the timing and location of a sexual assault are relevant factors in assessing preoffense predatory conduct, *People v Witherspoon*, 257 Mich App 329, 336, 670 NW2d 434 (2003), the trial court did not abuse its discretion in assessing 15 points for OV 10. [*Russell*, *supra* at 5.]

In *Cannon*, we concluded that "points should be assessed under OV 10 only when it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *Cannon*, *supra* at 158. We explained "predatory conduct" as follows: "A lion that waits near a watering hole hoping that a herd of antelope will come to drink is not engaging in conduct directed at a victim. However, a lion that sees antelope, determines which is the weakest, and stalks it until the opportunity arises to attack it engages in conduct directed at a victim." *Id*. at 160.

The Court of Appeals concluded on remand that "regardless of an offender's subjective intent, if no vulnerable victim was in fact placed in jeopardy or exploited by an offender's actions, OV 10 does not apply." *Russell*, *supra* at 615. The Court reasoned:

> Under the analysis of *Cannon*, regardless of defendant's intent, his conduct did not place any vulnerable victim in jeopardy because there was, in fact, no vulnerable victim to be jeopardized. The person with whom defendant communicated was not a vulnerable 14-year-old girl named "Kelly"; he was, instead, an adult special agent. Such a person would not qualify as a vulnerable victim under the factors set out in *Cannon*. *Id*. at 158-159. We conclude that, under these circumstances, no points can be assessed for OV 10. [*Russell*, *supra* at 615.]

The court also refused to score points under OV 10 because "predatory conduct" requires "preoffense conduct," MCL 777.40(3)(a). It saw no preoffense conduct here because "[d]efendant's interactions on the Internet with the person he believed to be a 14-year-old girl named 'Kelly' constituted the offenses themselves . . . ." *Id*. at 616 n 2.

I would grant leave to consider the prosecution's argument that defendant's conduct was "predatory" within the meaning of MCL 777.40(3)(c) because he sought and singled out a specific victim over the Internet. He believed that, as a 14-year-old girl, Kelly was especially vulnerable to his advances. Defendant's conduct was similar to the preoffense conduct involved in *People v Kimble*, 252 Mich App 269 (2002), where the Court of Appeals held that the defendant, who drove around looking for a victim with particular characteristics, was correctly scored

15 points for predatory conduct.[1] At the time defendant sought his victim on the Internet, Kelly's "susceptibility . . . to injury, physical restraint, persuasion, or temptation" was "readily apparent" to defendant, even though he turned out to be mistaken. "Readily apparent" suggests that it is a defendant's intent to exploit one who is obviously vulnerable—in other words, his subjective belief that a victim is vulnerable—rather than the victim's actual vulnerability, that matters for purposes of scoring this offense variable.[2] While some offense variables, such as OV 3 (physical injury to a victim), MCL 777.33, and OV 4 (psychological injury to a victim), MCL 777.34, are designed to capture the extent of the harm to the victim or victims, others, like OV 6 (intent to kill or injure another individual), MCL 777.36, are designed to punish the defendant for his conduct or intended conduct, regardless of its effect on the victim. The statutory language suggests that OV 10 falls into the latter category.

That statutory definition requires only that the victim have a "readily apparent susceptibility"—here, the perceived youth and gullibility of the 14-year-old victim. The appearance of susceptibility is the statutory measure because the offense variable examines the defendant's actions in manipulating the defendant's vulnerability, not the actual injury to the victim.

I tend to concur with the Solicitor General's view as set forth in the application for leave to appeal. OV 10 is directed at the malice of defendant's conduct, not the victim's injury. *Cannon* did not resolve whether there must be an actual rather than a perceived victim; I would grant leave to clarify this jurisprudentially significant issue.

The interpretation of OV 10 I would propose is consistent with the rule concerning the elements of attempt offenses involving conduct over the Internet. In *People v Thousand*, 465 Mich 149; 631 NW2d 694 (2001), where the purported victim was actually a police officer posing as a minor on the Internet, this Court held the trial court erred in dismissing a charge of attempted distribution of obscene material to a minor based on the doctrine of legal impossibility "[b]ecause the nonexistence of a minor victim does not give rise to a viable defense to the attempt charge in this case." *Id*. at 166. It was the defendant's intent that was dispositive. *Id*.

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[1] In *Kimble*, *supra* at 274-275, the "defendant and his accomplices drove around for an hour, looking for a car to steal so they could remove and sell the wheel rims. . . . [W]hen [they] saw the victim driving a car with valuable rims, they followed the victim home, watched the victim pull into the driveway, and shot the victim in order to steal the car." The court held that the "[d]efendant's preoffense behavior in seeking out a victim and following this victim home for the specific purpose of committing a crime against her was clearly predatory within the meaning of the statute." *Id*. at 275.

[2] *Random House Webster's College Dictionary* (2001) defines "apparent" as follows: "1. readily seen; open to view"; "2. capable of being easily understood; obvious"; "3. according to appearances; ostensible rather than actual."

Similarly, it appears that defendant's conduct here meets the definition of "predatory conduct" in OV 10 notwithstanding his mistake about the actual characteristics of the victim.

The Court of Appeals on remand gave an unnecessarily crimped view of our holding in *Cannon*. If we deny leave to appeal, the Court of Appeals decision will render a classic example of predatory conduct—seducing minors for sexual abuse over the Internet—immune from OV 10 when the perpetrator is prosecuted by units targeting Internet predators. I would not so cripple this essential investigative technique when the decision below does not square with the plain statutory language of OV 10. I would grant leave to appeal.

YOUNG, J. I join the statement of Justice CORRIGAN.

*In re* COLLINS (DEPARTMENT OF HUMAN SERVICES v COLLINS) Nos. 138912 and 138923; Court of Appeals Nos. 288182 and 288253.

*Summary Disposition June 10, 2009:*

HANNA v MERLOS, No. 138743. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted. See *Scarsella v Pollak*, 461 Mich 547, 549 (2000). We further order that the trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. Court of Appeals No. 289513.

*Leave to Appeal Denied June 10, 2009:*

PEOPLE v HUVER, No. 136701; Court of Appeals No. 274099.

KELLY, C.J. I would grant leave to appeal.

PEOPLE v NEIL BENNETT, No. 136942; Court of Appeals No. 274390.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

PEOPLE v WILLIAM GATES, No. 136998; Court of Appeals No. 271508.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

PEOPLE v RICHARD HENSLEY, No. 137252; Court of Appeals No. 272688.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

PEOPLE v RILEY, No. 137493; Court of Appeals No. 277757.

PEOPLE v BLOCKSOM, No. 137810; Court of Appeals No. 277214.

FITZGERALD v BOARD OF HOSPITAL MANAGERS FOR THE CITY OF FLINT, No. 138224; Court of Appeals No. 280032.

KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

RICHARDSON v RWC, INC, No. 138246; Court of Appeals No. 287521.

PEOPLE v NIEMIEC, Nos. 138256 and 138257, Court of Appeals Nos. 277212 and 277237.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

MOORE v MOORE, No. 138283; Court of Appeals No. 288088.

LOVELAND v SPECTRUM HEALTH, No. 138329; Court of Appeals No. 278497.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

BECKER v GLAISTER, No. 138335; Court of Appeals No. 281481.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would grant leave to appeal.

ADRINE v EVENT STAFFING, INC, No. 138414; Court of Appeals No. 281360.

OTTAWA COUNTY v POLICE OFFICERS ASSOCIATION OF MICHIGAN, No. 138422; reported below: 281 Mich App 668.

*Reconsideration Granted June 10, 2009:*

PEOPLE v WHITAKER, No. 137554. On reconsideration, we modify the second sentence of our previous order to state as follows: "The Wayne Circuit Court shall order a new trial unless it finds (a) that Stephanie McClung's absence at trial could not have been remedied by reasonable efforts to compel her attendance, or (b) that Stephanie McClung's absence from the first trial was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405-406 (1994)." In all other respects, the motion for reconsideration is denied. We do not retain jurisdiction. Summary disposition entered at 483 Mich 879. Court of Appeals No. 278828.

*Leave to Appeal Denied June 12, 2009:*

PEOPLE v NATHANIEL WARD, No. 137979; Court of Appeals No. 288318.

YOUNG, J. (*concurring*). I concur in this Court's order denying defendant's application for leave to appeal and write separately to respond to Chief Justice KELLY's dissent. Chief Justice KELLY's dissent reveals an unusual perspective of criminal law and criminality in general. What Chief Justice KELLY vilifies as a "ruse" and "subterfuge" is a legitimate law enforcement tactic to safely apprehend a known drug dealer. Further,

because offense variable (OV) 19, MCL 777.49, plainly does not include an intent element, the caselaw from other states that Chief Justice KELLY cites is irrelevant. Accordingly, there is no basis in the law for rescoring OV 19, as Chief Justice KELLY urges.

Defendant is a career drug dealer who sold heroin, powder cocaine, and crack cocaine to a confidential informant and an undercover officer on three separate occasions between April 24, 2007, and April 30, 2007. Because the police officers possessed cash seized from defendant during a traffic stop on April 16, 2007,[1] they asked defendant to meet at a Michigan State Police post for return of the money seized. Defendant agreed and they were able to arrest him for the three prior drug sales in the safety of a controlled environment. I agree that this was a "ruse," but it offends no principle of law to use a criminal's stupidity against him.

Chief Justice KELLY chooses to chastise the police officers for their "subterfuge" rather than the defendant, who knowingly carried 47 grams of crack cocaine and 20 packets of heroin *into a police station* and then attempted to smuggle the same 47 grams of crack cocaine and packets of heroin into the Grand Traverse County Jail. Chief Justice KELLY asserts that defendant "could hardly be said to have intended to engage in conduct that 'threatened the security of a penal institution.' "[2] It is hard to believe that anyone could sincerely dispute that the presence of illicit drugs "threaten[s] the security of a penal institution." Moreover, it was not "only because of a police subterfuge"[3] that defendant's behavior was a threat to the security of a penal institution. Defendant *could have* told the officers that he had the 47 grams of crack cocaine and packets of heroin in his underwear when he was arrested at the station. Instead, he *chose* to attempt to smuggle this considerable amount of drugs into the county jail. Chief Justice KELLY suggests that defendant may be excused from the consequences of that choice "because he wished not to be charged for possession with intent to deliver prohibited substances in addition to his other crimes."[4] A criminal's interest in avoiding punishment for his crimes does not, has never, and, hopefully, will never excuse criminal behavior. The law does not require courts to ignore criminal behavior; rather, it assigns consequences. "[T]rying to avoid having drugs . . . detected during booking"[5] is deviant behavior for which the law assigned a consequence—25 points for OV 19. That we may be able to theorize a defendant's motive to conceal his crime does not decriminalize the act.

OV 19 does not contain a "ruse" exception to its provisions. And, contrary to Chief Justice KELLY's argument, OV 19 does not contain an intent element. Whether defendant "*intended* to 'threaten the security

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[1] The police officers seized the money because a police dog indicated that the money contained cocaine and heroin residue.

[2] *Post* at 1073, quoting MCL 777.49(a).

[3] *Post* at 1073.

[4] *Post* at 1073.

[5] *Post* at 1075.

of a penal institution' " is irrelevant.[6] Twenty-five points are assigned when "the offender *by his or her conduct* threatened the security of a penal institution." MCL 777.49(a) (emphasis added). Defendant's conduct—attempting to smuggle 47 grams of crack cocaine and packets of heroin into the jail—"threatened the security of a penal institution"; thus, OV 19 was properly scored.

Because I do not share Chief Justice KELLY's vision of criminal jurisprudence, I concur in this Court's order denying leave to appeal.

CORRIGAN, J. I join the statement of Justice YOUNG.

KELLY, C.J. (*dissenting*). I would grant leave to appeal to consider the scoring of offense variable (OV) 19. Defendant was brought to the police station as part of a police ruse. The officers told defendant that he could recover some money that had been seized during a traffic stop if he came to the station. When he arrived, he was arrested and sent to the jail for booking. During a strip search at the jail, officers found 47 grams of crack cocaine and numerous packets of heroin in his underwear.

Clearly, defendant should not have been in possession of illegal drugs and should not have taken them to the police station. But his purpose in going there was not to deal drugs. He could hardly be said to have intended to engage in conduct that "threatened the security of a penal institution."[1] If his behavior can be said to have been a threat, regardless of defendant's intent, it must be conceded that the threat existed only because of a police subterfuge.[2] I believe this crucial fact could make defendant's conduct an insufficient basis for the scoring of OV 19 here.

Justice YOUNG observes that defendant could have avoided having his sentence increased by telling the officers that he carried prohibited substances on his person when he was arrested at the station. He points out that it was defendant's choice to bring the drugs into the county jail. However, defendant chose not to reveal the drugs, presumably because he wished not to be charged for possession with intent to deliver prohibited substances in addition to his other crimes. It seems unlikely that he chose to conceal the drugs because he intended to "threaten the security of a penal institution."

I believe that scoring points for OV 19 may require that a defendant intend to threaten the security of a penal institution. Caselaw from our sister states supports the conclusion that intent is necessary for a defendant to be liable for conduct of this sort.[3] Courts in some other jurisdictions have come to contrary conclusions.[4] Moreover, this issue is

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[6] *Post* at 1073 (emphasis added).

[1] MCL 777.49(a).

[2] In his concurring statement, Justice YOUNG agrees that the police conduct in this case was a "ruse" to get defendant to the police station.

[3] *State v Cole*, 142 NM 325 (2007); *State v Sowry*, 155 Ohio App 3d 742 (2004); *State v Tippetts*, 180 Or App 350 (2002).

[4] *State v Carr*, 2008 WL 4368240 * 5 (Tenn Crim App, 2008); *State v Winsor*, 110 SW3d 882, 886-888 (Mo App, 2003); *Brown v State*, 89 SW3d

currently before the supreme courts of Washington and California.[5] Clearly, the issue is of jurisprudential significance and this Court should not summarily dismiss it.

Courts in other jurisdictions have disagreed over whether a defendant's culpability is affected by the defendant's failure to reveal the existence of contraband on his or her person before booking.[6] This was the basis for the trial court's scoring of OV 19 and is the key argument advanced by Justice YOUNG's concurrence. My conclusion that further review of this issue is warranted is supported by these varying outcomes under similar circumstances.

The Washington Court of Appeals recently addressed this issue in the same sentencing enhancement context at issue in this case. In *State v Eaton*,[7] the defendant was arrested for driving while under the influence (DUI) and transported to the county jail. During a search of his person, an officer discovered methamphetamine. Defendant was charged with one count of DUI and one count of possession of a controlled substance. The state sought a sentencing enhancement under RCW 9.94A.533(5)(c), which allows a court to add 12 months to a defendant's sentence if the offense was committed "while in a county jail or state correctional facility." Although defendant objected to the sentencing enhancement, the trial court increased defendant's sentence from 0 to 6 months to 12 to 18 months.

The Washington Court of Appeals reversed. The court first noted that "this sentence enhancement is not a separate sentence or a separate substantive crime. . . . Rather, it presupposes that the defendant's behavior already constitutes a crime, such as possession of a controlled substance."[8] Nevertheless, the court ultimately determined that the

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630, 633 (Tex Crim App, 2002); *State v Canas*, 597 NW2d 488, 496-497 (Iowa, 1999), abrogated in part on other grounds by *State v Turner*, 630 NW2d 601, 606 n 2 (Iowa, 2001).

[5] *State v Eaton*, 143 Wash App 155 (2008), review granted 164 Wash 2d 1013 (2008); *People v Gastello*, 57 Cal Rptr 3d 293 (2007), review granted and opinion superseded by *People v Gastello*, 61 Cal Rptr 3d 1 (2007).

[6] Compare *Cole*, *supra* at 328 ("It is of no moment . . . that Defendant could have avoided the charge of bringing contraband into a jail by admitting to the booking officer that he possessed marijuana. The dispositive issue is that Defendant cannot be held liable for bringing contraband into a jail when he did not do so voluntarily.") with *Canas*, *supra* at 496 (upholding defendant's conviction after noting that the defendant "had the option of disclosing the presence of the drugs concealed on his person before he entered the jail and became guilty of the additional offense of introducing controlled substances into a detention facility").

[7] *State v Eaton*, *supra*.

[8] *Eaton*, *supra* at 160.

legislature "did not intend the unlikely, absurd, or strained consequence of punishing a defendant for his *involuntary* act."[9]

The argument accepted by the court in *Eaton* is even more persuasive in the context of OV 19. Many of the statutes in *Eaton* and the other cited cases explicitly did *not* contain an intent requirement. The courts reversed the convictions because they considered the requirement that conduct be volitional as part of the *actus reus* of the crime. Even if one rejects that argument, here OV 19 arguably does include an intent requirement because of the Legislature's use of the word "threatened." Black's Law Dictionary's definition of "threat" includes the element of the *intention* to cause loss or harm to something.[10] In my mind, the use of this language makes defendant's argument more persuasive and worthy of further review. I would have no difficulty with the scoring of OV 19 in this case if the OV provided extra points for trying to avoid having drugs being detected during a booking, or, as Justice YOUNG suggests, simply for "stupidity." But it does neither. I think the assessment of 25 points here may have lengthened defendant's sentence for conduct not covered by OV 19.[11]

Hence, I would grant leave to appeal to consider the scoring of OV 19.

SAFRANEK v MONAGHAN, Nos. 137997 and 138055. The stay of enforcement of the Washtenaw Circuit Court's November 14, 2008 order, ordered on January 14, 2009, is dissolved. Court of Appeals No. 289237.

WEAVER, J. (*concurring*). I concur in the order denying leave to appeal in this case. I write separately to provide important background information concerning the defendant's repeated attempts to avoid producing his personal notes.[1]

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[9] *Id.* at 164. In reaching this conclusion, the court observed that even with crimes and sentence enhancements with no *mens rea* requirement "[t]here is a certain minimal mental element required in order to establish the actus reus itself. *This is the element of volition*." *Id.* at 160 (quoting *State v Utter*, 4 Wash App 137 [1971]). Requiring a voluntary action to impose criminal liability finds support in LaFave, Substantive Criminal Law, § 6.1(c), pp 425-426 (2d ed).

[10] Black's Law Dictionary (8th ed) defines "threat" as "[a] communicated intent to inflict harm or loss on another or on another's property . . . ."

[11] It seems I should be entitled to this and similar conclusions without being accused of holding "an unusual perspective of criminal law and criminality in general," especially given the divergent outcomes on the issue in other states.

[1] I note further that the dissent improperly insinuates that the issue concerning the request for production of documents in this case is also an issue that should be addressed in the companion case of *Safranek v Monaghan*, Docket No. 138055.

Plaintiffs are former law professors at defendant Ave Maria School of Law. Plaintiffs claim that their employment was wrongfully terminated at Ave Maria in 2007 because they reported violations or suspected violations of law by Ave Maria. Plaintiffs brought suit against Ave Maria and others, including Thomas S. Monaghan, who is the chairperson of both the Ave Maria Board of Governors and the Ave Maria Foundation.

At the outset, the public should be made aware of the fact that defendant Monaghan's attempts to avoid the production of these personal notes have a long history. Plaintiffs first filed suit against the defendant, among others, in October 2007. On March 10, 2008, plaintiffs served document requests on the defendant's attorneys. Of particular importance to this appeal was plaintiffs' document Request 16, which asked the defendant to produce

> [a]ll slips, note cards, index cards, or other paper format that Thomas S. Monaghan [defendant] carried on his person and/or used to log or record his thoughts and/or to record, as they occur to him, tasks, reminders, "to do" items, creative ideas or agenda items for himself or others. Mr. Monaghan made use of such writing during his taped deposition in this action, and on information and belief, makes the use of such writings part of his daily work practice and has kept the originals or transcriptions of such documents for decades. *Such request is limited to documents or portions of documents that relate to any matter raised in this litigation, including, without limitation, any material relating to any party in this action as well as any matter whatsoever involving AMSL [Ave Maria School of Law], AMU [Ave Maria University], AMC [Ave Maria College] or his investments or other interests in Florida*. [Emphasis added.]

The italicized language above limits the request for production to only those documents pertaining to the lawsuit; however, it appears that the defendant attempted to avoid or at least delay the production of the documents on the ground that the request was "overbroad" and "unduly burdensome" when, in fact, the request was appropriately limited to only those documents pertaining to the lawsuit. It is also pertinent that defendant Monaghan evidently failed to disclose that he possessed documents that might pertain to the lawsuit, specifically defendant's personal notes recorded on yellow legal pads. Indeed, defendant's own attorneys were apparently not aware of the existence of these personal notes at the time of the May 21, 2008, court hearing.

On May 21, 2008, the trial court held a hearing on defendant Monaghan's motion for a protective order and plaintiffs' motion to compel. In its bench ruling, the court stated, "The Court's ruling on that whole group of things is, that any reminder notes regarding the law school shall be produced." The defendant asserts that because the yellow legal pads were not specifically mentioned in the court's bench ruling, the ruling was limited to the orange travel itineraries. Although the ruling is apparently ambiguous, there is no question that the trial judge's August

27, 2008, memorialization of her May 21, 2008, bench ruling pertained to all documents be they orange, green, or yellow:

> IT IS FURTHER ORDERED that defendant Monaghan shall produce documents responsive to Request 16, which may be limited to documents regarding the Ave Maria School of Law, its faculty/staff, named parties to the matter, and/or the move to Florida.

Yet even after this order for production was entered on August 27, 2008, the defendant managed to stall production of the documents further by objecting to how to produce them. Thus, there were hearings on these discovery motions on October 1, November 12, and December 17, 2008.

The trial court's November 14, 2008, order, relating back to the hearings on October 1 and November 12, explicitly detailed what was required of the defendant and read, in part as follows:

> A. Defendant Monaghan shall comply with the Court's order of August 27, 2008, and produce to plaintiffs' counsel by producing copies of all notes, of any description and/or date, which might reasonably contain matters (a) responsive to the plaintiffs' "Request 16," to which that Order refers, and (b) which pertain to the Ave Maria School of Law, its faculty/staff, named parties to this matter and/or the move to Florida. *Defendant shall produce any documents that are responsive to Request 16 . . . without regard to whether the document is an itinerary, included in a spiral-bound notebook, part of a legal or other pad of paper or loose, and without regard to the color of the paper*. [Emphasis added.]

Rather than comply with the trial court's November 14 order, defendant Monaghan filed a motion on November 21, to stay the effect of the November 14 order while he pursued an application for leave to file an interlocutory appeal in the Court of Appeals. The hearing on the defendant's motion to stay was held on December 17 and the trial judge warned the defendant that if he did not produce the documents within seven days, she would hold him in contempt of court and order sanctions of $2,500.

On December 23, the Court of Appeals stayed the trial court proceedings until the resolution of the defendant's appeal and, on December 29, the Court of Appeals lifted the stay and denied the defendant's application for leave to appeal. The defendant filed an application for leave to appeal the Court of Appeals order less than a week later, on January 2, 2009, nearly nine months after plaintiffs made their request for all documents pertaining to the lawsuit.

In light of the history of plaintiffs' repeated attempts to obtain copies of defendant's relevant personal notes, the trial judge did not abuse her discretion in issuing the November 14, 2008, order. Over the course of eight months, defendant did not produce documents in response to plaintiffs' requests. Even after the trial court issued the order on August

27, 2008, defendant did not offer to produce the relevant notes on yellow legal pads, but contended that the production of those notes had not been ordered.

While it is understandable why defendant does not want to produce notes revealing his private thoughts on subjects unrelated to this lawsuit, *some of his notes* might be relevant to this lawsuit. To the extent any of those notes are relevant, he should have produced them long before the hearing on October 1, 2008.

Thus, in light of defendant Monaghan's failure to produce the relevant notes voluntarily, the trial judge was justified in taking action to force him to do so. As noted by the judge on page five of the November 14, 2008, order: "These documents . . . should have been produced without objection months ago—*many* months ago . . . ." Thus, because the trial judge did not abuse her discretion in issuing the November 14, 2008, order, I concur in the order denying defendants' application for leave to appeal.

MARKMAN, J. (*dissenting*). I dissent. This case involves a trial court's sweeping, over-broad, and inherently unfair order, which forces defendant to produce over 10 years of personal notes detailing his most intimate and private thoughts concerning religion, politics, people with whom he has met and with whom he associates, his family, his creative ideas, and his business dealings, *regardless of whether these notes are discoverable or responsive to plaintiffs' document request*.[1] Because I believe that such a disregard for both the court rules of this state and defendant's privacy raises serious questions about whether the trial court abused its discretion, I would remand this matter to the Court of Appeals for further consideration.

Under MCR 2.302(B)(1), parties may obtain discovery regarding any "relevant" information that "appears reasonably calculated to lead to discovery of admissible evidence." "[We review] a trial court's decision regarding discovery for an abuse of discretion." *Muci v State Farm Mut Automobile Ins Co*, 478 Mich 178, 200 (2007). Significantly, a trial court must "ensure that discovery requests are fair and legitimate by providing that discovery may be circumscribed to prevent excessive, abusive, irrelevant, or unduly burdensome requests." *Hamed v Wayne Co*, 271 Mich App 106, 110 (2006), citing MCR 2.302(C).

Defendant is apparently a prolific notetaker and, over the past decade, has kept notes on three separate mediums—orange paper, green notebooks, and yellow legal pads. The genesis of the current dispute lies in plaintiffs' requests for production (Request 16), which sought "Monaghan's daily reminders, his daily notes to himself," to which defendant objected that plaintiffs' request was "over-broad." During a May 21, 2008, hearing on this matter, defense counsel sought clarification from

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[1] Although the trial court's order for production is also subject to a protective order, the efficacy of that protective order, as discussed below, has been seriously called into question and in no way alters the onerous burden to produce over 10 years of largely irrelevant notes that the trial court has now imposed on defendant.

the trial court concerning whether the request only "applies to the orange and the [green] notebook items, if it says law school." The court stated, "Right," "that's what they asked, aren't those called the reminder notes, the orange ones?" Thus, the court's ruling specifically limited plaintiffs' Request 16 to defendant's *orange* notes, which limitation was then memorialized in an August 27, 2008, order that stated "defendant Monaghan shall produce documents responsive to Request 16, which may be limited to documents regarding Ave Maria School of Law, its faculty/staff, named parties to this matter, and/or the move to Florida."

Defendant complied with the court's order by making the orange notes available to plaintiffs' counsel, and voluntarily producing relevant portions of the green spiral notebooks. However, plaintiffs' counsel then filed a motion to compel production of *all* notes, claiming that defendant had violated the trial court's August 27, 2008, order by only producing the orange notes since "[t]he court d[id]n't say anything about [green] spiral versus orange versus yellow or white. [Defendant] just decided that." Despite the fact that the court had specifically instructed defendant that he was only required to produce the orange notes, the court agreed with plaintiffs' counsel and issued a subsequent order on November 14, 2008, that required defendant to produce *all* notes "wholesale" pertaining to Request 16 "without redaction . . . and without regard to whether the document is an itinerary, included in a spiral-bound [green] notebook, part of a [yellow] legal or other [orange] pad or paper or loose, and without regard to the color of the paper." Additionally, the order also stated that "*plaintiffs* shall redact any part of any page of notes that contains both responsive and non-responsive materials and make such redactions known to defendant." (Emphasis added.) Thus, defendant must now produce over 10 years of notes regardless of their relevancy or discoverability.

This order appears to be directly contrary to MCR 2.302(B)(1), inasmuch as plaintiffs have offered no discernable reason why *all* of defendant's notes, which include his religious beliefs, private thoughts, personal contacts, etc., are "reasonably calculated to lead to discovery of admissible evidence" in regard to the instant litigation. Instead, the court's order seems likely to subject defendant to unwarranted "annoyance, embarrassment, oppression, [and] undue burden," MCR 2.302(C)(1), the very result our court rules are intended to prevent. Thus, I believe there are serious questions concerning whether the court abused its discretion. Further, I find it even more troubling that the court affirmatively represented to defendant that plaintiffs' Request 16 pertained only to the orange notes, but then essentially penalized him for not producing *all* types of relevant notes by now requiring that defendant produce all his notes "wholesale" to plaintiffs' attorney. This seems extraordinarily unfair to defendant and, in my judgment, warrants further consideration by the Court of Appeals.[2]

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[2] In light of the trial court's ruling that defendant, in response to Request 16, was *only* required to produce the orange notes, it is puzzling how Justice WEAVER in her concurrence could assert that this ruling was

Additionally, plaintiffs' recent appeal to this Court in the companion case of *Safranek v Monaghan*, Docket No. 138055, raises further concerns that the trial court's production order risks compromising defendant's legitimate privacy concerns. During defendant's intermediate appeal in the instant case, plaintiffs *publically* disclosed five pages of defendant's personal notes that had been designated as "confidential." Because this violated the trial court's protective order, which requires that plaintiffs take "reasonably appropriate steps . . . to preserve the confidentiality of information [designated as] confidential," defendant moved to have those documents stricken from the record. Recognizing that the trial court specifically "require[d defendant] to produce [his notes] *subject to the protective order*," the Court of Appeals ordered that notes designated as "confidential" be stricken from the record. The court also specified, however, that these documents could still be used in the trial court if the trial court found them to be relevant—a determination that has not yet been made. Nonetheless, plaintiffs have appealed that decision to this Court in Docket No. 138055. In doing so, they argued that these notes are "matters of which the public generally has a right to know," which is only true in the event the trial court concludes that those documents are *relevant* to the issues in this case. There is no public "right to know" the personal beliefs and attitudes of a person simply because that person has become a party to a lawsuit, unless such beliefs and attitudes are materially relevant to the lawsuit.

In other words, plaintiffs have appealed whether defendant's notes, which plaintiffs may still attempt to introduce at trial, should be made public *before* any determination by the trial court that those documents are indeed *relevant* to the subject matter of plaintiffs' claim. Plaintiffs' interest in publicly disclosing the contents of defendant's personal notes in this fashion is troubling, and lends strength to the concerns raised by defendant in this appeal, which is that plaintiffs wish to disclose the substance of even *irrelevant* notes apparently for no other purpose than to publicly denigrate defendant's personal beliefs and attitudes regarding politics, religion, friends, etc. These personal beliefs and attitudes have no obvious relationship to the issues involved in the instant lawsuit, and are properly made publicly available only after a determination of relevance and materiality.

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"ambiguous." How could the trial court have been any *more* clear that defendant was required only to produce his orange notes? This misapprehension on Justice WEAVER's part also explains her misapprehension concerning defendant's arguments that he was unfairly treated by being required to produce *all* of his notes "wholesale," in apparent response to having violated the initial production order. Finally, even if a litigant *has* failed to comply with a production order, since when is the appropriate remedy to require the production of irrelevant documents?

Thus, defendant's concerns appear not to be unwarranted.[3] A party should not have to undergo an invasion of privacy of this sort in order to defend himself in civil litigation in this state. Therefore, I would remand this matter to the Court of Appeals to consider the propriety of the trial court's November 14, 2008, order. However, because the majority does not concur with this position, I would respectfully urge the trial court to carefully review and reconsider the breadth of its production order.

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

PEOPLE v SCHMIDT, 138209; Court of Appeals No. 280127.

KELLY, C.J. I would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J. I would grant leave to appeal.

*Reconsideration Granted June 12, 2009:*

CHAMBERS v WAYNE COUNTY AIRPORT AUTHORITY, No. 136900. We vacate our order dated December 19, 2008. On reconsideration, the application for leave to appeal the judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the questions

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[3] To further emphasize defendant's concern regarding the trial court's production order, plaintiffs have acknowledged providing *Ave Watch*, a public website that is apparently antagonistic to defendant, with copies of defendant's notes that they consider relevant to this litigation. However, defendant has alleged that one of his notes, which had not yet been filed with the trial court and that defendant had not been afforded an opportunity to designate as "confidential," was provided to *Ave Watch*. Defendant alleged that plaintiffs' counsel used her cell phone to take a picture of this document, which she then sent to *Ave Watch*. Plaintiffs' counsel denied this claim and stated that "I'm not even savvy enough to get this thing. I barely can print a blurry thing off my phone. But even if I had I wouldn't have provided it to [*Ave Watch*]." However, the note at issue *did* appear on *Ave Watch*, <http://avewatch.com/?p=89> (accessed June 1, 2009), accompanied by the following narrative:

> [Plaintiffs' counsel], apparently, was visiting [defendant]'s office in accordance with an earlier Court Order to produce documents. [Plaintiffs' counsel] was allowed to view only a select subset of [defendant]'s personal notes, and was then denied a request to have any of the notes copied. Why? One sample was preserved as a photo on [plaintiffs' counsel's] cell phone.

This note stated, "November 4 Goals; 5 down, 6 to go. 2 leaders gone. Now they are in the minority."

presented should be reviewed by this Court. Summary disposition entered at 482 Mich 1136. Court of Appeals No. 277900.

CORRIGAN, J. (*dissenting*). In this case arising from a slip and fall in a puddle of water at the Detroit Metropolitan Airport, I dissent from the order granting plaintiff's motion for reconsideration. This Court did not err in its December 18, 2008, order reversing the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion. Defendant Wayne County Airport Authority is entitled to summary disposition because plaintiff failed to serve on defendant a notice of the occurrence of the injury and the nature of the defect within 120 days of his injury. An injured person must serve such a notice as a condition to recovery under the public building exception to governmental immunity, MCL 691.1406.

By granting reconsideration and reinstating the Court of Appeals decision, the majority leaves intact a complete distortion of the statutory notice provision. Under the decision upheld today, a governmental agency in Michigan now must divine the intentions of any injured or potentially injured person and then notify itself that the person may file a lawsuit. Any routine police or incident report that the government itself creates may now be deemed a notice to the government of a potential lawsuit. This decision subverts our Legislature's clearly expressed mandate that "the injured person" must serve a notice on the government as a "condition" to recovery. As a result, governmental agencies in Michigan will likely be forced to devote limited public resources to comply with a new, judicially invented duty in thousands of potential lawsuits every year.

The notice provision of the public building exception, MCL 691.1406, provides:

> As a *condition* to any recovery for injuries sustained by reason of any dangerous or defective public building, *the injured person*, within 120 days from the time the injury occurred, *shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect*. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.
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> The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. [Emphasis added.]

In *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197 (2007), the plaintiff filed a written notice after 140 days, thus failing to meet the 120-day deadline of the notice provision in the highway exception to governmental immunity, MCL 691.1404(1). This Court rejected earlier caselaw[1] that had assumed notice provisions are unconstitutional if they do not contain a prejudice requirement. *Rowland*, *supra* at 210. This

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[1] See *Hobbs v Dep't of State Hwys*, 398 Mich 90, 96 (1976), and *Brown v Manistee Co Rd Comm*, 452 Mich 354, 356-357 (1996).

Court agreed with Justice RILEY's dissent in *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996), that the notice provision is social legislation that has a rational basis. " 'Notice provisions rationally and reasonably provide the state with the opportunity to investigate and evaluate a claim.' " *Rowland*, *supra*, at 210, quoting *Brown*, *supra* at 370 (RILEY, J., dissenting). Other reasons for requiring notice include "allowing time for creating reserves for the [Motor Vehicle Accident Claims] Fund, reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed." *Rowland*, *supra* at 212, citing the dissent in the consolidated cases of *Lisee v Secretary of State* and *Howell v Lazaruk*, 388 Mich 32 (1972). All these reasons provided a rational basis that assured the constitutionality of the notice provision. *Rowland*, *supra* at 212.

The notice provision at issue here is substantively identical to the provision in *Rowland*. It requires "the injured person" to serve a notice on the responsible governmental agency "within 120 days from the time the injury occurred." Plaintiff did not serve any notice. Rather, plaintiff claims, and the Court of Appeals held, that an internal incident report, a report that defendant itself generated, was sufficient to establish that plaintiff served a notice.

But it is beyond dispute that plaintiff, "the injured person," did not serve this internal incident report on an individual who may lawfully be served with civil process directed against defendant. An officer for defendant simply prepared the report in the course of his duties and submitted the report to defendant's operations agent. Plaintiff presented no evidence that either of these employees was authorized to accept service on behalf of defendant.[2]

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[2] Indeed, these lower level bureaucratic employees are not the individuals authorized to accept service of civil process on behalf of defendant under MCL 600.1925:

> Service of process upon public, municipal, quasi-municipal, or governmental corporations, unincorporated boards, or public bodies, may be made by leaving a summons and a copy of the complaint with
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> (8) *the president, chairman, secretary, manager, or clerk*, in the case of any other public body organized or existing under the constitution or any law of this state, when by statute no other method of service is specially provided.
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> The service of process may be made on *any officer having substantially the same duties as those named or described irrespective of their titles*. In any case, service may be made by leaving a summons and a copy of the complaint with a person in charge of the office of any of the above-described officers upon whom service may be

Nor did plaintiff's informal oral statement to defendant's officer following his fall suffice to establish the statutorily required notice. MCL 691.1406 requires the injured person to serve "*a* notice" on the governmental agency. The term "*a* notice" plainly contemplates a written document. Moreover, the statute provides that "the notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the responsible governmental agency . . . ." An informal oral statement obviously cannot be "served" personally or by certified mail. Black's Law Dictionary (6th ed) defines "service" in practice as the

> exhibition or delivery of a writ, summons and complaint, criminal summons, notice, order, etc., by an authorized person, to a person who is thereby officially notified of some action or proceeding in which he is concerned, and is thereby advised or warned of some action or step which he is commanded to take or to forbear.

This definition requires the delivery of a written document to the person authorized to accept service to provide the requisite official notice.

Further, the requirement of MCL 691.1406 that a notice be served on one "who may lawfully be served with *civil process*" on behalf of the governmental agency is incompatible with informal oral notice. The service of civil process is the service of formal written documents in order to commence suit.[3] It follows that a notice must also be a formal written document sufficient to make the governmental agency aware of the potentially impending lawsuit. The judiciary should not eviscerate the legal definition of the terms employed by the Legislature to allow completely informal oral statements to form the requisite service of notice.

Plaintiff's failure to serve a notice within 120 days bars his recovery. As we held in *Rowland*, service of a notice is mandatory, and MCL 691.1406 plainly says that service of a notice is "a condition to any recovery for injuries sustained by reason of any dangerous or defective public building." Plaintiff did not satisfy that condition, and he thus may not recover for his injuries under the public building exception.

The failure of the Court of Appeals to enforce the statutory notice requirement, a failure that the majority of this Court now leaves intact, entirely subverts the proper functioning of a large governmental organization such as the defendant airport authority. MCL 691.1406, by requiring an injured person to serve a notice on an individual who may legally be served with process against the governmental agency, ensures that the notice will be directed to appropriate personnel to evaluate the claim and prepare for potential litigation. By contrast, a routine internal

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made and sending by registered mail a summons and a copy of the complaint addressed to such officer at his office.

[3] MCR 2.102.

incident report may not alert the governmental agency's risk managers that the injured person is contemplating a potential claim.

Nor would the Court of Appeals reasoning be limited to cases arising under the public building exception. If an internal incident report is now considered "a notice" from "the injured person" under the public building exception, then it is fair to conclude that a routine police report of a seemingly minor traffic accident or of a pedestrian trip and fall could also constitute a notice for the purposes of the highway exception, MCL 691.1404(1).

The ramifications of this new, judicially invented duty of self-notification should not be underestimated. Governmental agencies in Michigan are now tantamount to agents for thousands of persons every year who might, one day, claim to be injured after tripping, slipping, falling, or stumbling in a public building or on a public road or sidewalk, or after a minor automobile accident. This new duty will arise whenever a routine incident or police report has been prepared. Governmental agencies may have no choice but to use limited public funds to hire additional staff to comb through thousands of reports of seemingly minor incidents to discern whether each report is actually "a notice" from "the injured person" that requires preparation for a possible lawsuit. Or perhaps, to protect against the increased risk of litigation and the resulting depletion of scarce public funds, governmental agencies will simply decline to prepare police and incident reports on a regular basis, thereby depriving the public of the obvious benefits that such reports serve.

Finally, the new majority's failure to abide by *Rowland* continues a growing and troubling trend. Rather than forthrightly overruling this decision, it is increasingly becoming the practice of this Court to simply ignore precedents with which it disagrees. See, e.g., *Vanslembrouck v Halperin*, 483 Mich 965 (2009), where the new majority ignored *Vega v Lakeland Hospitals*, 479 Mich 243, 244 (2007); *Hardacre v Saginaw Vascular Services*, 483 Mich 918 (2009), where it failed to follow *Boodt v Borgess Med Ctr*, 481 Mich 558 (2008); *Sazima v Shepherd Bar & Restaurant*, 483 Mich 924 (2009), where it failed to follow *Chrysler v Blue Arrow Transport Lines*, 295 Mich 606 (1940), and *Camburn v Northwest School Dist*, 459 Mich 471 (1999); and *Juarez v Holbrook*, 483 Mich 970 (2009), where it failed to follow *Smith v Khouri*, 481 Mich 519 (2008).

Accordingly, I would deny the motion for reconsideration. Plaintiff, "the injured person," did not serve "a notice" of the defect and his injury on the responsible governmental agency within 120 days and thus did not satisfy the "condition" for recovery prescribed in MCL 691.1406.

YOUNG and MARKMAN, JJ. We join the statement of Justice CORRIGAN.

YOUNG, J. (*dissenting*). I fully concur with the dissenting statement of Justice CORRIGAN. I write separately to note that the new majority's decision in this case reflects this Court's more recent hostility to the notion of governmental immunity and any other *legislatively* imposed measure that reduces the volume of civil litigation in this state. This

decision hearkens back to our predecessors' refusal to recognize the legislative prerogative to regulate when and how the state may be sued.[1]

Since its inception, the concept of sovereign immunity has given the state government and its agencies the broadest possible protection from civil suit. The concept of sovereign, or governmental, immunity dates back to English common law. It is based on the premise that the sovereign *is* the law and, therefore, cannot be sued as of right in its own courts.[2] Rather, the sovereign must "expressly permit[] a suit against it."[3] Consistent with that concept, this Court, until the 1970s, historically held that the state was entitled to place conditions on the suits it permitted against itself.[4] For at least 70 years, this Court strictly upheld the plain language of such statutes that required prior notice to the government agency as a precondition for suit.[5]

Despite this long history respecting governmental immunity, the modern Court has eschewed legislatively imposed conditions on lawsuits and eroded the government's innate immunity. Beginning in 1970, justices of this Court began to question the due process implications of treating plaintiffs who sue a governmental defendant differently from those who sue a private entity.[6] Subsequently, the Court held that the differentiation between suits against private and governmental defendants violated the equal protection rights of plaintiffs.[7]

The Court eventually acknowledged the intellectual incoherence of its constitutional assault on governmental immunity and held that a notice provision *might* be constitutionally valid if it "serve[s] a permissible purpose, such as to prevent prejudice . . . ."[8] The Court held that the only possible *legitimate* purpose that a notice provision could serve is to prevent prejudice against the governmental defendant. Accordingly, in the 1970s, the Court judicially rewrote notice provisions in governmental immunity statutes by engrafting a nonexistent "actual prejudice" element.[9] The Court upheld this judicially created element in governmental

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[1] See Young, *A judicial traditionalist confronts Justice Brennan's school of judicial philosophy*, 33 Okla City U L R 263, 269-271 (2008).

[2] *Odom v Wayne Co*, 482 Mich 459, 477 (2008), citing Prosser, Torts (4th ed), § 131, p 970, and 4 Restatement Torts, 2d, ch 45A, p 394.

[3] *Id.*, citing Prosser, *supra*, § 131, pp 971, 975-976, and Restatement, *supra*, § 895D and comment a, pp 399-401. See also Young, *supra* at 269-270 and n 21.

[4] *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 212 (2007), quoting *Moulter v Grand Rapid*s, 155 Mich 165, 168-169 (1908).

[5] *Id.* at 205-206 (citing caselaw dating from 1897 through 1969).

[6] *Id.* at 206, citing *Grubaugh v City of St Johns*, 384 Mich 165 (1970).

[7] *Id.* at 206-207, citing *Reich v State Hwy Dep't*, 386 Mich 617 (1972).

[8] *Id.* at 208, citing *Carver v McKearn*, 390 Mich 96 (1976).

[9] *Hobbs v Dep't of State Hwys*, 398 Mich 90 (1976); *Carver*, *supra*.

immunity notice provisions through 1996.[10] Conceding that the "actual prejudice" element was not in the plain language of such statutory notice provisions, the Court held that the Legislature had "acquiesced" in this interpretation because it had not amended the governmental immunity statutes to "overrule" the judicially engrafted element.[11]

The earlier Court's ever evolving legal rationale to limit governmental immunity notice provisions evinced a policy-driven desire to promote suits against government defendants. The language of these provisions is clear and unambiguous; yet, the Court went to great lengths "to justify and enforce its hostility" toward the concept of governmental immunity and to supplant its policy choice for that of the Legislature.[12]

However, as this Court has more recently reiterated, governmental immunity legislation is constitutionally valid because it is reasonably related to several legitimate government interests.[13] Notice provisions afford the government " 'the opportunity to investigate and evaluate a claim.' "[14] They protect the government's publicly funded treasury from " 'unjust raids . . . by unscrupulous prosecution of trumped-up, exaggerated, and stale claims, by requiring a claimant to give definite information . . . at a time when the matter is fresh, conditions unchanged, and

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[10] *Brown v Manistee Co Rd Comm*, 452 Mich 354 (1996).

[11] *Id.* at 366-368 and n 18. As we emphatically held in *Donajkowski v Alpena Power Co*, 460 Mich 243, 261 (1999), legislative acquiescence "is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence." (Emphasis in original.)

In any event, *Brown*'s conclusion based on the theory of legislative acquiescence is legally infirm. *Brown* asserted that the actual prejudice element was only engrafted onto the governmental immunity notice provision because the Court "could not posit another purpose for the notice provision . . . ." *Brown*, *supra* at 367 n 18. Accordingly, the Legislature could have subsequently clarified the statute by "further articulat[ing] the notice provision's purpose and possibly [creating] a presumption of prejudice" from the lack of timely notice. *Id.* As aptly noted by the dissent in *Brown*, however, the Legislature was powerless to remove the judicially created actual prejudice element from the statute because *Hobbs* held that this element "saved the statute from constitutional infirmity." *Brown*, *supra* at 373 (RILEY, J., dissenting).

[12] Young, *supra* at 271.

[13] *Rowland*, *supra* at 212. Moreover, we must find a statute constitutional if "any state of facts either known or which could reasonably be assumed affords support" for the holding. *Id.* (quotation marks and citations omitted).

[14] *Id.* at 211, quoting *Brown*, *supra* at 370 (RILEY, J., dissenting).

witnesses thereto and to the accident within reach.' "[15] More broadly, notice provisions are constitutional because the Legislature created them as "quid pro quo for its relinquishment of immunity" in relation to civil suits permitted under the exceptions to governmental immunity.[16]

Despite the various well-reasoned purposes notice provisions serve, justices of the modern Court have boldly stated:

> [W]e acknowledge frankly that statutes which limit access to the courts by people seeking redress for wrongs *are not looked upon with favor by us*. We acquiesce in the enforcement of statutes of limitation *when we are not persuaded that they unduly restrict such access*, but we *look askance at devices such as notice requirements* which have the effect of shortening the period of time set forth in such statutes.[17]

Although commendable for its blunt honesty, such a statement undermines our tripartite system of government and is acutely repugnant to the right of the people to express their views through their elected representatives in the Legislature. This is rule by a judicial oligarchy. It is completely contrary to our judicial function. Reversion to overruled caselaw that proudly usurps the legislative function in this fashion is exactly what the new majority has accomplished by ignoring *Rowland* and engrafting a "substantial compliance" exception onto the notice provision in the public building exception to governmental immunity.[18]

The new majority's reversion is not surprising given its members' past expressions of distaste for governmental immunity principles. For example, members of the new majority have repudiated the concept that immunity is a characteristic of government and would foist the duty of raising immunity onto the government as an affirmative defense.[19] The members of the new majority have not limited their disapproval of legislative limitations on causes of action to those against the govern-

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[15] *Id.*, quoting *Ridgeway v Escanaba*, 154 Mich 68, 72-73 (1908).

[16] *Brown*, *supra* at 372 (RILEY, J., dissenting).

[17] *Carver*, *supra* at 99 (emphasis added), quoted with approval in *Hobbs*, *supra* at 96.

[18] MCL 691.1406.

[19] See, e.g., *Lash v Traverse City*, 479 Mich 180, 201 (2007) (KELLY, J., dissenting in part) (arguing that governmental immunity is the exception rather than the rule and the governmental defendant must raise and prove immunity as an affirmative defense); *Costa v Community Emergency Medical Services, Inc*, 475 Mich 403, 416-420 (2006) (KELLY, J., dissenting) (arguing that governmental immunity is an affirmative defense and, therefore, it does not contradict the purpose of the doctrine to require a governmental defendant to file an affidavit of meritorious defense, MCL 600.2912e, in a medical malpractice case); *Mack v Detroit*, 467 Mich 186, 220-222 (2002) (CAVANAGH, J., dissenting) (expressing his preference for recent caselaw over the centuries-old common-law concept

ment. They have challenged statutes of limitations, notice and tolling provisions, and express limitations in the Legislature's defined parameters on causes of action.[20]

As noted by Justice CORRIGAN, the exercise *sub silentio* of judicial power will reign supreme in the new order the new majority desires to create.

For these reasons and those stated in Justice CORRIGAN's statement, I dissent from the new majority's decision to vacate our prior, precedentially supported order to reverse the Court of Appeals judgment and to simply deny leave to appeal without explanation of the majority's failure to follow *Rowland*.

CORRIGAN and MARKMAN, JJ. We join the statement of Justice YOUNG.

*Summary Disposition June 17, 2009:*

ROBERTS v SAFFELL, No. 137749. Pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we affirm the judgment of the Court of Appeals. Plaintiffs unknowingly purchased a termite-infested house from defendants. Under the Seller Disclosure Act (SDA), MCL 565.951 *et seq*., defendants were required to prepare a seller's disclosure statement (SDS) regarding "the condition and information concerning the property, known by [sellers.]" MCL 565.957(1). In response to the question concerning whether the house had a "history of infestation . . . (termites, carpenter ants, etc.)," defendants, "based on [their] knowledge at the

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of governmental immunity in arguing that the governmental defendant must plead immunity as an affirmative defense).

[20] See, e.g., *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 479 Mich 378, 420-425 (2007) (WEAVER, J., dissenting) (arguing that this Court should follow the common-law discovery rule regarding the accrual date of a claim for the purposes of a statute of limitations without regard to the subsequent enactment of a highly comprehensive statutory scheme meant to preempt the common law); *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 709 (2004) (KELLY, J., dissenting) (suggesting we adopt a substantial compliance standard for notices of intent in medical malpractice actions "if they serve the object of the statute and do not prejudice the defendant"); *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 50-54 (2002) (KELLY, J., dissenting) (contending that the standards of care for a medical malpractice action under MCL 600.2912a should apply to neonatal nurses, even though those individuals are not engaged in the practice of medicine as defined by the statute); *McDougall v Schanz*, 461 Mich 15, 52-55 (1999) (CAVANAGH, J., dissenting) (arguing that statutory standards or requirements for expert witness qualifications in medical malpractice actions do not affect the substance of the cause of action and, therefore, represent a legislative usurpation of judicial power).

signing of this document," answered "no" on the SDS. *Id*. Once plaintiffs subsequently discovered a termite problem, they initiated a claim for innocent misrepresentation, which requires a showing that defendants: (1) made a false statement in a transaction with plaintiff, (2) without knowledge of that statement's falsity, (3) which statement actually deceived plaintiffs, and (4) on which plaintiffs detrimentally relied, with the benefit inuring to defendants. *United States Fidelity & Guaranty Co v Black*, 412 Mich 99, 116 (1981). However, the SDA provides that a seller is "not liable for any error, inaccuracy, or omission in any information delivered pursuant to this act if the error, inaccuracy, or omission was not within the personal knowledge of the transferor . . . ." MCL 565.955(1). Thus, because a claim for innocent misrepresentation requires that a defendant make a false statement *without knowledge* of its falsity, the Court of Appeals correctly held that innocent misrepresentation does not constitute a viable cause of action under the SDA. Whether defendants did or did not possess personal knowledge of the infestation is a matter not before this Court as a result of plaintiffs' abandonment of their fraudulent misrepresentation claim and their exclusive focus on their innocent misrepresentation claim. Reported below: 280 Mich App 397.

*Leave to Appeal Denied June 17, 2009:*

PEOPLE v THURMAN BELL, No. 137381; Court of Appeals No. 277896.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v QUILLEN, No. 137553; Court of Appeals No. 285613.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

PEOPLE v LEANDER TAYLOR, No. 137871; Court of Appeals No. 274171.

PEOPLE v BRITTANY WALKER, No. 137886; Court of Appeals No. 284233.
KELLY, C.J. I would grant leave to appeal.

CALHOUN v BAISDEN, No. 137902; Court of Appeals No. 286453.
HATHAWAY, J. I would grant leave to appeal.

AMERISURE INSURANCE COMPANY v LAMSON, No. 137980; Court of Appeals No. 279588.
HATHAWAY, J. I would grant leave to appeal.

PEOPLE v STOKES, No. 138030; Court of Appeals No. 285585.
KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

HOME OWNERS INSURANCE COMPANY v SELFRIDGE, No. 138157; Court of Appeals No. 280112.
HATHAWAY, J. I would grant leave to appeal.

PEOPLE v STEVENSON, No. 138192; Court of Appeals No. 289184.

PEOPLE v MOYER, No. 138208; Court of Appeals No. 279915.
KELLY, C.J., and CAVANAGH, J. We would grant leave to appeal.

DENHA v DART PROPERTIES, INC, No. 138254; Court of Appeals No. 282142.

HATHAWAY, J. I would grant leave to appeal.

HUEY v ALLSTATE INSURANCE COMPANY, No. 138269; Court of Appeals No. 282136.

KELLER v PUBLIC SCHOOL EMPLOYEES RETIREMENT SYSTEM, No. 138275; Court of Appeals No. 287440.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v PINKNEY, No. 138550; Court of Appeals No. 286992.

*Reconsideration Denied June 17, 2009:*

CALLAWAY v GENERAL MOTORS CORPORATION, No. 137254. Leave to appeal denied at 483 Mich 887. Court of Appeals No. 283320.

KELLY, C.J., and HATHAWAY, J. We would grant reconsideration.

*Order Granting Oral Argument in Case Pending on Application for Leave to Appeal June 23, 2009:*

LEE v CITY OF DETROIT, No. 138091. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order addressing whether, with respect to the plaintiff's claim that the police department violated the Whistleblowers' Protection Act, MCL 15.361 *et seq*., the Court of Appeals erred in ruling that the plaintiff failed to provide sufficient evidence to establish a genuine issue of material fact regarding a causal connection between his November 2, 2004, internal complaint and his transfer from the Gang Enforcement Section to the Records and Identification Section of the police department. The parties should not submit mere restatements of their application papers. Court of Appeals No. 274530.

*Summary Disposition June 23, 2009:*

PEOPLE v MUNGO, No. 136017. By order of May 27, 2008, the application for leave to appeal the January 17, 2008, judgment of the Court of Appeals was held in abeyance pending the decision of the United States Supreme Court in *Arizona v Gant* (Docket No. 07-542). On order of the Court, the case having been decided on April 21, 2009, *Arizona v Gant*, 556 US ___; 129 S Ct 1710; 173 L Ed 2d 485 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that court for reconsideration in light of the decision in *Arizona v Gant*.

We further note that a similar issue is presented in *People v Hunter*, unpublished opinion per curiam of the Court of Appeals, issued April

3, 2008 (Docket No. 272873), which we have peremptorily vacated and remanded to the Court of Appeals for reconsideration in light of *Gant* by order dated June 23, 2009 (Docket No. 136546). We do not retain jurisdiction. Court of Appeals No. 269250.

PEOPLE v ODELL HUNTER, No. 136546. By order of September 9, 2008, the application for leave to appeal the April 3, 2008, judgment of the Court of Appeals was held in abeyance pending the decision of the United States Supreme Court in *Arizona v Gant* (Docket No. 07-542). On order of the Court, the case having been decided on April 21, 2009, *Arizona v Gant*, 556 US ___; 129 S Ct 1710; 173 L Ed 2d 485 (2009), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to that court for reconsideration in light of the decision in *Arizona v Gant*.

We further note that a similar issue is presented in *People v Mungo*, 277 Mich App 577 (2008), which we have peremptorily vacated and remanded to the Court of Appeals for reconsideration in light of *Gant* by order dated June 23, 2009 (Docket No. 136017). We do not retain jurisdiction. Court of Appeals No. 272873.

MARK CHABAN, PC v GETSINGER, Nos. 136752 and 136753. On order of the Court, the motion to intervene as appellant is granted. The application for leave to appeal the May 14, 2008, orders of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration of its May 14, 2008, orders to afford Tindall & Company P.C. the opportunity to present arguments in support of the portions of the probate court's March 6, 2006, and March 8, 2006, orders awarding sanctions that were vacated by the Court of Appeals' May 14, 2008, order in No. 282481. We do not retain jurisdiction. Court of Appeals Nos. 282109 and 282481.

CORRIGAN, J. I am not participating in this case because I retained defendant Joseph P. Buttiglieri to represent my husband's estate in probate court and on other matters.

YOUNG, J. *(concurring).* I concur in the order remanding this case to the Court of Appeals. I write separately to commend to the Court of Appeals the following provisions, which may cause the panel to reconsider its previous analysis. MCL 600.2591 provides in pertinent part:

> (1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> (3) As used in this section:

> (a) "Frivolous" means that *at least 1* of the following conditions is met:
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> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
>
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
>
> (iii) The party's legal position was devoid of arguable legal merit. [Emphasis added.]

And MCR 2.114 provides in pertinent part:

> (D) Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that
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> (1) he or she has read the document;
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> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) *the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation*.
>
> (E) Sanctions for Violation. If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages. [Emphasis added.]

The probate court expressly determined that defendant acted "in a manner specifically injected to prolong the proceedings" and "the reason [defendant] was asserting that position was primarily to harass, embarrass or injure [plaintiff]." Thus, on remand, the Court of Appeals may wish to reconsider its determination that the probate court "had no basis upon which to assess sanctions under MCR 2.114 . . . or MCL 600.2591."[1]

PEOPLE v THORNTON, No. 138296. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Genesee Circuit Court and remand this case to that court for resentencing. On remand, the trial court shall sentence the defendant within the appropriate sentencing guidelines range, or articulate on the record why this particular degree of departure is warranted, in accordance with *People v Smith*, 482 Mich 292, 318 (2008). We do not retain jurisdiction. Court of Appeals No. 288897.

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[1] *Mark A Chaban PC v Getsinger*, unpublished order of the Court of Appeals, entered May 14, 2008 (Docket No. 282481).

CORRIGAN, J. (*concurring in the result*). Although I dissented in *People v Smith*, 482 Mich 292 (2008), I concur in the Court's decision to remand for resentencing. I conclude that resentencing is called for in this case for the fundamental reason that, in imposing a sentence that departs from the sentencing guidelines, the sentencing judge did not articulate her reasons with enough specificity "to allow for effective appellate review." *People v Babcock*, 469 Mich 247, 259 n 13 (2003) ("[H]owever it is articulated, the quality of the trial court's statement must be sufficient to allow for effective appellate review."). For example, the sentencing judge observed that defendant lied to the court. His perjury may well constitute a substantial and compelling reason to depart. But because the judge did not describe the nature of the perjury or its effects on the underlying proceedings, we are unable to meaningfully evaluate whether her reasons were sufficient to support a departure.

*Leave to Appeal Granted June 23, 2009:*

PEOPLE v WILCOX, No. 136956. On order of the Court, the application for leave to appeal the June 5, 2008, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the legislative sentencing guidelines, MCL 777.1 *et seq*., applied to the defendant's sentence and, if so, whether the defendant is entitled to be resentenced. The parties may wish to compare the result in this case with the result in *People v Walton*, unpublished opinion per curiam of the Court of Appeals, issued June 3, 2008 (Docket No. 276161).

We further order the St. Joseph Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court. Reported below: 280 Mich App 53.

KELLY, C.J. I would also grant leave to appeal with respect to the defendant's challenge to the constitutionality of MCL 768.27a, for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

*Leave to Appeal Denied June 23, 2009:*

SIERRA CLUB MACKINAC CHAPTER v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 135898; Court of Appeals No. 269181.

MARKMAN, J. (*dissenting*). This case involves Department of Environmental Quality (DEQ) regulations concerning how Michigan's nearly 200 large animal farms, referred to as "concentrated animal-feeding operations (CAFOs)" must dispose of vast amounts of manure. This case produced a published Court of Appeals opinion with a dissent, and the DEQ now appeals, arguing that the Court of Appeals: (1) improperly reviewed the Environmental Protection Agency's approval of a state permit program, which it asserts is exclusively reserved for federal courts; and (2) mistakenly held that comprehensive nutrient management plans that must be submitted to the DEQ by CAFOs constituted an effluent limitation. The issues in this case are jurisprudentially significant and important for the agricultural economy of this state. Therefore, I would grant leave to appeal to consider these and other arguments.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v LYONS, No. 136846; Court of Appeals No. 284473.

*In re* MCBRIDE (DEPARTMENT OF HUMAN SERVICES v MCBRIDE), No. 136988; Court of Appeals No. 282062.

CORRIGAN, J. (*dissenting*). I would reverse the order terminating the respondent father's parental rights to his three sons. As the petitioner, Department of Human Services (DHS), concedes, respondent was unlawfully denied his right to counsel[1] and his right, as an incarcerated party, to participate by telephone in proceedings concerning his children.[2] Moreover, in light of these fundamental errors, the Michigan Attorney General (AG) and Solicitor General (SG) filed a brief amicus curiae[3] urging that reversal is required by Michigan statutory law and court rules, as well as by federal constitutional law. I agree that a miscarriage of justice has occurred. I strenuously dissent from this Court's decisions to countermand its previous order directing oral arguments[4] and to now deny leave to appeal altogether.

## I. FACTS AND PROCEEDINGS

Respondent is the father of three sons who were 8, 10, and 13 years old, respectively, when these proceedings against their mother began in September 2006. Respondent has been incarcerated with the Department of Corrections (DOC) since 2004.[5] His earliest possible release date from prison is June 30, 2015. Upon his incarceration, his sons remained in the care of his wife, and their mother, Susan McBride. Respondent

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[1] MCL 712A.17c; MCR 3.915(B)(1).

[2] MCR 2.004.

[3] The AG notes that the local prosecutor shall serve as the legal consultant to the DHS in child protective proceedings, MCL 712A.17(5), and the AG has supervisory authority over local prosecutors, MCL 14.30. The AG also has general duties to prosecute suits involving state departments, MCL 14.29, and, through the SG, to represent the state in this Court, MCL 14.28. But here the AG has elected to participate only as an amicus curiae as he takes a position adverse to that of the Bay County Prosecuting Attorney, who represents the DHS.

[4] *In re McBride*, 763 NW2d 633 (2009); *In re McBride*, 483 Mich 892 (2009).

[5] Respondent was convicted of first- and second-degree criminal sexual conduct involving a minor. The victim was not one of respondent's children. Significantly, no statute requires termination of a parent's rights to his children merely on the basis of the nature of such convictions. MCL 712A.19b(3)(n)(*i*) permits termination if a parent commits certain offenses, including criminal sexual conduct, if the court *also* "determines that termination is in the child's best interests because

maintained his relationship with his children, who also had relationships with respondent's extended family; the family facilitated the children's visits with respondent in prison.

In September 2006 Susan was briefly jailed and the DHS sought temporary custody of the children. Susan was temporarily released from jail to attend the September 14, 2006, preliminary hearing, at which she was represented by court-appointed counsel. The children's maternal grandmother offered to care for the children for the duration of Susan's detention in jail, but the court determined that both Susan and her mother actively abused prescription drugs and were not fit to provide proper care. Accordingly, the children were placed in foster care. Respondent was notified of these events several days later.

On September 29, 2006, one day after her release from jail, Susan appeared at the adjudication hearing and admitted the allegations contained in the DHS's neglect petition. She admitted her ongoing drug problem, that she had refused in-patient mental health treatment, and that she had inappropriately struck her 15-year-old son in the face. The court determined that Susan was presently not able to care for the children, but ordered substance abuse services, counseling, and visitation with the goal of ultimately returning them to her care.

Although respondent had a right to communicate with the court by telephone in order to participate in the child protective proceedings, he was not informed of this right. He received notices concerning the hearings,[6] but the DHS and the court failed to comply with MCR 2.004(B) and (C), which require the DHS to move the court to arrange for telephonic communication with a respondent parent through the DOC.

Respondent's sister, Kelly McBride, did appear at the hearing. The record reflects that Kelly had regular contact with DHS workers between September 14 and 29 and had offered to care for the children in her home. The court rejected Kelly's request for placement with her, stating that although she "appears to be suitable," the court would not place the children with her because she lived more than an hour away from the children's current community; the court and the DHS preferred for the children to live closer to their mother and to remain in their current schools. Kelly then asked the court to permit the children to continue to visit their father in prison. When the court opined that it would be inappropriate to require foster parents to transport them, Kelly offered

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continuing the parent-child relationship with the parent would be harmful to the child[.]" The DHS did not seek termination under this section.

[6] Before August 2007, none of the notices and orders sent to respondent suggested that his parental rights were at issue. Rather, each stated that the goal of the proceedings was to provide temporary foster care for the children while Susan participated in services aimed at reunifying her with them.

that she and the children's grandparents would drive them to the visits. The court denied her request with little further explanation.[7]

For almost a year, Susan attempted to comply with court orders and DHS services in order to regain custody of her children. But at the July 30, 2007, permanency planning hearing, the court concluded that she appeared unable to reform. She consistently relapsed into drug addiction, and the children remained withdrawn and reported feeling unsafe with her. Without addressing the children's ages,[8] the court changed the goal

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[7] The court's refusal to permit visitation may have violated MCL 712A.13a and MCR 3.965. MCL 712A.13a(11) states that, until a petition for termination is filed, the court must permit "the juvenile's parent to have frequent parenting time" unless visits, "even if supervised, may be harmful to the juvenile . . . ." MCR 3.965(C)(6)(a) similarly states: "Unless the court suspends parenting pursuant to MCL 712A.19b(4) [because a petition to terminate parental rights has been filed], . . . the court must permit each parent frequent parenting time . . . unless parenting time, even if supervised, may be harmful to the child."

[8] A child's age affects whether he is likely to be adopted after his parents' rights are terminated. As of the November 7, 2007, date of termination in this case, respondent's sons were 9, 11, and 15 years old. Of the total adoptions in Michigan reported from October 1, 2006, to September 30, 2007, children aged nine and older comprised less than one-third of those adopted (31.48%). State of Michigan Department of Human Services, [Adoption and Foster Care Analysis and Reporting System] Adoptions by Federal Age Groups, October 01, 2006 - September 30, 2007, <http://www.michigan.gov/documents/dhs/AdoptionsByFederalAgeGroups-FY07_243181_7.pdf> (accessed June 8, 2009). Yet older children represent a higher percentage of those waiting to be adopted after their parents' rights have been terminated. For example, a DHS report states that, as of September 30, 2008, there was a "backlog" of 4,396 children who remained in foster care although their parents' rights had been terminated before January 1, 2008; of these children, 716 were 5 years old or younger, 925 were 6 to 11 years old, and 2,655 were 12 or older. Michigan Department of Human Services, Recent Developments in Child Welfare, May 4, 2009 (presentation to the State Court Administrative Office), pp 63-64, 66 <http://courts/michigan.gov/scao/services/cws/Materials/05-04-09-RDCWL.3.LL.pdf> (accessed June 8, 2009). Nationwide statistics similarly show that, in the fiscal year ending September 30, 2006, 56% of the total number of children in foster care (which includes temporary wards of the state and children awaiting adoption) were aged nine and older, but this age group comprised only 28% of total adoptions. The AFCARS Report, Preliminary FY 2006 Estimates as of January 2008, <http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm> (accessed June 8, 2009). The

of the proceedings to adoption instead of reunification with Susan. But it gave Susan 30 more days in which to try to prove that she could change her ways.

On August 27, 2007, the DHS petitioned for termination of Susan's *and* respondent's parental rights under MCL 712A.19b(3)(g), which permits termination when the "parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." The petition also sought termination of respondent's rights under MCL 712A.19b(3)(h), which applies when the

> parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

On September 18, 2007, respondent was personally served with a copy of the petition and with notice that the termination hearing would take place a few weeks later, on October 10, 2007.

At the termination hearing, for the first time, the DHS and the court arranged for respondent to participate by telephone.[9] He immediately invoked his right to counsel, but the court denied his request.[10] He did not question his wife or the DHS workers who testified during the

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relative likelihood that an older child will *actually* be adopted is significant because it bears on the child's best interests. Even when statutory grounds for termination are present, under the former version of MCL 712A.19b(5) applicable here, a court could terminate a parent's rights "unless . . . termination . . . [was] clearly not in the child's best interests." See *In re Trejo Minors*, 462 Mich 341, 352-353, 356 (2000) (MCL 712A.19b[5] "preserves to the court the opportunity to find that termination is 'clearly not in the child's best interests' despite the establishment of one or more grounds for termination"; the court may "consider evidence, within the whole record, that termination is clearly not in a child's best interests."). If adoption is unlikely, a child's best interests may be better served by continuing his relationships with his parents and extended family, particularly when the extended family is willing to take custody of him until the child reaches the age of majority.

[9] The court advised respondent that "the only reason we've got you here by telephone today is because the prosecutor's secretary thought that you should be present and set it up."

[10] As the Court of Appeals would later recognize, the trial court erred when it concluded that respondent waived his right to counsel by failing to assert the right earlier in the proceedings. A court is obligated to

hearing, but testified by telephone on his own behalf, stating in part: "I love my children and I do not want to lose them. And I would love to hopefully have some sort of visiting rights and so would my parents and my other family members." He noted that the children had visited him before they were placed in foster care.

On November 7, 2007, the court issued an opinion and order terminating both parents' rights to their sons. Susan and respondent separately appealed, and the Court of Appeals affirmed in a split, unpublished opinion.[11] Dissenting Judge GLEICHER would have reversed the order terminating respondent's parental rights. She opined that the DHS's and the court's failures to comply with MCR 2.004 and the complete denial of counsel required reversal because respondent's procedural and substantive due process rights were violated and, therefore, the court's resulting order "lack[ed] any inherent integrity . . . ." *In re McBride*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket No. 282062 and 282243), at 11 (GLEICHER, J., dissenting) (*In re McBride I*).

## II. DISCUSSION

I agree with Judge GLEICHER, respondent, the AG, and respondent's numerous other amici curiae that reversal is required. Indeed, reversal is *mandated* by MCR 2.004(F). Accordingly, although I am also persuaded by respondent's arguments—which are consistent with Judge GLEICHER's dissent and the AG's position—that his due process rights were violated, we need not even reach the constitutional question.[12] Further, although MCR 2.004(F) appears to require automatic reversal (as would the

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inform a respondent parent of his right to counsel—and to appoint counsel if necessary—"at the respondent's *first court appearance* . . . ." MCL 712A.17c(4) and (5) (emphasis added); see also MCR 3.915(B)(1)(a). Therefore, as the Court of Appeals majority concluded, "[t]o hold that a respondent waives his right to counsel by failing to request a court-appointed attorney before his first court appearance is inconsistent with the plain language of MCL 712A.17c(4) and MCR 3.915(B)(1)(a)." *In re McBride*, unpublished opinion per curiam of the Court of Appeals, issued July 15, 2008 (Docket Nos. 282062 and 282243), at 3 (*In re McBride I*).

[11] *In re McBride I*, *supra* at 1.

[12] In the words of my concurring colleagues in *In re Rood*, 483 Mich 73 (2009)—in which my lead opinion addressed the constitutional implications of errors committed by the trial court and the DHS in a termination proceeding—here I am content to squarely conclude that the "numerous statutory and court rule violations" are "sufficiently egregious to require appellate relief." *Id.* at 130-131 (YOUNG, J., concurring in part); see also *id.* at 125 (CAVANAGH, J., concurring in part) ("[T]he alleged due process violations arise out of the same state actions that resulted in statutory violations," and reversal is "clearly compelled by the statutes and court

apparent constitutional violations),[13] without regard to whether respon-

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rules . . . ."); *id.* at 125 (WEAVER, J., concurring in part) (reversal is required "both substantively and procedurally on the basis of Michigan law").

[13] The termination order foreclosed respondent's rights to have any contact with his sons and to contribute to their upbringing. It thereby permanently extinguished his constitutionally protected "fundamental liberty interest . . . in the care, custody, and management" of his children. *Santosky v Kramer*, 455 US 745, 753 (1982). The state must provide "parents with fundamentally fair procedures" in proceedings involving their fundamental parental rights. *Id.* at 754. Yet here, because of the violation of MCR 2.004 and the improper denial of his request for counsel, respondent was deprived of the most basic procedural protections available under Michigan law to a parent in his circumstances. Accordingly, I am persuaded by Judge GLEICHER's conclusion that the " 'commanding' liberty interests at stake here, in conjunction with the statutory and court rule mandates for appointed counsel, are entirely stripped of meaning if this Court employs a harmless error analysis." *In re McBride I*, *supra* at 8 (GLEICHER, J., dissenting), quoting and citing *Lassiter v Dep't of Social Services of Durham Co*, 452 US 18, 27 (1981) ("A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is . . . a commanding one."). Further, although respondent convincingly argues that the outcome of the case would have been different if he had participated in the proceedings or had been represented by counsel, in many cases errors such as those present here will effectively prevent a respondent from *ever* showing that his lack of participation and representation affected the outcome; because no one will have developed a record in support of his interests, it may be difficult if not impossible for him to provide an offer of proof to support his claim that the proceedings might have ended differently. It just so happens in this case that respondent's sister consistently advocated for ongoing relationships among the children, their father, and their paternal family and, therefore, the pretermination record contains proof that respondent had an ongoing relationship with his children and that he could potentially provide for their care and custody through his family, as I discuss further *infra*. On this point, I also note my disagreement with the conclusion of the Court of Appeals that the complete denial of a parent's statutory right to counsel may be harmless under these circumstances. *In re McBride I*, *supra* at 3. The majority in that case cited *In re Powers Minors*, 244 Mich App 111, 123 (2000), and *In re Hall*, 188 Mich App 217, 222-223 (1991), but neither of those cases involved the total deprivation of counsel or lack of counsel at a termination hearing. Indeed, the Court in *In re Hall* reasoned that, even if the respondent mother had not waived her right to counsel during several review hearings, her attorney's

dent can show that the errors affected the outcome of the proceedings, respondent convincingly argues that the errors indeed substantially contributed to the court's decision and therefore were not harmless.

### A. PARTIES CONCEDE THAT RESPONDENT'S RIGHTS UNDER MCR 2.004 WERE VIOLATED

MCR 2.004 requires the court and the petitioning party to arrange for telephonic communication with incarcerated parents whose children are the subject of child protective proceedings or termination petitions.[14]

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absence from those hearings was harmless in part because she was represented by counsel at the termination hearing. *In re Hall*, *supra* at 222-223. As the DHS concedes, no Michigan case has held harmless a *total* deprivation of counsel, including at the termination hearing.

[14] MCR 2.004(A) to (C) provide:

> (A) This rule applies to
>
> (1) domestic relations actions involving minor children, and
>
> (2) other actions involving the custody, guardianship, neglect, or foster-care placement of minor children, or the termination of parental rights, in which a party is incarcerated under the jurisdiction of the Department of Corrections.
>
> (B) The party seeking an order regarding a minor child shall
>
> (1) contact the department to confirm the incarceration and the incarcerated party's prison number and location;
>
> (2) serve the incarcerated person with the petition or motion seeking an order regarding the minor child, and file proof with the court that the papers were served; and
>
> (3) file with the court the petition or motion seeking an order regarding the minor child, stating that a party is incarcerated and providing the party's prison number and location; the caption of the petition or motion shall state that a telephonic hearing is required by this rule.
>
> (C) When all the requirements of subrule (B) have been accomplished to the court's satisfaction, the court shall issue an order requesting the department, or the facility where the party is located if it is not a department facility, to allow that party to participate with the court or its designee by way of a noncollect and unmonitored telephone call in a hearing or conference, including a friend of the court adjudicative hearing or meeting. The order shall include the date and time for the hearing, and the prisoner's name and prison identification number, and shall be served by the

Significantly, the express purpose of the rule is to engage the incarcerated party by telephone at the outset of the proceeding to determine:

> (1) whether the incarcerated party has received adequate notice of the proceedings and has had *an opportunity to respond and to participate*,
>
> (2) *whether counsel is necessary* in matters allowing for the appointment of counsel *to assure that the incarcerated party's access to the court is protected*,
>
> (3) whether the incarcerated party is capable of self-representation, if that is the party's choice,
>
> (4) how the incarcerated party can communicate with the court or the friend of the court *during the pendency of the action*, and whether the party needs special assistance for such communication, including participation in additional telephone calls, and
>
> (5) the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate. [MCR 2.004(E) (emphasis added).]

The AG observes that the enumerated purposes of the rule are consistent with traditional due process concepts of notice and opportunity to be heard.[15]

B. THE REMEDY FOR VIOLATION OF MCR 2.004 IS REVERSAL

With regard to a remedy for violation of MCR 2.004, MCR 2.004(F) explicitly provides: "A court *may not grant the relief requested* by the moving party concerning the minor child *if the incarcerated party has not been offered the opportunity to participate in the proceedings*, as described in this rule."[16] (Emphasis added.) I agree with respondent and the AG

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court upon the parties and the warden or supervisor of the facility where the incarcerated party resides.

[15] See *Dow v Michigan*, 396 Mich 192, 205 (1976) ("The fundamental requisite of due process of law is the opportunity to be heard. The hearing must be at a meaningful time and in a meaningful manner. The opportunity to be heard includes the right to notice of that opportunity.") (quotation marks and citations omitted).

[16] MCR 2.004(F) does not apply, even if the court or petitioning party failed to comply with a provision of MCR 2.004, under two circumstances: "if the incarcerated party actually does participate in a telephone call, or if the court determines that immediate action is necessary on a temporary basis to protect the minor child." MCR 2.004(F). The latter exception arguably applied to the September 14, 2006, preliminary hearing because Susan had been jailed and the children were staying with their maternal grandmother, who the court concluded was not an appropriate custodian. Otherwise, the DHS generally concedes that MCR 2.004 was violated,

that the plain language of subrule F, combined with the rule's overall purposes, defies typical harmless error review. MCR 2.004(F) affirmatively prohibits the trial court from taking action when the rule has been violated. And the rule would be effectively meaningless if its enforcement depended on an imprisoned parent's ability to show, in hindsight, that his participation would have affected the outcome of the proceeding. Such a requirement would rewrite the rule to require parental participation only upon proof that the parent likely could achieve an outcome in his favor; such a notion negates a parent's right to participate in proceedings involving his children and turns due process on its ear.

MCR 2.004(F) clearly requires reversal here. Neither the DHS nor the court ever fulfilled its respective duty to arrange for respondent's participation. And because respondent did not have an attorney to represent him, no one familiar with the law appeared on his behalf to ensure that the rule was enforced. The enumerated purposes of the rule were never fulfilled and, as a result, respondent was totally deprived of the ability to participate in the proceedings.[17] Accordingly, the court was

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and it does not argue that respondent's belated participation by telephone at the termination hearing was sufficient to satisfy the first exception to MCR 2.004(F). Indeed, by the time the termination hearing took place, the proceedings were effectively over; respondent's unrepresented telephonic participation at that time did not satisfy any of the purposes of the rule.

[17] Respondent also reasonably observes that, although *termination* of his parental rights was not initially at issue, his lack of opportunity to participate from the outset of the proceedings directly affected his constitutionally protected fundamental right as a parent to participate in decisions concerning his children's care and custody. *Santosky*, *supra* at 753. His lack of opportunity to participate also had broader ramifications for child welfare in Michigan. For example, Michigan is at risk of losing significant federal funding under subchapter IV, part E, of the United States Social Security Act, 42 USC 670 *et seq.*—commonly called "Title IV-E" funding—as a result of failures to involve *both* parents in a child's case planning process *throughout* the proceedings. Indeed, to avoid funding losses after the United States Department of Health and Human Services Child and Family Services review (CFSR) and Title IV-E review of Michigan court and DHS procedures, in 2004 the DHS established a Program Improvement Plan—or "PIP"—aimed at remedying our state's failures to engage fathers and seek out relatives in child protective proceedings. *PIP General Information*, pp 26, 28, 32 <http://www.michigan.gov/documents/FIA-CFS-PIP-Narrative_106409_7.pdf> (accessed June 8, 2009) (CFSR review revealed failures "to conduct a thorough search or evaluation of relatives as potential placement resources or relatives had requested to be considered for placement and the agency failed to follow up," "[p]articular concern was expressed over the lack of consistent efforts to locate and involve

prohibited from granting the DHS's petition for termination. I would reverse on the basis of MCR 2.004(F) alone.

### C. THE ERRORS WERE NOT HARMLESS

Finally, even if it were incumbent upon respondent to show that violation of MCR 2.004 actually affected the outcome of the proceedings, he persuasively argues that the error was not harmless. First, the error clearly qualifies for reversal under MCR 2.613(A), the harmless error rule. MCR 2.613(A), which generally applies to civil proceedings—including child protective proceedings, see MCR 3.902(A)—provides:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

The court's decision to terminate respondent's constitutional parental rights after depriving him of the most basic procedural protections throughout the proceedings was certainly "inconsistent with substantial justice." Second, respondent has shown that his substantial rights were affected and that, absent the errors, the outcome of the proceedings likely would have been different.[18]

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fathers," and "[f]athers were not engaged in the case planning process even when their whereabouts were known."). See also national expert Judge Leonard Edwards (retired) on the consequences, including funding losses, of states' failures to engage fathers in child protective proceedings. Edwards, *Engaging Fathers in the Child Protection Process: The Judicial Role (Part 1)*, in American Bar Association: Child Law Practice, vol 28, no 1, pp 1, 6-10 (March 2009).

[18] Respondent reasonably argues that the errors were of constitutional dimension and were preserved because he properly requested counsel—who could have moved *inter alia* for relief based on the ongoing violation MCR 2.004—at the termination hearing. Accordingly, he argues that the error must be reviewed for whether it was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774 (1999). But *even if* we assume that the violation of MCR 2.004 constituted a nonconstitutional error, respondent has shown that the error "more probabl[y] than not" affected the outcome. *Id.*, citing *People v Lukity*, 460 Mich 484 (1999). Indeed, even under the plain error standard for unpreserved errors, I am convinced that the violation of MCR 2.004 affected his substantial rights and "seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Carines*, *supra* at 774.

Respondent cites the DHS's statutory duties in child protective proceedings to "identify, locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child's developmental, emotional, and physical needs as an alternative to foster care," to subsequently "[m]ake a placement decision and document in writing the reason for the decision," and to "[p]rovide written notice of the decision and the reasons for the placement decision" to those involved, including the "father" and "each relative who expresses an interest in caring for the child . . . ." MCL 722.954a(2).[19] Respondent makes a strong argument that placement with a paternal relative—particularly his sister, Kelly—would have been very likely if the correct procedures had been followed. Indeed, the trial court clearly erred when it stated, in its November 7, 2007, opinion, that "[f]amily members were unwilling to step in after the mother's long period of addiction." To the contrary, Kelly requested custody, was in contact with the DHS and the court throughout the proceedings, and indeed appeared at the termination hearing along with respondent's mother. Nothing in the record suggests that the court or the DHS considered placement with Kelly or other paternal relatives after the court determined that reunification with Susan was inappropriate.

Further, the DHS and the Court of Appeals majority incorrectly assumed that termination was inevitable under MCL 712A.19b(3)(h). That statute does not automatically authorize termination merely because a parent will be imprisoned for more than two years. Rather, the statute permits termination if the

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[19] Michigan and federal law favor placement with relatives throughout child protective proceedings. MCL 712A.13a(10) ("[T]he court shall order the juvenile placed in the most family-like setting available consistent with the juvenile's needs."); MCR 3.965(E) (providing that at the preliminary hearing, the court "shall direct" the DHS to identify and consult with relatives pursuant to MCL 722.954a[2]); MCR 3.965(B)(13) ("The court must inquire of the parent . . . regarding the identity of relatives of the child who might be available to provide care."); 42 USC 671(19) (providing that states receiving funding under subchapter IV, part E, of the United States Social Security Act, 42 USC 670 *et seq.*, must "consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards[.]"). Indeed, after this case was decided the Legislature enacted new statutes aimed at encouraging and funding guardianships, including those by relatives. See, e.g., MCL 712A.19a(7) through (15). In particular, a parent may now explicitly avoid termination of his rights, although statutory grounds for termination are present, if the child is being cared for by relatives or if adoption is not an appropriate permanency goal. MCL 712A.19a(6)(a) and (b)(*i*).

> *parent is imprisoned* for such a period that the child will be deprived of a normal home for a period exceeding 2 years, *and the parent has not provided for the child's proper care and custody*, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age. [MCL 712A.19b(3)(h) (emphasis added).]

The statute's use of the word "and" clearly permits a parent to provide for the child's proper care and custody although he is in prison; he need not personally care for the children.[20] Thus, respondent reasonably argues that the facts underlying the DHS's termination petition against him would have been negated—or would not have arisen in the first place—if respondent had participated earlier in the proceedings or had been represented by counsel; he or his attorney could have argued for placement with Kelly or another paternal relative. If such a placement had succeeded, termination would have been inappropriate, and respondent and his children would have been able to continue their relationship.

## III. CONCLUSION

For each of these reasons, I would reverse the order terminating respondent's parental rights and remand for further proceedings in the trial court. I would direct the trial court to appoint counsel for respondent and to fully consider placement with relatives and guardianship options, particularly with Kelly McBride.

KELLY, C.J. I join the statement of Justice CORRIGAN.

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[20] Michigan precedent supports the notion that a parent may achieve proper care and custody through placement with a relative. *In re Taurus F*, 415 Mich 512, 535 (1982) (WILLIAMS, J.) (equally divided opinion) ("[I]f a mother gives custody to a sister, that can be 'proper custody'."); *In re Weldon*, 397 Mich 225, 296 (1976) (LEVIN, J.) ("Some parents, . . . because of illness, incarceration, employment or other reason, entrust the care of their children for extended periods of time to others. This they may do without interference by the state as long as the child is adequately cared for."), overruled in part *Bowie v Arder*, 441 Mich 23, 43 (1992); *In re Curry*, 113 Mich App 821, 823-826 (1982) (incarcerated parents may achieve proper custody by placing a child with relatives); *In re Ward*, 104 Mich App 354, 360 (1981) (holding that a child "who was placed by her natural mother in the custody of a relative who properly cared for her, is not a minor 'otherwise without proper custody or guardianship' and thus she was not subject to the jurisdiction of the probate court" under MCL 712A.2). Michigan's Estates and Protected Individuals Code includes an extensive statutory scheme designed to establish guardians for minors—including guardians who are relatives—by appointment of the court *or by appointment of the minor's parents*. MCL 700.5201 *et seq.*

PEOPLE v CECIL HAWKINS, No. 137456; Court of Appeals No. 285167.

PEOPLE v NORRIS JOHNSON, No. 137506; Court of Appeals No. 277812.

PEOPLE v BIBBS, No. 137631. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286036.

PEOPLE v POOLE, No. 137637. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285843.

PEOPLE v DARIUS WILLIAMS, No. 137643. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286002.

PEOPLE v KEITH SMITH, No. 137646. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285756.

PEOPLE v GAINFORTH, No. 137651; Court of Appeals No. 275750.

PEOPLE v CHISOLM, No. 137658. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). The application is also subject to dismissal because the defendant's application for leave to appeal was not filed with the Court of Appeals within 12 months of the March 5, 2007, order of the circuit court, as required by MCR 7.205(F)(3). Court of Appeals No. 286842.

PEOPLE v JERMELL JOHNSON, No. 137659. The defendant's motion for relief from judgment is prohibited by MCR 6.502(G). Court of Appeals No. 286627.

KELLY, C.J., did not participate because she served on the Court of Appeals panel that affirmed the defendant's conviction on direct appeal.

PEOPLE v JASPER, No. 137674. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284697.

PEOPLE v GREENE, No. 137678. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287704.

PEOPLE v DOUGLAS WRIGHT, No. 137782. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 286362.

PEOPLE v O'HARE, No. 137787; Court of Appeals No. 278244.

PEOPLE v ROSCOE OWENS, No. 137788; Court of Appeals No. 287000.

PEOPLE v MAY, No. 137818. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 283349.

PEOPLE v RUSSELL EDWARDS, No. 137842. The defendant has failed to

meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285942.

PEOPLE v HAMPTON, No. 137893. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 285907.

PEOPLE v TORRES, No. 137895; Court of Appeals No. 287855.

PEOPLE v MONTY MATTHEWS, No. 137944. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 284417.

PEOPLE v DRIELICK, No. 137946. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287563.

PEOPLE v CARVIN, No. 137963. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 282292.

SARKIS v THE CINCINNATI INSURANCE COMPANY, No. 137971; Court of Appeals No. 280860.

CORRIGAN, J., did not participate for the reasons stated in *People v Parsons*, 728 NW2d 62 (2007).

MARKMAN, J. (*dissenting*). Arundhati Umesh sustained lacerations to her face when Patrizia Sarkis threw a martini glass into her face. Ms. Sarkis was charged with aggravated assault and pleaded no contest.

Ms. Umesh then sued Ms. Sarkis, alleging that Ms. Sarkis threw the contents of her glass into Ms. Umesh's face after Ms. Umesh accidentally nudged her, and that when Mr. Umesh attempted to separate the two, Ms. Sarkis threw her glass directly into Ms. Umesh's face. Ms. Sarkis asked defendant, her homeowner's insurer, to defend her, but it declined. Ms. Sarkis then sought a declaratory judgment that defendant was obligated to defend her. The trial court granted summary disposition for defendant, ruling that the incident was not a "covered occurrence" under the terms of the relevant policy and fell within the policy's intentional-acts exclusion. However, the Court of Appeals reversed because it was unable to conclude that no genuine issue of material fact existed. In particular, the court cited Ms. Sarkis's deposition testimony that her glass "flew out of her hand" and that she "did not know" what happened to the glass.

I would reverse the Court of Appeals judgment and reinstate the order of the trial court. Ms. Sarkis's testimony that her drink glass "flew out of her hand" would seem to contradict most known laws of physics and, in my judgment, constitutes an insufficient basis for proceeding to trial. Rather, in my judgment, the policy's exclusion of coverage for intentional and criminal acts precludes coverage under the instant circumstances. Coverage is precluded where an insured's claim "flies in the face of all reason, common sense and experience." *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 384 (1997) (quotation marks and citations omitted).

ESTATE OF TYSZKA v WOMEN TO WOMEN HEALTH CENTER, PC, No. 137989; Court of Appeals No. 281166.

PEOPLE v DEMETRIUS MCBRIDE, No. 138007; Court of Appeals No. 279051.

PEOPLE v MCSAUBY, No. 138067; Court of Appeals No. 275561.

PEOPLE v TYRONE CARTER, No. 138074; Court of Appeals No. 288198.

CORRIGAN, J. (*concurring*). I concur in the order denying defendant's application for leave to appeal. Nevertheless, I write separately to reiterate my view that the judicial branch lacks the authority to implement the entrapment defense. Because our judicially crafted entrapment defense is without constitutional foundation, it should be abrogated. Consequently, I would conclude that not only does the entrapment issue set forth by defendant lack merit, it also lacks a valid legal foundation.

Defendant was charged with conspiracy to deliver less than 50 grams of cocaine[1] and delivery of less than 50 grams of cocaine.[2] Additionally, defendant was given notice of possible sentence enhancement under both the habitual offender statutes[3] and the Public Health Code.[4] Defendant moved to dismiss the charges, arguing that he had been entrapped. After an evidentiary hearing, the trial court concluded that entrapment was not established under the test set forth in *People v Johnson*, 466 Mich 491 (2002). Immediately thereafter, defendant entered an unconditional guilty plea to the conspiracy charge. In exchange, the prosecutor dismissed the remaining charge and the sentence enhancement notices. Defendant subsequently filed a delayed application for leave to appeal in the Court of Appeals, which the Court denied for lack of merit in the grounds presented.

While I generally concur with the Court of Appeals that the entrapment issue raised by defendant lacks merit, I further believe that the entrapment defense itself lacks a valid legal foundation. Indeed, "[o]nce a 'defendant has engaged in conduct constituting all the elements of a criminal offense, as defined by the Legislature,' this Court does not then have the authority to conclude that the Legislature did not intend that the defendant be punished or that the prosecution should be barred as a matter of policy."[5] Accordingly, for the reasons stated in my dissenting statement in *People v Maffett*, 464 Mich 878 (2001), as well as my concurring in part and dissenting in part opinion in *People v Claypool*, 470 Mich 715 (2004), I remain convinced that our judicially crafted entrapment defense is without constitutional foundation and should be abrogated. Moreover, although I agree with the order denying defendant's application in this case, I would not oppose a grant of leave to

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[1] MCL 333.7401(2)(a)(*iv*); MCL 750.157a.

[2] MCL 333.7401(2)(a)(*iv*).

[3] MCL 769.12.

[4] MCL 333.7413(2).

[5] *People v Claypool*, 470 Mich 715, 735-736 (2004), quoting *People v Maffett*, 464 Mich 878, 895 (2001).

appeal to consider the argument that entrapment is a non-jurisdictional affirmative defense that should be considered waived by an unconditional guilty plea and, as a corollary, whether *People v White*, 411 Mich 366 (1981), was correctly decided.[6]

For these reasons, I concur in the order denying defendant's application for leave to appeal, but I also reaffirm my view that the ongoing recognition of the entrapment defense by the judiciary amounts to an unconstitutional usurpation of executive and legislative powers.

KELLY, C.J. (*dissenting*). I disagree with the Court of Appeals decision to deny leave to appeal for lack of merit in the grounds presented.

The issue of the constitutionality of the entrapment defense was never raised in this Court. In fact, the prosecution never responded to defendant's application for leave to appeal.[1]

In *People v Johnson*,[2] the Court listed 12 factors that are relevant in determining whether the police engaged in impermissible conduct. Here, at least three of those factors are present: (1) the existence of inducements that would have made the commission of a crime unusually attractive to an otherwise law-abiding citizen similarly situated to the defendant, (2) the existence of offers of excessive consideration or other enticement, and (3) the existence of any police procedures that tended to escalate the criminal culpability of the defendant. The presence of these factors may support a finding that defendant was entrapped. Indeed, numerous cases have found entrapment under circumstances similar to those present in this case.[3]

Therefore, I would remand this case to the Court of Appeals for consideration of the issue as on leave granted.

PEOPLE V ARMOR TURNER, No. 138088. The defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). Court of Appeals No. 287272.

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[6] Chief Justice KELLY is correct that the "issue of the constitutionality of the entrapment defense was never raised in this Court." *Post* at 1110. A review of the record reveals, however, that the prosecutor did raise this issue before the Court of Appeals. The prosecutor specifically argued that when properly understood as a non-jurisdictional defense, entrapment "should be considered waived" by an unconditional guilty plea. Indeed, the prosecutor expressly raised this issue "for purposes of issue preservation."

[1] See, e.g., *Gross v Gen Motors Corp*, 448 Mich 147, 162 n 8 (1995) ("[f]ailure to properly brief an issue on appeal constitutes abandonment of the question").

[2] *People v Johnson*, 466 Mich 491 (2002).

[3] See, e.g., *People v Juillet*, 439 Mich 34 (1991); *People v White*, 411 Mich 366 (1981); *People v Killian*, 117 Mich App 220 (1982); *People v LaBate*, 122 Mich App 644 (1983); *People v Asher*, 67 Mich App 174 (1976).

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v DOTSON, No. 138093; Court of Appeals No. 276394.

PEOPLE v MARSHALL JOHNSON, No. 138099; Court of Appeals No. 272750.

CROZIER v HENRY FORD HOSPITAL, No. 138117; Court of Appeals No. 279924.

PEOPLE v REDDELL, No. 138119; Court of Appeals No. 288457.

PONTIAC FOOD CENTER v DEPARTMENT OF COMMUNITY HEALTH, No. 138141; Court of Appeals No. 277281.

PEOPLE v BAKER, No. 138194; Court of Appeals No. 278951.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v DAVID WILLIAMS, No. 138195; Court of Appeals No. 276595.

PEOPLE v BERRY, No. 138197. The denial is without prejudice to the defendant's filing a delayed application for leave to appeal in the Court of Appeals from the Bay Circuit Court's August 26, 2008, order denying relief from judgment under MCR Subchapter 6.500. See MCR 6.509(A); MCR 7.205(F)(3). Court of Appeals No. 287972.

PEOPLE v KENNETH GREEN, No. 138213; Court of Appeals No. 279327.

PEOPLE v LAMBERT, No. 138221; Court of Appeals No. 276993.

PEOPLE v CAPITO, No. 138249; Court of Appeals No. 275907.

PEOPLE v CROSS, No. 138264; reported below: 281 Mich App 737.

PEOPLE v ROWE, No. 138266; Court of Appeals No. 280508.

MCKAY CONSULTING, INC v ST JOHN HEALTH, Nos. 138271 and 138272; Court of Appeals Nos. 273132 and 273196.

PEOPLE v BROOKE COLLINS, No. 138291; Court of Appeals No. 289089.

PEOPLE v CARP, No. 138299; Court of Appeals No. 275084.

PEOPLE v ROYSTER, No. 138303; Court of Appeals No. 280676.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

PEOPLE v KEYES, No. 138306; Court of Appeals No. 275280.

PEOPLE v OLLIE, No. 138316; Court of Appeals No. 287668.

PEOPLE v KEAN, No. 138319; Court of Appeals No. 280434.

PEOPLE v SETH BROWN, No. 138327; Court of Appeals No. 289797.

PEOPLE v HOSIEA TURNER, No. 138331; Court of Appeals No. 288634.

PEOPLE v SABOURIUNM DAVIS, No. 138333; Court of Appeals No. 284586.

FENDERSON v DEPARTMENT OF CORRECTIONS, No. 138341; Court of Appeals No. 287451.

PEOPLE v STRONG, No. 138343; Court of Appeals No. 288876.

MCKAY CONSULTING, INC v OAKWOOD HEALTHCARE, INC, Nos. 138347 and 138348; Court of Appeals Nos. 273196 and 273132.

PEOPLE v JACK SMITH, No. 138354; Court of Appeals No. 282505.

MARKMAN, J. (*concurring*). I concur in the Court's order denying leave to appeal. I write separately only to note that the Court of Appeals erred in its rationale for rejecting defendant's argument that he was entitled to a jury instruction on attempted arson. The court rejected this on the grounds that attempted arson constitutes a cognate offense of the charged offense, arson, and therefore such an instruction is not permitted under *People v Cornell*, 466 Mich 335 (2002).

*People v Cornell* construed MCL 768.32(1), which provides:

> Except as provided in subsection (2), upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an *attempt* to commit that offense. [Emphasis added.]

Pursuant to this, footnote 7 of *Cornell* notes, "MCL 768.32(1) . . . also permits instruction on an attempt to commit [an] offense." *Cornell*, *supra* at 354 n 7.

*Cornell* and its progeny have largely focused on which offenses are necessarily included lesser offenses and which are cognate offenses. However, it cannot be overlooked that MCL 768.32(1) expressly authorizes an instruction for an "attempt" of a charged offense, even though an attempt may otherwise constitute a cognate offense. Where warranted by the evidence, such an instruction must be provided.

CORRIGAN and HATHAWAY, JJ. We join the statement of Justice MARKMAN.

PEOPLE v NELSON, No. 138355; Court of Appeals No. 281662.

PEOPLE v HETTICH, No. 138356; Court of Appeals No. 289104.

PEOPLE v CONAWAY, No. 138360; Court of Appeals No. 288989.

PEOPLE v ELLIOTT, No. 138364; Court of Appeals No. 289512.

*In re* REINSTATEMENT PETITION OF LEONARD, No. 138372; ADB: 07-87-RP.

CORRIGAN, J. (*not participating*). I am not participating because I was an Assistant United States Attorney involved in petitioner's original conviction.

PEOPLE v YUL WILLIAMS, No. 138384; Court of Appeals No. 280673.

GLOD v CLINTON RIVER CRUISE COMPANY, INC, No. 138393; Court of Appeals No. 279422.

PEOPLE v CASPER, No. 138408; Court of Appeals No. 280261.

PEOPLE v GAINES, No. 138415; Court of Appeals No. 274721.

PEOPLE v LICEAGA, No. 138426; Court of Appeals No. 280726.

PEOPLE v DUDLEY, No. 138428; Court of Appeals No. 281979.

PEOPLE v MUNTAQIM-BEY, No. 138430; Court of Appeals No. 280323.

PEOPLE v MUNRO, No. 138434; Court of Appeals No. 280154.

PEOPLE v SCOTT HENSLEY, No. 138435; Court of Appeals No. 280781.

PLUTSCHUCK v MANDEL, No. 138442; Court of Appeals No. 282980.

PEOPLE v HENDERSON, No. 138445; Court of Appeals No. 279861.

NOVASTAR HOME MORTGAGE, INC v D C ACCEPTANCE, LLC, No. 138448; Court of Appeals No. 280865.

CAVANAGH, J., did not participate due to a familial relationship with counsel of record.

PEOPLE v SALATHIEL BROWN, No. 138453; Court of Appeals No. 279073.

PEOPLE v COURON, No. 138468; Court of Appeals No. 278082.

PEOPLE v DAVID TAYLOR, No. 138470; Court of Appeals No. 279975.

PEOPLE v SINGLETON, No. 138475; Court of Appeals No. 280429.

PEOPLE v ANTHONY GATES, No. 138482; Court of Appeals No. 281205.

PEOPLE v EDDIE THOMPSON, No. 138483; Court of Appeals No. 289574.

PEOPLE v RICHARDSON, No. 138484; Court of Appeals No. 272367.

PEOPLE v RICHARD MARTINEZ, No. 138485; Court of Appeals No. 289235.

PEOPLE v JOHN GREER, No. 138487; Court of Appeals No. 278746.

PEOPLE v ALDRIDGE, No. 138488; Court of Appeals No. 280984.

PEOPLE v VRONKO, No. 138492; Court of Appeals No. 279857.

SCHWENDENER v MIDWEST BANK AND TRUST COMPANY, No. 138498; Court of Appeals No. 289306.

HICKS v ODL, INC, No. 138502; Court of Appeals No. 287154.

PEOPLE v SHANEKA WASHINGTON, No. 138507; Court of Appeals No. 281621.

PEOPLE v PIRTLE, No. 138510; Court of Appeals No. 289422.

SCHULZE v CLAYBANKS TOWNSHIP, No. 138521; Court of Appeals No. 282428.

PEOPLE v VANOVER, No. 138524; Court of Appeals No. 280431.

PEOPLE v KORY GROSS, No. 138527; Court of Appeals No. 289418.

PEOPLE v MICHAEL ALLEN MILLER, No. 138529; Court of Appeals No. 273488.

PEOPLE v DOBSON, No. 138536; Court of Appeals No. 280598.

PEOPLE v CONE, No. 138543; Court of Appeals No. 280691.

PEOPLE v ANTOINE SIMPSON, No. 138546; Court of Appeals No. 279353.

PERRY v GENERAL MOTORS CORPORATION, No. 138553; Court of Appeals No. 288249.

BECK v GENERAL MOTORS CORPORATION, No. 138554; Court of Appeals No. 288964.

LYDE v GENERAL MOTORS CORPORATION, No. 138555; Court of Appeals No. 289155.

E&N PROPERTIES v HIPPENSTEEL, No. 138557; Court of Appeals No. 287727.

PEOPLE v ROSEBERRY, No. 138561; Court of Appeals No. 280884.

FRIED v REEVES, Nos. 138567 and 138569; Court of Appeals Nos. 288115 and 288629.

REID v FLINT CIVIL SERVICE COMMISSION, No. 138568; Court of Appeals No. 281935.

BROWN v DELHI CORPORATION, No. 138572; Court of Appeals No. 288611.

PEOPLE v AARON CLARK, IV, No. 138582; Court of Appeals No. 280809.

PEOPLE v HUBBARD, No. 138592; Court of Appeals No. 280704.

PEOPLE v ANDREW HALL, No. 138598; Court of Appeals No. 290559.

PEOPLE v MARK OWENS, No. 138612; Court of Appeals No. 278960.

HATHAWAY, J. (*not participating*). I recuse myself and will not participate in this case as I was the presiding trial judge. See MCR 2.003(B).

AUSTIN v KELLY, No. 138620; Court of Appeals No. 282583.

PEOPLE v MCQUEEN, No. 138646; Court of Appeals No. 290156.

PEOPLE v DARNELL THOMPSON, No. 138652; Court of Appeals No. 281199.

PARDO v DETROIT POLICE OFFICER TIMOTHY EWALD, No. 138654; Court of Appeals No. 282821.

PEOPLE v LEONARD WALKER, No. 138659; Court of Appeals No. 279500.

PEOPLE v COTTENHAM, No. 138663; Court of Appeals No. 280782.

STERNBERG v MICHIGAN STATE UNIVERSITY, No. 138674; Court of Appeals No. 281521.

PEOPLE v BLACKAMORE, No. 138683; Court of Appeals No. 283487.

PEOPLE v NASH, No. 138695; Court of Appeals No. 290226.

PEOPLE v SCOTT LINCOLN, No. 138751; Court of Appeals No. 288462.

GENTNER v FARM BUREAU INSURANCE COMPANY, No. 139005; Court of Appeals No. 290013.

PEOPLE v LEONARR MOORE, No. 139009; Court of Appeals No. 291194.

*In re* COVINGTON (DEPARTMENT OF HUMAN SERVICES v COVINGTON), No. 139031; Court of Appeals No. 291640.

*Reconsideration Granted June 23, 2009:*

PEOPLE v RICHMOND, No. 136648. On order of the Court, the motion for reconsideration of this Court's October 31, 2008, order is granted. We vacate our order dated October 31, 2008. On reconsideration, the application for leave to appeal the April 22, 2008, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the prosecutor's dismissal of the charges rendered moot the prosecutor's subsequent appeal to the Court of Appeals. In discussing this issue, the parties shall address the relevance, if any, of *People v Torres*, 452 Mich 43 (1996), *Dybata v Kistler*, 140 Mich App 65 (1985), and *Detroit v Ambassador Bridge Co*, 481 Mich 29 (2008).

We further order the Wayne Circuit Court, in accordance with Administrative Order No. 2003-3, to determine whether the defendant is indigent and, if so, to appoint the State Appellate Defender Office to represent the defendant in this Court.

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 may move the Court for permission to file briefs amicus curiae. Leave to appeal denied at 482 Mich 1041. Court of Appeals No. 277012.

*Reconsiderations Denied June 23, 2009:*

VAUGHAN v THOMAS, No. 134989. Leave to appeal denied at 483 Mich 976. Court of Appeals No. 267396.

DEPARTMENT OF ENVIRONMENTAL QUALITY v WATEROUS COMPANY, No. 136520. Leave to appeal denied at 483 Mich 890. Reported below: 279 Mich App 346.

CORRIGAN, J. I would grant the motion for reconsideration.

MARKMAN, J. I would grant the motion for reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in my dissenting statement in this case, 483 Mich 890 (2009).

JACOBSON v NORFOLK DEVELOPMENT CORPORATION, Nos. 136586 and 136588. Summary disposition entered at 483 Mich 885. Court of Appeals Nos. 281587 and 283361.

LEAPHART v CITY OF DETROIT, Nos. 136662 and 136663. Leave to appeal denied at 483 Mich 880. Court of Appeals Nos. 285146 and 285147.

OLIVER/HATCHER CONSTRUCTION AND DEVELOPMENT, INC v SHAIN PARK ASSOCIATES, No. 136803. Leave to appeal denied at 482 Mich 1155. Court of Appeals No. 275500.

MAMOU v CUTLIP, No. 136927. Leave to appeal denied at 483 Mich 912. Court of Appeals No. 275862.

PEOPLE v LANDRUM, No. 137084. Leave to appeal denied at 483 Mich 912. Court of Appeals No. 282403.

PEOPLE v STREATER, No. 137427. Leave to appeal denied at 483 Mich 894. Court of Appeals No. 285856.

PEOPLE v KELLMAN, No. 137482. Leave to appeal denied at 483 Mich 882. Court of Appeals No. 276454.

NATIONWIDE MUTUAL FIRE INSURANCE CO v KERSH, No. 137612. Leave to appeal denied at 483 Mich 883. Court of Appeals No. 284903.

EDEN v JP MORGAN CHASE BANK, No. 137750. Leave to appeal denied at 483 Mich 896. Court of Appeals No. 285225.

MCCARTHY v SCOFIELD, No. 138034. Leave to appeal denied at 483 Mich 916. Court of Appeals No. 284129.

*Leave to Appeal Denied June 26, 2009:*

PEOPLE v PLUMP, No. 137232; Court of Appeals No. 277788.

KELLY, C.J. I would grant leave to appeal.

CAVANAGH, J. I would grant leave to appeal to consider the issue in *People v Watkins*, 482 Mich 1114 (2008).

DEVLON PROPERTIES, INC v CITY OF BOYNE CITY, No. 138165; Court of Appeals No. 279188.

MARKMAN, J. (*dissenting*). I would grant leave to appeal to consider the "vesting of property rights in existing zoning" issue raised in my concurring statement in *Dorman v Clinton Twp*, 477 Mich 955, 956-957 (2006).

CITY OF KENTWOOD v POLICE OFFICERS LABOR COUNCIL, No. 138232; Court of Appeals No. 279993.

MARKMAN, J. (*dissenting*). I respectfully dissent and would reinstate the trial court's order vacating the arbitration award. The Kentwood chief of police did not provide one of his detectives with a take-home car, and a grievance was filed alleging that this decision violated the parties' collective bargaining agreement (CBA).

The Kentwood Police Department has adopted a Policy and Procedures Manual in accordance with the CBA. Operating Procedure FC 301 provides:

> 3.1.3. The Chief of Police may assign specific vehicles for 24-hour use by specified employees. This assignment may be terminated at any time at the discretion of the Chief of Police.
>
> 3.1.4. Vehicles assigned for 24-hour use shall only be utilized for official business or transport to and from work sites. Personal use of the vehicle may only occur with specific permission of the Chief of Police.

Section 17.2 of the CBA provides:

> The Employer reserves the right to establish reasonable departmental rules, regulations, policies and procedures not inconsistent with the provision of this Agreement.

Section 17.12 of the CBA provides:[1]

> It is the intent of the parties hereto that the provisions of this Agreement, which supersedes all prior agreements and understandings . . . shall govern the relationship and shall be the sole source of any and all claims which may be asserted in arbitration hereunder, or otherwise. The parties acknowledge that during the negotiations which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter. . . . Therefore, the Employer and the Union for the life of this Agreement, each voluntarily and unqualifiedly waive the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Although the CBA does not refer to take-home vehicles in any way, and FC 301 accords the police chief discretion in assigning such vehicles, the arbitrator nonetheless granted the grievance and awarded the detective a take-home vehicle.

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[1] This is a so-called "zipper clause," a provision in a labor contract "indicating that the agreement is an exclusive and complete expression of consent." *Merriam-Webster's Dictionary of Law* (1996).

The city filed a complaint to vacate this award, and the trial court granted summary disposition in the city's favor, concluding that, contrary to Section 5.5 of the CBA, which limits the authority of the arbitrator to applying and interpreting the CBA as written, and which disavows any power on her part to alter or modify the agreement, or to interfere with the city's exercise of its inherent rights, the arbitrator here failed to adhere to these limits on her authority, because the award "ignored and failed to apply the plain terms of Sections 17.2 and 17.12 of the CBA."

The Court of Appeals reversed on the ground that the CBA is not sufficiently specific as to demonstrate that defendant waived its right to bargain over take-home vehicle practices.

The city now appeals, arguing that the arbitrator exceeded her authority by disregarding the "zipper clause" in the CBA, in which the parties expressly waived the right to bargain over any issues not included in the CBA. The zipper clause also provides that the CBA supersedes all prior agreements and understandings, oral or written, express or implied, between the parties. This language, in my judgment, clearly provides that the CBA supersedes any alleged past practices. The Court of Appeals erred in concluding that the zipper clause was not dispositive because it did not specifically refer to take-home vehicles. However, the CBA gives the city the authority to adopt policies on all issues not covered by the CBA, and the zipper clause precludes consideration of issues outside the four corners of the agreement. The city adopted a policy giving the police chief the discretion to determine which officers would receive take-home vehicles, and the police chief decided that the detective who filed the grievance did not require his own vehicle. To the extent the parties' past practice may or may not have differed from defendant's expectations, the zipper clause should have precluded any argument that these past practices survived the parties' mutual agreement in the CBA.

I am cognizant of the broad authority vested in the arbitrator under the CBA when disputes arise, but I am also cognizant that such authority is not boundless. If the collective bargaining process, public or private, is going to work effectively, faithful regard must be given to contracts and agreements. The people of Kentwood, through their elected representatives, have chosen to cede a part of their administrative control over public employees from their elected city council to the arbitrator. Where, however, they have clearly *not* ceded such authority, as here, the regular processes of local self-government must be permitted to prevail.

CORRIGAN, J. I join the statement of Justice MARKMAN.

PEOPLE v LATOSHA CARTER, No. 138330; Court of Appeals No. 279911.

CORRIGAN, J. (*concurring*). I concur in the order denying leave to appeal. Although I dissented in *People v Smith*, 482 Mich 292 (2008), I join the order here because of unanswered questions. The Court of Appeals reasonably remanded this case for resentencing because the trial court appears not to have fully considered all the relevant circumstances in imposing a probationary sentence. The trial court departed downward

from the sentencing guidelines' recommended minimum sentence range of 51 to 85 months of imprisonment. Defendant claimed that her two convictions for delivery of 50 to 450 grams of cocaine resulted from her having temporarily fallen in with the wrong crowd and trying to protect her boyfriend who was a drug dealer. She asked the court to show mercy on her because she is a single mother. In departing downward, the court reasoned that defendant had indeed cleaned up her life after having been involved in the drug trade. I question the soundness of this conclusion.

The discussion at sentencing failed to acknowledge the identity of the father of defendant's baby. It seems the baby's father was defendant's coconspirator, the subject of the underlying police investigation and apparently a major drug dealer. Further, although defendant's convictions resulted from her acts in 2004, her son was only one year old at the time of her 2007 sentencing.

Clearly, defendant's relationship with her drug dealing boyfriend continued well after 2004. Defendant states that her child's father is now imprisoned in another state. The record does not reveal how long he will remain there or whether he has an ongoing relationship with his son that is facilitated by defendant.

The lack of information on these points creates a significant gap in the facts underlying the trial court's reasoning. The departure was based on defendant's alleged change in circumstances. The judge opined that defendant had been entrapped by her boyfriend, who may have set her up as a middleman, in order to protect himself during the police investigation. The judge seemed to view defendant's conduct as being in the past, but he did not explore the nature of her current relationship with her drug dealing boyfriend. For these reasons, I encourage the trial judge to consider the entire record and flesh out additional facts at the resentencing hearing.

KELLY, C.J. (*dissenting*). I dissent from the order denying defendant's application for leave to appeal. I believe that the trial court sufficiently justified its downward departure from the sentencing guidelines range with objective and verifiable facts. Specifically, the trial court noted that defendant's age, employment, and educational development since her offenses warranted a downward departure. None of these factors is considered in the sentencing guidelines. Therefore, I cannot conclude that the trial court abused its discretion.

I would grant defendant's application for leave to appeal.

WEAVER and HATHAWAY, JJ. We join the statement of Chief Justice KELLY.

PEOPLE v CASBAR, No. 138437; Court of Appeals No. 280647.

KELLY, C.J. I agree with Justice CAVANAGH and would grant leave to appeal for the reasons set forth in my dissenting statement in *People v Xiong*, 483 Mich 951 (2009).

CAVANAGH, J. I would grant leave to appeal to consider the issue in *People v Watkins*, 482 Mich 1114 (2008).

*In re* GEORGE (DEPARTMENT OF HUMAN SERVICES v ANTHONY), No. 139007; Court of Appeals No. 286896.

*Reconsiderations Denied June 26, 2009:*

*In re* APPLICATION OF DETROIT EDISON COMPANY (ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION), Nos. 134667, 134668, and 134669. Court of Appeals judgment affirmed in part and reversed in part at 483 Mich 993. Reported below: 276 Mich App 216.

CORRIGAN and MARKMAN, JJ. We would grant Detroit Edison's motion for reconsideration and would affirm the judgment of the Court of Appeals.

ATTORNEY GENERAL v PUBLIC SERVICE COMMISSION, No. 136431. Court of Appeals judgment affirmed at 483 Mich 998. Court of Appeals No. 261747.

PEOPLE v KIRCHER, No. 137652. Leave to appeal denied at 483 Mich 986. Court of Appeals No. 275215.

KELLY, C.J., and CAVANAGH and MARKMAN, JJ. We would grant the motion for reconsideration and would grant leave to appeal for the reasons set forth in Justice MARKMAN's dissenting statement in *People v Kircher*, 483 Mich 986 (2009).

*Leave to Appeal Denied July 7, 2009:*

PEOPLE v BRANNER, No. 137373; Court of Appeals No. 275911.

KELLY, C.J. (*dissenting*). I dissent from the order denying defendant's application for leave to appeal. The Court of Appeals concluded that the record was sufficient to establish that defendant waived his right to a jury trial. However, it never addressed that, in the brief colloquy regarding the parties' stipulation to a trial on the paper record, the court never advised defendant of his other trial rights. Rather, the court employed a perfunctory process, concluding that defendant voluntarily waived all those rights. The dissenting Court of Appeals judge reasonably questioned whether virtually *all* the rights associated with a trial could properly be waived in such a manner.

I agree with the dissent that the absence of procedural safeguards in this case spawns a fundamental concern about how the justice system should operate. The issue stretches beyond defendant's case and is jurisprudentially significant, especially if other trial courts employ the procedure used here. It is significant also given the distressed condition of criminal defense for the indigent in this state.[1]

Therefore, I would grant leave to appeal to determine whether the procedure employed to determine defendant's guilt was adequate and whether the trial court fulfilled its obligation to safeguard defendant's fundamental rights.

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[1] See National Legal Aid & Defender's Association, *Evaluation of Trial-Level Indigent Defense Systems in Michigan*, <http://www.michbar.org/publicpolicy/pdfs/ indigentdefense_report.pdf> (accessed June 23, 2009).

In addition, defense counsel's performance may have been so deficient that it constituted ineffective assistance. Counsel stipulated to allow the trial court to decide the case using only the preliminary examination record, the police report, and the toxicology report. This decision seemingly provided *no* defense to the charges against defendant.

At a minimum, had defense counsel chosen to proceed with a bench trial, the court would have had an opportunity to observe witnesses and evaluate their credibility. Given that failure, it is premature to assume that there is no probability of a different result had defendant received a full trial.

Therefore, I dissent from the denial order and would grant defendant's application for leave to appeal.

CAVANAGH, J. I join the statement of Chief Justice KELLY.

PEOPLE v DWIGHT ANDREWS, No. 138082; Court of Appeals No. 286191.

KELLY, C.J. (*dissenting*). I dissent from the Court's order denying defendant's application for leave to appeal.

Defendant pleaded guilty of receiving or concealing stolen property valued at over $100 and unlawfully driving away an automobile. He was sentenced to two to five years of imprisonment for both convictions.

Defendant filed a motion for relief from judgment, which the trial judge granted by order dated January 6, 2006. Upon receiving a copy of the order, the Department of Corrections (DOC) wrote the judge, opining that the court should not have granted the motion. After a second letter and a call to the judge's secretary from the DOC, the judge issued a new order dated November 20, 2007, vacating the January 6, 2006, order. Defendant received a copy of the DOC letters, but the court provided him neither notice nor an opportunity to be heard before issuing the November 20, 2007, order.

MCR 6.435 governs the correction of mistakes in judgments. It allows a court to correct clerical mistakes on its own initiative. However, there was no clerical mistake in this case. Instead, the trial court corrected what it believed to be a substantive mistake two years after the original judgment of sentence was entered.[1]

What is central to this appeal is the fact that the court failed to provide defendant notice or an opportunity to be heard as required by MCR 6.435(B) before vacating its order. No authority exists for a trial judge to sua sponte vacate a final order outside the appeals process solely on the basis of a communication with a nonparty such as the DOC.[2]

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[1] In order to correct a substantive mistake, a court must discover the error before the judgment has been entered and give the parties an opportunity to be heard. MCR 6.435(B).

[2] *People v Holder*, 483 Mich 168 (2009). In *Holder*, we held that a court may not unilaterally rely on a letter from the DOC to modify a defendant's sentence. Such letters are merely advisory in nature.

For these reasons, the trial court's November 20, 2007, order should be vacated. The January 6, 2006, order should be reinstated, and the trial court should communicate with the DOC to determine if defendant is entitled to be released.

CAVANAGH, J. I join the statement of Chief Justice KELLY.

THORN v MERCY MEMORIAL HOSPITAL, Nos. 138085, 138116, and 138118; reported below 281 Mich App 644.

YOUNG, J. (*dissenting*). I respectfully dissent from the order denying defendants' applications for leave to appeal. At issue is whether household services of a decedent are "noneconomic damages" limited by MCL 600.1483. The jurisprudential significance of this issue is apparent: plaintiff seeks to recover more than $1.4 million for these damages, but § 1483 limits noneconomic damages to either $280,000 or $500,000. The Court of Appeals decision on this jurisprudentially significant issue is published and therefore binding precedent on all future Court of Appeals panels, MCR 7.215(J)(1). Nevertheless, a majority of this Court has declined to review this issue. I respectfully dissent.

Plaintiff, as personal representative of the estate of the decedent, Laurie Ann Green,[1] alleged that defendants[2] committed medical malpractice during the treatment of the decedent that resulted in her death. Most pertinent to this appeal, plaintiff's complaint sought to recover damages for "[l]oss of services of plaintiff's decedent which necessarily includes the value of her services that plaintiff's decedent was accustomed to perform in the household; services ordinarily performed by plaintiff's decedent and special services uniquely performed by a mother."

Plaintiff retained Dr. Nitin Parajpne, an economics expert, who estimated a present value of $1,499,122 for the lost household services. In an affidavit, Dr. Parajpne explained that he used the American Time Use Survey (ATUS) and the hourly rate of a live-in aide to estimate that the loss of household services was valued at $225 a day. Dr. Parajpne further averred that the services he considered included: "physical care for children; playing and doing hobbies with children; reading to/with children; talking to/with children; helping with homework/education-related activities; attendance at children's events; taking care of children's health care needs' [sic] and dropping off, picking up, and waiting for children." Dr. Parajpne also included "secondary activities" done at the same time as one of the above activities, which would include, for example, cooking dinner.

Defendants sought summary disposition, arguing that the Wrongful Death Act (WDA)[3] precluded plaintiff from recovering for loss of house-

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[1] See MCL 600.2922(2).

[2] In these consolidated appeals, the following defendants have sought leave to appeal in this Court: Mercy Memorial Hospital; Blessing B. Nwosu, M.D.; S. Ahadi, M.D., P.C.; Kianoush Khaghany, M.D.; and Tanvir Iqbal Qureshi, M.D.

[3] MCL 600.2922.

hold services and, in the alternative, if such damages were recoverable, they were "noneconomic damages" limited by MCL 600.1483. The trial court held that the loss of household services were recoverable under the WDA as "damages for . . . the loss of society and companionship of the deceased,"[4] but, as such, they were noneconomic damages limited by § 1483.

Plaintiff sought leave to appeal in the Court of Appeals, which granted leave and reversed. The Court held that plaintiff could recover lost household services under the WDA, but reversed the trial court and held that "plaintiff's claim for loss of services comprises an economic damage, which is not subject to the damages cap of MCL 600.1483."[5]

Defendants seek leave to appeal in this Court, arguing that damages for loss of household services are a "noneconomic loss" limited by MCL 600.1483. "Noneconomic loss" is defined in § 1483 as "damages or loss due to pain, suffering, inconvenience, physical impairment, physical disfigurement, or other noneconomic loss."[6] The primary issue is whether loss of household services is an "other noneconomic loss."

Defendants' argument has support in our caselaw. "Consortium is defined as including 'society, companionship, *service*, and all other incidents of the marriage relationship.' "[7] Moreover, "[i]t is undisputed that loss of consortium is a noneconomic loss."[8] In *Montgomery v Stephan*,[9] in which this Court recognized a wife's loss of consortium claim for injury to her husband, this Court eloquently addressed the fool's errand of partitioning consortium into economic or noneconomic categories:

> To a large degree, the objection in the cases to allowing the wife recovery for loss of consortium turns directly or indirectly upon the aspect of consortium just mentioned, that of material services. . . .

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[4] See MCL 600.2922(6), which provides, in pertinent part:

> In every action under this section, the court or jury may award damages as the court or jury shall consider fair and equitable, under all the circumstances including reasonable medical, hospital, funeral, and burial expenses for which the estate is liable; reasonable compensation for the pain and suffering, while conscious, undergone by the deceased during the period intervening between the time of the injury and death; and damages for the loss of financial support and the loss of the society and companionship of the deceased.

[5] *Thorn v Mercy Mem Hosp Corp*, 281 Mich App 644, 667 (2008).

[6] MCL 600.1483(3).

[7] *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 504 (1981), quoting *Washington v Jones*, 386 Mich 466, 472 (1971) (emphasis added).

[8] *Rusinek*, *supra* at 505.

[9] 359 Mich 33 (1960).

> The argument thus made involves 2 fundamental errors. The first is that the concept of consortium, of conjugal fellowship, is capable of dismembership into material services and sentimental services. Is the well kept home or the carefully prepared meal a manifestation of affection (*i.e.*, a sentimental service) or of the skilled performance of a menial chore (*i.e.*, a material service)? Does the well-trained child know anything of sentimental services? Of material services? Of both? Are they different? Which is which? The fact of the matter is that the effort to break down consortium into its component parts is no more than a theoretician's boast, the modern counterpart to the medieval resolution of the number of angels able to dance on the head of a pin. It requires a wisdom, and an effrontry, far greater than ours to make differentiations so subtle, if, indeed, they are within the realm of human competence.
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> The second fundamental error in the objection made is that (assuming we can and do make the theoretical differentiation described) the law does not permit recovery for the sentimental aspect alone of consortium. . . . The fact of the matter is that there is no predominant element in the concept of consortium, that consortium is not capable of subdivision, and that it is not necessary that there be an allegation of the loss of any particular "element" thereof.[10]

Here, as averred by plaintiff's expert, the following lost household services are economic losses: physical care for children; playing and doing hobbies with children; reading to/with children; talking to/with children; helping with homework/education-related activities; attendance at children's events; and taking care of children's health care needs and dropping off, picking up, and waiting for children. These lost services are acutely similar to the "well kept home or the carefully prepared meal" pondered in *Montgomery*.

The Court of Appeals cited a product liability statute that defines "economic loss," in part, as "costs of obtaining substitute domestic services."[11] In the absence of a specific statutory provision defining "economic loss" for the purposes of § 1483, however, defendants have a strong argument that the common-law definition of consortium, which includes lost services and "indisputably" constitutes noneconomic damages, must be included as "other noneconomic loss."

Indeed, at minimum, the Court of Appeals decision, which permits plaintiff to place a dollar value on a mother's attendance at her child's events, seems over-broad. Thus, not only does the Court of Appeals decision threaten to defeat the purpose of the noneconomic loss cap, it also devalues the relationship that family members share with one another. This Court ought to address the point it made in rejecting the objectification of consortium in *Montgomery*. Does the Court of Appeals

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[10] *Id.* at 42-44.

[11] MCL 600.2945(c).

analysis "require[] a wisdom, and an effrontry, far greater than ours to make differentiations so subtle, if, indeed, they are within the realm of human competence"?[12]

Accordingly, I would grant leave to appeal to further review this issue.

CORRIGAN and MARKMAN, JJ. We join the statement of Justice YOUNG.

HAYES v LANGFORD, No. 138100; Court of Appeals No. 280049.

MARKMAN, J. (*dissenting*). Plaintiff sued defendant, a 911-emergency operator, for gross negligence and intentional infliction of emotional distress (IIED). Defendant answered plaintiff's 911 calls after plaintiff had been shot in the head and chest by her boyfriend, and plaintiff alleged under both claims that defendant's conduct during these calls caused plaintiff emotional injury. The trial court dismissed both claims on summary disposition, but the Court of Appeals reinstated plaintiff's IIED claim. Although plaintiff undoubtedly suffered in a disastrously tragic event, the only issue is whether plaintiff has established a prima facie claim of IIED. In my opinion, she has not, and thus the trial court properly dismissed this claim. Accordingly, I respectfully dissent from this Court's order to deny leave to appeal.

To establish a prima facie case for IIED, a plaintiff must show "(1) the defendant's extreme and outrageous conduct, (2) the defendant's intent or recklessness, (3) causation, and (4) the severe emotional distress of the plaintiff." *Walsh v Taylor*, 263 Mich App 618, 634 (2004); see also *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 602 (1985). For conduct to be "extreme and outrageous conduct," it must be

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community. A defendant is not liable for mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. [*Lewis v LeGrow*, 258 Mich App 175, 196 (2003) (quotation marks and citations omitted).]

This understanding of "extreme and outrageous conduct" sets a high threshold for such conduct, which is not met by mere "inconsiderate and unkind" behavior. *Roberts*, 422 Mich at 603.

The record reveals no genuine factual dispute regarding defendant's conduct, because the two calls were recorded and transcribed. Rather, defendant's questions and tone during these calls reflect her initial disbelief that plaintiff's emergency was genuine. This disbelief arose out of plaintiff's overall demeanor and the nature of the situation she described, which, in my judgment, might conceivably raise questions with any 911 operator that the call was not genuine. When plaintiff first called 911, her voice did not reflect any sense of urgency or distress. Instead, plaintiff's voice remained measured and monotone throughout the call. Additionally, defendant's second question to plaintiff was, "Are you male

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[12] *Montgomery*, *supra* at 43.

3or female?" to which plaintiff responded, "I'm a male; I'm a female." Defendant then asked, "Which one?" and plaintiff responded, "My name is Lorraine." Plaintiff then told defendant that the person who had shot her in the "temple" was still there standing next to her. When defendant asked plaintiff to put him on the phone, plaintiff was unable to do so. This brief sequence of events, lasting approximately one minute, explains defendant's disbelief that plaintiff had really been shot.

Because of her skepticism, defendant questioned the veracity of plaintiff's emergency. The manner in which defendant questioned plaintiff may arguably have been "inconsiderate and unkind," but it was not "outrageous in character." Defendant's job required her to make sure incoming calls were genuine in order to prevent unnecessary dispatches of limited emergency services, and defendant's continued disbelief that plaintiff had truly suffered a gunshot wound to the head was not altogether unreasonable. Defendant necessarily had to inquire about what she viewed as suspicious aspects of plaintiff's circumstances. In the end, defendant initiated emergency services to the address provided by plaintiff after only a few seconds of delay.[1]

Consequently, defendant's conduct, in my judgment, cannot fairly be described as "utterly intolerable in a civilized community." Indeed, we live in a society in which 911 calls are regularly made for inappropriate purposes and in which there are insufficient public resources to respond to every frivolous call, yet still be able to effectively respond to genuine emergencies. Thus, defendant's questions, even if asked in the wrong *tone*, were not under the circumstances unreasonable, much less "extreme and outrageous."

CORRIGAN and YOUNG, JJ. We join the statement of Justice MARKMAN.

ARNOLD v FARM BUREAU GENERAL INSURANCE COMPANY, No. 138689; Court of Appeals No. 288456.

KELLY, C.J. (*concurring*). I concur in the order denying defendant's application for leave to file an interlocutory appeal. Plaintiffs presented testimony that defendant's claims specialist specifically told them that they had fully complied with the requirements of their insurance contract. They said she told them that there was nothing more they

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[1] Unfortunately, emergency services proved slow in responding, because plaintiff had called from a cell phone, which does not allow the 911 system to generate a street address, and the police had difficulty locating plaintiff's home because the addresses in her neighborhood were handwritten and difficult to read. However, a second telephone call from plaintiff several minutes later resulted in defendant informing plaintiff that emergency medical services had been deployed, while clarifying plaintiff's location.

When legislators assess appropriate punishments for persons who abuse emergency services, or who make fake calls, they would do well, in my judgment, to take into consideration the seconds of delay that are added to response times in cases such as the instant one.

needed to do to preserve their rights. Such testimony is sufficient to create genuine issues of material fact about whether the statements were made and whether plaintiffs reasonably relied on them. Plaintiffs asserted that they relied on the statements by forgoing a suit against the underlying tortfeasors for three years. The insurance policy required plaintiffs to sue the tortfeasors before the expiration of the three-year statutory period.

If plaintiffs reasonably relied on defendant's statements, defendant may appropriately be equitably estopped from asserting a statute of limitations defense as a basis for denying coverage. Moreover, defendant conceded that no provision in the contract explicitly required plaintiffs personally to sue the tortfeasors. Therefore, viewed in the light most favorable to the plaintiffs, they may have been justified in relying on the claims specialist's alleged statements.

Equitable estoppel originated "in moral duty and public policy; and its chief purpose is the promotion of common honesty, and the prevention of fraud."[1] The alleged facts raise questions about whether defendant's behavior toward its insured here was honest. Defendant delayed its decision on plaintiffs' claim, telling them that it would settle the claim when plaintiff Deborah Arnold's condition "has reached maximum improvement verified by medical records." However, defendant never did settle the claim, and plaintiffs brought suit. As soon as the limitations period expired, defendant moved for summary disposition of the lawsuit based on the statute of limitations defense.

I agree with the trial court that a jury reasonably could conclude that equitable estoppel should apply here. Therefore, I concur in the order denying leave to appeal.

YOUNG, J. (*dissenting*). I respectfully dissent from the order denying defendant's application for leave to appeal. I would remand to the Court of Appeals for consideration as on leave granted because defendant raises a meritorious argument that may dispose of this case without the expense of trial.

On July 25, 2003, plaintiff Deborah Arnold was driving her daughter's car when she was hit by an uninsured motorist. Deborah was insured by defendant Farm Bureau General Insurance Company and gave defendant notice of the accident and requested uninsured motorist benefits on August 18, 2003.[1] In June 2004, plaintiff Frederick Arnold, Deborah's husband, spoke with defendant's casualty claims specialist Doris Keefer. At his deposition, Frederick recounted his conversation with Ms. Keefer: "I asked her . . . did I need to pursue anything else, and was there any statute of limitations that I had to be concerned with, and do I need to do anything with this other person at all because she was uninsured? And the answer was no." Defendant sent plaintiffs a letter on November 3, 2004, which stated in pertinent part:

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[1] *Hassberger v General Builders' Supply Co*, 213 Mich 489, 491 (1921).

[1] The car was insured under a policy issued by defendant and Deborah was insured under her own policy issued by defendant. The claim was made under both policies, which contained identical provisions.

> This is a follow up to the recent conversation with Mr. Arnold wherein he was inquiring as to whether there is any time limit involved per this claim. I advised him that due to the fact that you have complied with the conditions of this policy to date, the one year limitation regarding initiating legal action would not apply. . . . [2]
>
> I have enclosed copies of the portion of your daughter's policy which applies to your claim Part V — Unisured Motorist Coverage. I ask that you read this portion carefully. The uninsured motorist coverage of Farm Bureau requires that the insured preserve all of Farm Bureau's potential subrogation rights as we deem these rights to be very important and are not willing to waive them. You must also comply with all conditions and provisions of this policy.

As indicated in the letter, and significant to the issue raised by defendant, the policy provided:

> b. Coverage under this endorsement shall be void if:
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> * * *
>
> (3) the **insured** does not pursue the assets that are not exempt from legal process of all persons or organizations legally responsible for the **accident**.

The period of limitations for an action brought by plaintiffs against the uninsured driver expired on July 25, 2006.[3] The policy additionally provided that uninsured motorist "coverage does not apply to . . . any person whose claim against the owner or operator of an uninsured automobile is barred by applicable statutes of limitation."

Defendant sought summary disposition, arguing that plaintiffs' claim was prohibited by the above policy provisions because plaintiffs did not pursue, and were then barred by the statute of limitations from pursuing,

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[2] The policies contained the following time limitation:

> Any person seeking Uninsured Motorist Coverage must:
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> a. present the claim for compensatory damages in compliance with the terms and conditions of this coverage and policy; and
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> b. present to us a written notice of the claim for Uninsured Motorist Coverage within one year after the **accident** occurs.
>
> A suit against us for Uninsured Motorist Coverage may not be commenced later than one year after the accident that caused the injuries being claimed, unless there has been full compliance with all of the conditions of this coverage and the policy.

[3] See MCL 600.5805(10).

the assets of the uninsured driver. Plaintiffs responded that defendant was equitably estopped from relying on the above provisions because defendant's agent told them that there was nothing more they need do to make a claim for uninsured motorist benefits. The trial court denied defendant's motion, concluding that there was a question of fact whether "it was justifiable for the plaintiffs to rely on the claim's [sic] adjuster's direction that the plaintiffs did not need to do anything more." The Court of Appeals denied defendant's application for leave to appeal.

I believe that defendant's argument may have merit. This Court has long held that

> it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another, to his injury, was himself not only destitute of knowledge of the state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge; and that, where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.[4]

The declaration that plaintiffs claim influenced them was defendant's agent's statement that there was nothing more they need do to make a claim for uninsured motorist benefits. Plaintiffs, however, were not "destitute of any convenient and available means of" determining whether they needed to do anything more. Indeed, both parties "ha[d] the same means of ascertaining the truth"—reading the policy—and the plaintiffs received a copy of the policy and were advised by letter dated November 3, 2004, to read it carefully and "comply with all conditions and provisions of this policy" to perfect their claim. The policy unambiguously provides that unless plaintiff "pursue[d] the assets that are not exempt from legal process of all persons or organizations legally responsible for the accident," uninsured motorist coverage would be void.

Accordingly, I believe that defendant has a strong argument that equitable estoppel does not apply and the coverage was voided by

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[4] *Sheffield Car Co v Constantine Hydraulic Co*, 171 Mich 423, 450 (1912); *Rix v O'Neil*, 366 Mich 35, 42 (1962). See also *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 415 (2008), discussing reasonable reliance on misrepresentations for fraud claims:

> One is presumed to have read the terms of his or her insurance policy, see *Van Buren v St Joseph Co Village Fire Ins Co*, 28 Mich 398, 408 (1874); therefore, when an insurer has made a statement that clearly conflicts with the terms of the insurance policy, an insured cannot argue that he or she reasonably relied on that statement without questioning it in light of the provisions of the policy. See also *McIntyre v Lyon*, 325 Mich 167, 174, 37 NW2d 903 (1949); *Phillips v Smeekens*, 50 Mich App 693, 697; 213 NW2d 862 (1973).

plaintiffs' failure to pursue the assets of the uninsured driver as they had been instructed in writing almost two years before the period of limitations expired for the claim against the uninsured driver. I would remand the case to the Court of Appeals for consideration of this issue as on leave granted and, therefore, respectfully dissent.

CORRIGAN and MARKMAN, JJ. We join the statement of Justice YOUNG.

ANTRIM COUNTY v BEELAND GROUP, LLC, No. 139056; Court of Appeals No. 290803.

*Summary Disposition July 9, 2009:*

GRIEVANCE ADMINISTRATOR v COTE, No. 138313. The application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. The application for leave to appeal as cross-appellant is also considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the March 6, 2009, order of the Attorney Disciplinary Board and we remand this case to the Attorney Disciplinary Board for consideration as on reconsideration granted. The board should reconsider its vacation of conditions A through D of the hearing panel's June 25, 2008, order of suspension in light of the documentation provided by the Grievance Administrator. In all other respects, the application for leave to appeal as cross-appellant is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. ADB: 07-83-GA.

PEOPLE v LARIO-MUNOZ, No. 138416. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and we reinstate the ruling of the Kent Circuit Court granting the defendant a new trial. The Court of Appeals erred by finding that the circuit court abused its discretion in deciding to grant the motion for a new trial. *People v Blackston*, 481 Mich 451, 460 (2008). The ruling on the motion did not fall outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269 (2003). Court of Appeals No. 275509.

PEOPLE v JACOB WRIGHT, No. 138473. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentences of the Wexford Circuit Court, and remand this case to the trial court for resentencing. Offense Variable 17 was inapplicable to defendant's sentencing offense of assault with intent to do great bodily harm; therefore, it was plain error to score that variable. MCL 777.47(1), 777.22(1). In addition, Prior Record Variable 1 was misscored. According to the presentence investigation report, defendant was scored 25 points for this variable because of a 2005 conviction for attempted assault with intent to do great bodily harm. Because assault with intent to do great bodily harm is a class D offense, and an attempt to commit a class A, B, C, or D offense is a class E offense, defendant's prior conviction for attempted assault with intent to do great bodily harm was a class E offense. MCL 777.19(3)(a). Defendant's prior class E offense should have been treated as a "prior low severity felony conviction," scorable under Prior Record Variable 2. MCL 777.52. Therefore, resentencing is required.

MCL 769.34(10); *People v Kimble*, 470 Mich 305 (2004). In all other respects, leave to appeal is denied, because we are not persuaded that the remaining question presented should be reviewed by this Court. Court of Appeals No. 289179.

WEAVER, J. I dissent from that part of the order remanding this case for resentencing as I am not persuaded that there is any manifest injustice in this case.

CORRIGAN, J. I would direct that the prosecutor respond to the application for leave to appeal.

PEOPLE v RAPLEY, No. 138779. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals and reinstate defendant's convictions for being a felon in possession of a firearm and for possession of a firearm during the commission of a felony. Where a defendant challenges the sufficiency of the evidence, all reasonable inferences which can be drawn from the evidence must be resolved in favor of the prosecution. *People v Nowack*, 462 Mich 392 (2000). Even though the firearm was not in plain view in this case, the jury could reasonably have inferred that defendant was in knowing possession of the firearm based on its proximity to a quantity of controlled substances that defendant was intending to deliver, defendant's proximity to both the weapon and the controlled substances, and the well-known relationship between drug dealing and the use of firearms as protection. Court of Appeals No. 281865.

KELLY, C.J. I would deny leave to appeal.

*Leave to Appeal Granted July 9, 2009:*

SHEPHERD MONTESSORI CENTER MILAN v ANN ARBOR CHARTER TOWNSHIP, No. 137443. The application for leave to appeal the judgments of the Court of Appeals is granted, limited to the issues: (1) whether the Court of Appeals applied the correct standard of review in determining that the defendants violated the plaintiff's right to equal protection; and (2) whether the defendants violated the plaintiff's right to equal protection in denying the plaintiff's request for a variance. The motion to strike the amicus curiae brief is denied. Reported below: 280 Mich App 449.

SUPERIOR HOTELS, LLC v MACKINAW TOWNSHIP, No. 138696. The parties shall include among the issues to be briefed whether the State Tax Commission has jurisdiction, pursuant to MCL 211.154(1), to correct the taxable value of real property erroneously recorded on the local assessment roll.

The Michigan Townships Association is invited to file a brief amicus curiae. Other persons or groups interested in the determination of the issue presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 282 Mich App 621.

*Leave to Appeal Denied July 9, 2009:*

PEOPLE v ALTHOFF, No. 137560; reported below: 280 Mich App 524.

PEOPLE v LARRY LEE, Nos. 137863 and 137864; Court of Appeals Nos. 277551 and 277552.

CAVANAGH, J. I would grant leave to appeal.

PEOPLE v MILESKI, No. 137998; Court of Appeals No. 280563.

PEREZ v OAKLAND COUNTY, No. 138104; Court of Appeals No. 278129.

KELLY, C.J. I would grant leave to appeal.

MOCK v HACKLEY HOSPITAL, No. 138328; Court of Appeals No. 280269.

PEOPLE v NORTHUP, No. 138332; Court of Appeals No. 288821.

PEOPLE v PARISH, No. 138366; reported below: 282 Mich App 106.

PEOPLE v HOLLAND, Nos. 138392, 138394, 138396, 138398, 138400, and 138402; Court of Appeals Nos. 278876, 279870, 281152, 281153, 281154, and 282817.

MAPLEWOOD PROPERTIES, LLC v LONG LAKE MARKET, INC, No. 138409; Court of Appeals No. 280467.

PEOPLE v CHAMPLAIN, No. 138423; Court of Appeals No. 276447.

KELLY, C.J. I would grant leave to appeal.

PEOPLE v GREENBERG, No. 138474; Court of Appeals No. 280650.

CORRIGAN, J., did not participate for the reasons stated in *People v Parsons*, 728 NW2d 62, 66 (2007).

PEOPLE v MUNN, No. 138512; Court of Appeals No. 289620.

PEOPLE v GRIFFIS, No. 138528; Court of Appeals No. 279182.

CAVANAGH, J. I would grant leave to appeal.

BURTON v DYE, No. 138580; Court of Appeals No. 282895.

*Reconsideration Denied July 9, 2009:*

KING v MCPHERSON HOSPITAL, No. 137071. Leave to appeal denied at 482 Mich 1156. Court of Appeals No. 283271.

HATHAWAY, J. I would grant reconsideration.

*Leave to Appeal Denied July 10, 2009:*

ELLIS v HATCHEW, No. 138083; Court of Appeals No. 279930.

KELLY, C.J., and CAVANAGH and HATHAWAY, JJ. We would reverse the judgment of the Court of Appeals because we are not persuaded that the trial court erred when it denied defendant's motion for summary disposition. When the facts are viewed in a light most favorable to plaintiff, there were disputed issues of material fact relating to the applicability of the open and obvious danger doctrine.

*Summary Disposition July 15, 2009:*

LOFTON v AUTOZONE, INC, No. 136029. By order of October 1, 2008, this Court vacated the decision of the Workers' Compensation Appellate Commission (WCAC) mailed April 4, 2007, and remanded this case to the Board of Magistrates for reconsideration in light of *Stokes v Chrysler LLC*, 481 Mich 266 (2008), with instruction that the magistrate assigned to the case take additional proofs upon request of either party and issue a decision. This Court retained jurisdiction. On order of the Court, the assigned magistrate having subsequently presided over an evidentiary hearing and having submitted a new decision in accordance with this Court's instructions, we remand this case to the WCAC for review of any challenges the parties may have to the magistrate's decision pursuant to the standard of review established in MCL 418.861a. The motion for leave to file brief amicus curiae is granted. We do not retain jurisdiction. Court of Appeals No. 277845.

KELLY, C.J., and WEAVER and HATHAWAY, JJ. We would grant leave to appeal.

OAKLAND COUNTY v OAKLAND COUNTY DEPUTY SHERIFFS ASSOCIATION, No. 138444. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate, as dictum, that portion of the judgment of the Court of Appeals stating that "it is well settled that county corrections officers and other employees who are not police officers are not subject to the hazards of police work." In all other respects, the application for leave to appeal is denied, because we are not persuaded that the questions presented should be reviewed by this Court. Reported below: 282 Mich App 266.

*Leave to Appeal Denied July 15, 2009:*

PEOPLE v HERNANDEZ, No. 137563; Court of Appeals No. 287028.

HENSON v BOAL, No. 138412; Court of Appeals No. 280796.

WEAVER, J. I would direct that oral argument be heard on the application for leave to appeal.

COLE v SUBURBAN MOBILITY AUTHORITY REGIONAL TRANSPORTATION, No. 138552; Court of Appeals No. 288480.

KELLY, C.J., and HATHAWAY, J. We would grant leave to appeal.

*Orders Granting Oral Arguments in Cases Pending on Application for Leave to Appeal July 17, 2009:*

BERKEYPILE v WESTFIELD INSURANCE COMPANY, No. 137353. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties shall submit supplemental briefs within 42 days of the date of this order and shall address the effect of paragraph E(1)(a) of the Westfield policy's Michigan uninsured motorist coverage, which provides that "[i]f there is other applicable insurance available under one or more policies or provisions of coverage . . . [t]he maximum recovery under all coverage forms or policies

combined may equal but not exceed the highest applicable limit for any one vehicle under any coverage form or policy providing coverage on either a primary or excess basis." The parties should not submit mere restatements of their application papers. Reported below: 280 Mich App 172.

ROBINSON v CITY OF LANSING, No. 138669. We direct the clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(H)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

The Michigan Association for Justice and the Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Reported below: 282 Mich App 610.

*Summary Disposition July 17, 2009:*

LEASE ACCEPTANCE CORPORATION v ABEL, No. 138009. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and reinstate the order of the Oakland Circuit Court dismissing the plaintiff's consolidated actions with prejudice relative to future litigation in Michigan between the parties concerning the subject matter of the underlying lawsuit and without prejudice relative to future litigation outside Michigan. The trial court did not abuse its discretion in determining that Michigan was not "a reasonably convenient place for the trial of the action," MCL 600.745(2)(b), when considering the factors supplied in *Cray v Gen Motors Corp*, 389 Mich 382, 395-396 (1973). See also *Lease Acceptance Corp v Adams*, 272 Mich App 209 (2006). The motion to dismiss and request for sanctions is denied. Court of Appeals No. 278716.

MARKMAN, J. (*dissenting*). I would not reverse the Court of Appeals. Instead, I would grant leave to appeal to consider: (1) whether, contrary to MCL 600.745(2), which is designed to determine whether Michigan constitutes a *reasonably convenient* place for certain types of litigation, the trial court erred in importing a standard drawn from the common law, which is designed to determine whether Michigan constitutes the *most convenient* place for certain other types of litigation, thereby placing a greater burden on Michigan plaintiffs to sustain lawsuits in Michigan courts and a lesser burden on out-of-state defendants to sustain lawsuits in out-of-state courts; and (2) whether the trial court abused its discretion by finding that Michigan does not constitute a reasonably convenient place for the instant litigation, thereby requiring a Michigan business to make approximately 300 trips to California in order to bring a breach of contract action rather than requiring each of approximately 300 California defendants to make one trip to Michigan, so that the Michigan business can defend itself against a breach of contract action, despite the fact that each such defendant has contractually consented to personal jurisdiction in Michigan.

*Leave to Appeal Granted July 17, 2009:*

PIERRON v PIERRON, No. 138824. The parties are directed to include among the issues to be briefed whether: (1) the defendant's unilateral decision to enroll the children in a school district 60 miles from their former school district and from their father's home resulted in a change in the custodial environment; (2) the "clear and convincing evidence" or "preponderance of the evidence" standard governed the defendant's burden of proof; (3) the defendant demonstrated that the school change was in the children's best interests; and (4) the children's preference for the Howell school district was "reasonable."

We further order that the parties maintain the status quo with respect to the children's continued enrollment in the Grosse Pointe school district, and that trial court proceedings are stayed pending the completion of this appeal.

The Clerk of the Court is directed to place this case on the October 2009 session calendar for argument and submission. Appellant's brief and appendix must be filed no later than August 21, 2009, and appellee's brief and appendix, if appellee chooses to submit an appendix, must be filed no later than September 11, 2009.

The Children's Law Section and the Family Law Section of the State Bar of Michigan are invited to file briefs amicus curiae, to be filed no later than September 25, 2009. Other persons or groups interested in the determination of the issues presented may move the Court for permission to file briefs amicus curiae, with such briefs to be filed no later than September 25, 2009. Reported below: 282 Mich App 222.

*Leave to Appeal Denied July 17, 2009:*

PEOPLE v EVANS, No. 138516; Court of Appeals No. 290061.

WELGOSH v TRI-MOUNT CUSTOM HOMES, INC, No. 139190; Court of Appeals No. 290196.

*Appeal Dismissed July 17, 2009:*

PEOPLE v ORONDE THOMPSON, No. 136601; Court of Appeals No. 273777.

SPECIAL ORDERS

# SPECIAL ORDERS

In this section are orders of the Court (other than grants and denials of leave to appeal from the Court of Appeals) of general interest to the bench and bar of the state.

*Order Entered January 14, 2009:*

PROPOSED AMENDMENT OF RULE 2.516 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 2.516 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

MCR 2.516 Instructions to the Jury.

(A) [Unchanged.]

(B) Instructing the Jury.

(1) After the jury is sworn and before evidence is taken, the court shall give such preliminary instructions regarding the duties of the jury, trial procedure, and the law applicable to the case as are reasonably necessary to enable the jury to understand the proceedings and the evidence. MCR 2.516(D)(2) does not apply to such preliminary instructions. The court shall specifically instruct the jurors that they shall not:

(a) discuss the case with others until deliberation begins, except as otherwise authorized by the court;

(b) read or listen to any news reports about the case;

(c) use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation;

(d) use a computer, cellular phone, or other electronic device with communication capabilities to obtain information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:

(i) seeking information about the criminal record of a party or witness;

(ii) reviewing news accounts of the case;

(iii) conducting research on any topics raised or testimony offered by any witness;

(iv) researching any other information the juror might think would be helpful, such as an aerial map of the scene.

(e) Any juror who observes or has reason to believe that another juror has used an electronic device in violation of this rule shall immediately inform the court of the violation.

(2)-(5) [Unchanged.]

(C)-(D) [Unchanged.]

*Staff Comment*: This proposal, submitted by the Prosecuting Attorneys Association of Michigan, would require judges to instruct jurors that they are prohibited from using computers or cell phones when they are in attendance at trial or during deliberation, and prohibited from using a computer or other electronic device to obtain information about the case when they are not in the courtroom. It would further require a juror who knows or has reason to know that another juror has violated these prohibitions to inform the judge. The proposal also would prohibit discussion among jurors until deliberation, and would prohibit jurors from reading about or listening to news reports about the case.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-33. Comments will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF RULE 8.115 OF THE MICHIGAN COURT RULES. (Cell Phone Usage in Court Facilities)

On order of the Court, this is to advise that the Court is considering an amendment of Rule 8.115 of the Michigan Court Rules. **Please note that the order contains alternative options for the proposed language of MCR 8.115(C)**. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 8.115. COURTROOM DECORUM.

(A)-(B) [Unchanged.]

**Alternative A**

(C) Electronic Devices. Lawyers may carry cell phones or other portable electronic devices into any court facility. Cell phone or other portable electronic device use shall be allowed anywhere outside the courtroom. When in any courtroom, all phones or other portable electronic devices shall either be turned off or silenced. If silenced, counsel shall make certain that any transmissions do not interfere with court proceedings. No photographs may be taken inside any courtroom without permission of the court. No photographs may be taken of any jurors or witnesses. Individuals shall not initiate or answer any calls while court is in session without the consent of the court. Failure to comply with this section may result in a fine, incarceration, or both for contempt of court.

**Alternative B**

(C) Electronic Devices. Lawyers may carry cell phones or other portable electronic devices into any court facility. Cell phone or other portable electronic device use shall be allowed anywhere outside the courtroom. When in any courtroom during court proceedings, all phones or other portable electronic devices shall be turned off. No photographs may be taken inside any courtroom without permission of the court. No photographs may be taken of any jurors or witnesses. No text message shall be sent or received. Failure to comply with this section may result in a fine, incarceration, or both for contempt of court.

*Staff Comment*: Alternative A, submitted by the State Bar of Michigan but with several clarifying revisions, would allow attorneys to bring cell phones into a courthouse, but would limit their use in courtrooms during court proceedings. In addition, the proposal would allow a court to impose sanctions for failure to comply with cell phone usage restrictions. Alternative B, similar to one submitted by the State Bar of Michigan, would allow attorneys to bring cell phones into a courthouse, but would prohibit their use in courtrooms during court proceedings. In addition, the proposal would allow a court to impose sanctions for failure to comply with cell phone usage restrictions.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-35. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Superintending Control Denied February 24, 2009:*

HILL v ATTORNEY GRIEVANCE COMMISSION, No. 137630; AGC: 0808/07.

*Order Entered March 10, 2009:*

PROPOSED AMENDMENT OF RULE 3.936 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.936 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language would be amended as indicated below:]

RULE 3.936. FINGERPRINTING.

(A)-(C) [Unchanged.]

(D) Order for ~~Return~~ Destruction of Fingerprints. When a juvenile has been fingerprinted for a juvenile offense, but no petition on the offense is submitted to the court, the court does not authorize the petition, or the court does not take jurisdiction of the juvenile under MCL 712A.2(a)(1), if the records have not been destroyed as provided by MCL 28.243(7)-(8), the court, on motion filed pursuant to MCL 28.243(8), shall~~:~~

~~(1)~~ issue an order directing the Department of State Police, or other official holding the information, to ~~return~~ destroy the fingerprints and~~,~~ arrest card~~, and description~~ of the juvenile pertaining to the offense, other than an offense as listed in MCL 28.243(12)~~; and~~

~~(2) direct that fingerprint information in the court file pertaining to the offense be destroyed~~.

*Staff Comment*: This proposal would eliminate the procedure by which a juvenile could ask for the return of fingerprints, and instead would require the destruction of fingerprints, which more closely follows the statutory authority in MCL 28.243.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by July 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-08. Comments will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Order Entered March 18, 2009:*

PROPOSALS REGARDING PROCEDURE FOR DISQUALIFICATION OF SUPREME COURT JUSTICES.

On order of the Court, this is to advise that the Court is considering the following alternative proposals, and variations thereof, regarding the disqualification of Supreme Court justices. Before determining whether one of the proposals should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt.

Publication of these proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of any of the proposals in their present form.

[The present language would be amended as indicated below:]

ALTERNATIVE A (proposed new Rule 2.003-SC of the Michigan Court Rules)

RULE 2.003-SC. DISQUALIFICATION OF A JUSTICE.

Unless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case. Each justice shall, on motion or sua sponte, decide whether grounds exist for his or her disqualification in a particular case. Disqualification of a justice is required if:

(1) The justice is actually biased against or for a party in the proceeding.

(2) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(3) The justice has been consulted or employed as an attorney in the matter in controversy.

(4) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(5) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

(6) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer in the proceeding;

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

A justice is not disqualified merely because the justice's former law clerk is an attorney of record for a party in an action that is before the justice or is associated with a law firm representing a party in an action that is before the justice.

ALTERNATIVE B (proposed new Rule 2.003-SC of the Michigan Court Rules)

RULE 2.003-SC. DISQUALIFICATION OF A JUSTICE.

(A) Who May Raise. A party may raise the issue of a justice's disqualification by motion, or any justice may raise it.

(B) Grounds for Disqualification. Disqualification of a justice is warranted if:

(1) The justice is actually biased or prejudiced against or for a party in the proceeding.

(2) The justice's impartiality might objectively and reasonably be questioned. Statements or conduct by anyone other than the justice shall not be considered in assessing the impartiality of a justice, nor shall campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765; 122 S Ct 2528; 153 L Ed 2d 694 (2002), be a proper basis for the disqualification of a justice.

(3) The justice has personal knowledge of disputed evidentiary facts concerning the proceeding.

(4) The justice has been consulted or employed as an attorney in the matter in controversy.

(5) The justice was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(6) The justice knows that he or she, individually or as a fiduciary, or the justice's spouse, parent, or child wherever residing, or any other member of the justice's family residing in the justice's household, has a more than de minimis economic or other interest in the subject matter in controversy.

(7) The justice or the justice's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(a) is a party to the proceeding, or an officer, director, or trustee of a party;

(b) is acting as a lawyer of record in the proceeding;

(c) is known by the justice to have a more than de minimis interest that could be substantially affected by the proceeding; or

(d) is to the justice's knowledge likely to be a material witness in the proceeding.

A justice is not disqualified merely because a former law clerk of the justice is an attorney of record for a party in an action that is before the Court or is associated with a law firm representing a party in an action that is before the Court.

(C) Procedure.

(1) *Time for filing*. A party must file a motion to disqualify a justice within 14 days after the moving party discovers or should have discovered the basis for disqualification. If a motion is not timely filed, untimeliness is a factor in deciding whether the motion should be granted. A justice may raise a question of disqualification at any time a potential justification for so doing arises.

(2) *All grounds to be included; Affidavit*. In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling*. The challenged justice shall decide the motion for disqualification. If the challenged justice denies the motion for disqualification, the moving party may appeal to the Chief Justice, who shall decide the motion de novo. If the challenged justice is the Chief Justice, and the motion for disqualification is denied, the moving party may appeal to the entire Court, which shall decide the motion de novo.

(4) *Motion Denied*. If the Chief Justice denies the motion for disqualification, the Chief Justice shall issue an order to that effect without elaboration. If the challenged justice is the Chief Justice, and the Court denies the motion for disqualification, the Court shall issue a denial order without elaboration. No other additional statements are permitted.

(5) *Motion Granted*. When a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

ALTERNATIVE C

RULE 2.003. DISQUALIFICATION OF JUDGE.

(A) Applicability. This rule applies to all judges, including justices of the Michigan Supreme Court, unless a specific provision is stated to apply only to judges of a certain court. The word "judge" includes a justice of the Michigan Supreme Court.

(BA) Who May Raise. A party may raise the issue of a judge's disqualification by motion, or the judge may raise it.

(CB) Grounds. ~~A judge is disqualified when the judge cannot impartially hear a case, including but not limited to instances in which:~~

(1) Disqualification of a judge is warranted for reasons that include, but are not limited to, the following:

(a1) The judge is actually~~personally~~ biased or prejudiced for or against a party or attorney.

(b) The judge's impartiality might objectively and reasonably be questioned.

(c2) The judge has personal knowledge of disputed evidentiary facts concerning the proceeding.

(d3) The judge has been consulted or employed as an attorney in the matter in controversy.

(e4) The judge was a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years.

(f5) The judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household, has an more than de minimis economic or other interest in the subject matter in controversy. or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding.

(g6) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(ia) is a party to the proceeding, or an officer, director, or trustee of a party;

(iib) is acting as a lawyer in the proceeding;

(iiie) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding; or

(ivd) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) Disqualification of a judge is not warrantedA judge is not disqualified merely because the judge's former law clerk is an attorney of record for a party in an action that is before the judge or is associated with a law firm representing a party in an action that is before the judge.

(DC) Procedure.

(1) *Time for Filing*. To avoid delaying trial and inconveniencing the witnesses or delaying the appellate process, a motion to disqualify must be filed within 14 days after the moving party discovers or should have discovered the ground for disqualification. In the trial court, ifIf the discovery is made within 14 days of the trial date, the motion must be made forthwith. If a motion is not timely filed, untimeliness, including, in the trial court, delay in waiving jury trial, is a factor in deciding whether the motion should be granted.

(2) *All Grounds to be Included; Affidavit.* In any motion under this rule, the moving party must include all grounds for disqualification that are known at the time the motion is filed. An affidavit must accompany the motion.

(3) *Ruling.*

(a) For courts other than the Supreme Court, Tthe challenged judge shall decide the motion. If the challenged judge denies the motion,

(ia) in a court having two or more judges, on the request of a party, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo;

(iib) in a single-judge court, or if the challenged judge is the chief judge, on the request of a party, the challenged judge shall refer the motion to the state court administrator for assignment to another judge, who shall decide the motion de novo.

(b) In the Supreme Court, if a justice's participation in a case is challenged by a written motion or if the issue of participation is raised by the justice himself or herself, the challenged justice shall decide the issue and publish his or her reasons about whether to participate.

If the challenged justice denies the motion for disqualification, a party may move for the motion to be decided by the entire Court. The entire Court shall then decide the motion for disqualification de novo. The Court's decision shall include the reasons for its grant or denial of the motion for disqualification.

(4) *Motion Granted.*

(a) For courts other than the Supreme Court, w~~W~~hen a judge is disqualified, the action must be assigned to another judge of the same court, or, if one is not available, the state court administrator shall assign another judge.

(b) In the Supreme Court, when a justice is disqualified, the proceeding will be decided by the remaining justices of the Court.

(E~~D~~) Remittal of Disqualification. If it appears that there may be grounds for disqualification, the judge may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. In the Court of Appeals and the Supreme Court, the clerk of the court may contact the parties with a written explanation of the possible grounds for disqualification. If, following disclosure of any basis for disqualification other than actual~~personal~~ bias or prejudice concerning a party, the parties, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be in writing or placed on the record.

WEAVER, J. (*concurring*). Below, in its entirety, is the statement I submitted to be published in 2006 when this Court first voted to publish for comment the proposed court rules concerning the participation or disqualification of Michigan Supreme Court Justices. My statement includes bracketed material on pages 1216 and 1220-1221 that represents my 2009 editorial comments concerning the duty of a justice to participate in a case pursuant to the common-law rule of necessity doctrine. My statement also includes an important chart on page 1221 that provides a comparison of each of the proposed rules to the existing court rule, MCR 2.003.

Although my statement contains references to 2006 statements of other justices, as yet not resubmitted, I have chosen to retain those references because they provide necessary context for understanding my views on the participation and disqualification of justices. In addition, I note that while Justice CORRIGAN has not resubmitted her 2006 statement on disqualification, she and Justice YOUNG have submitted 2009 statements for this order in which they reassert the argument that there is a so-called historic unwritten practice or tradition in Michigan similar to that of the United States Supreme Court, sometimes called a federal

"duty to sit." Further, Justices CORRIGAN and YOUNG reassert the argument that justices cannot be replaced by other judicial officers.

The Michigan Constitution, art 6, § 23, provides:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The Supreme Court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

Art 6, § 23 is the constitutional authority that allows, but does not require, the Supreme Court, as it has done in the past and continues to do so today, to "authorize persons who have been elected and served as judges [i.e., current and retired trial judges, Court of Appeals judges, and Supreme Court Justices who have been elected and served as judges] to perform judicial duties for limited periods or specific assignments" in the trial courts and the Court of Appeals when illness, disqualification, recusal, or other temporary occurrence or need prevents judicial duties from being performed by trial or Court of Appeals judges.

As I have stated before, I do not suggest that our Michigan Constitution, art 6, § 23, *requires* this Supreme Court to authorize a person who has been elected and has served as a judge to perform judicial duties for limited periods or specific assignments every time an illness, disqualification, or other temporary occurrence prevents judicial duties from being performed by a justice, but rather art 6, § 23 provides for and thus *allows* this Court to do so when, in the exercise of its sound discretion, doing so is necessary. None of the three proposals (A, B, and C drafted in 2006) submitted for public comment addresses the application of art 6, § 23 to the disqualification or recusal of justices issue.

For those interested in even more information and the history behind the disqualification issue, see my personally funded website at www.justiceweaver.com. My website includes my dissent in *Grievance Administrator v Fieger,* 477 Mich 1228, 1232 (2006)—in which I published my 2006 disqualification statement. My dissent in *Grievance Administrator v Fieger* was ordered suppressed on December 6, 2006 by the then-majority of four (then-Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN) and remained suppressed for 15 days until December 21, 2006.

In addition to the ideas presented in my reproduced 2006 statement, I note that we are only just beginning this important process of discerning court rules for the participation or disqualification of Michigan Supreme Court Justices. For example, one addition to be considered for inclusion in a court rule is whether a justice must disclose any prior attorney-client relationship between the justice and a party, or an

attorney for the party, appearing before the court *regardless of how much time has lapsed since the representation*. Another item for consideration might be whether a justice must disclose a monetary contribution exceeding a certain amount and received directly or indirectly from any party or attorney involved the case.

My 2006 statement now follows:

[WEAVER, J.] It is right for this Court to publish for public comment proposed court rules concerning the participation or disqualification of Michigan Supreme Court Justices. Since May 2003, I have called for this Court to recognize, publish for public comment, place on a public hearing agenda, and address the procedures concerning the participation or disqualification of justices.[1]

I strongly encourage the public (citizens, judges, attorneys, and the media) to carefully review the three proposals offered and the current court rule, MCR 2.003, and to comment on them. Public comment, both written and at the public hearing, is essential to achieving clear, fair, orderly, and enforceable rules governing the participation or disqualification of justices. Such rules are essential to maintaining the integrity and independence of the judiciary and the public's confidence in it, particularly the Supreme Court.

I. The Alternative Proposals

I am sincerely interested in receiving written comments and hearing public comment on all the proposals. Because I have thought and worked long on this important issue of the rules governing the disqualification of

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[1] During this Court's deliberations in *In re JK,* 468 Mich 202 (2003), a case involving termination of parental rights, my participation in the case became an issue and led me to research the procedures governing the participation and disqualification of justices. For an explanation of this history, see my statement of non-participation in *In re JK, supra* at 219. Since *In re JK,* I have repeatedly called for this Court to address the need for clear, fair disqualification procedures for justices. See, e.g. *Graves v Warner Bros*, 469 Mich 853, 854-855 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883, 889 (2003), *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 472 Mich 91, 96 (2005), *Harter v Grand Aerie Fraternal Order of Eagles,* 693 NW2d 381 (2005), *Grievance Administrator v Fieger*, 472 Mich 1244, 1245 (2005), *Scalise v Boy Scouts of America*, 473 Mich 853 (2005), *McDowell v Detroit,* 474 Mich 999, 1000 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080, 1081 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006).

Since May 2003, there have been nine public hearings on other administrative matters in which the rules governing the disqualification of justices could have been addressed; September 23, 2003; January 29, 2004; May 27, 2004; September 15, 2004; January 27, 2005; May 26, 2005; September 29, 2005; January 25, 2006; and May 24, 2006.

justices, and because understanding and comparing these three proposals is complicated and potentially confusing, I offer the following list of pertinent questions with discussion and a comparison chart in section II to highlight the distinctions between the proposed alternative rules and the current court rule, MCR 2.003.

These questions and commentary and the comparison chart in section II of this statement, which summarize the substance of the alternative rules, are intended to facilitate informed, candid input from the public (citizens, judges, attorneys, and the media) regarding the rules for the participation or disqualification of justices that will best protect the public and the independence and integrity of the judiciary and earn the public's trust and confidence in the Michigan Supreme Court.

1) WHAT FORM SHOULD A RULE ON THE DISQUALIFICATION OF MICHIGAN SUPREME COURT JUSTICES TAKE?

Currently, justices of the Michigan Supreme Court sometimes follow unwritten traditions, not always known even to all the justices, when deciding a motion for disqualification. At other times, justices follow portions of the current court rule on disqualification, MCR 2.003.[2] This helter-skelter approach of following "unwritten traditions" that are

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[2] There has been inconsistency by some justices regarding the applicability of MCR 2.003 to Supreme Court justices. At times they have applied the rule to themselves, and at times they have not. Indeed, Chief Justice TAYLOR and Justices CORRIGAN and MARKMAN have each at times availed themselves of MCR 2.003. In *Adair v Michigan,* 474 Mich 1027, 1043 (2006), Chief Justice TAYLOR and Justice MARKMAN specifically recognized that they were required to comply with MCR 2.003, stating that "[p]ursuant to MCR 2.003(B)(6), we would each disqualify ourselves if our respective spouses were participating as lawyers in this case, or if any of the other requirements of this court rule were not satisfied." [Emphasis added.] Justice YOUNG concurred in their statement, saying that he supported their joint statement and fully concurred in the legal analysis of the ethical questions presented in it. *Id.* at 1053. Similarly, for *Grosse Pointe Park v Michigan Muni Liability & Prop Pool,* 473 Mich 188 (2005), then-Chief Justice CORRIGAN used the remittal of disqualification process of MCR 2.003(D). While Justice CORRIGAN asserts that I have said MCR 2.003(D) is binding, I have not made that assertion because subsection D is permissive. Specifically, MCR 2.003(D) states that "[i]f it appears that there may be grounds for disqualification, the judge *may* ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." [Emphasis added.]

But at other times, these four justices have not followed the provisions of MCR 2.003. For example, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883, 889 (2003), then-Chief Justice CORRIGAN and Justices TAYLOR, YOUNG, and MARKMAN denied a motion for reconsideration of the Court's order denying the motion for disqualification and did not refer the motion to

secret from the public is wrong. There should be clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.

It is important to identify the three actions that may occur after the public hearing on this issue:

- A majority of the justices could decline to commit any new rules to writing and could simply continue to follow secret "unwritten traditions" whenever it so desired. An obvious flaw of "unwritten traditions" is that no one can be sure that an alleged tradition is really a tradition, or that it ever even existed. Further, unwritten traditions can be changed without notice to the public and without public comment.
- A majority of the justices could adopt a proposal, either one of the three published today or some other proposal that was not published for comment, as an unenforceable guideline within the Court's internal operating procedure (IOP). Unlike a court rule, which is binding on the justices and defines the rights of the parties in a case, an IOP is not binding on the justices and creates no recourse for parties who are concerned about a justice's impartiality.[3] Further, an IOP can be amended without notice to the public and without public comment.
- A majority of the justices could adopt a proposal, either one of the three published today or some other proposal that was not published for comment, as a Michigan Court Rule. Hopefully, such a rule would contain clear, fair, orderly, and public procedures concerning the participation or disqualification of justices.

Rules governing the participation or disqualification of justices are best promulgated formally, after public notice and comment, in the form of an amended or new Michigan Court Rule that provides written enforceable rights and duties.

Alternatives A and B are offered as new court rules. Alternative C is offered as an amendment to the current court rule, MCR 2.003. Amending the existing court rule that governs the disqualification of all Michigan judges is clearer and simpler than enacting a new court rule that would apply only to Michigan Supreme Court justices.

2) SHOULD THE LIST OF GROUNDS FOR DISQUALIFICATION BE EXCLUSIVE OR NON-EXCLUSIVE?

The current court rule, MCR 2.003, provides that the grounds for disqualification listed in the rule are not exclusive. MCR 2.003 states that a judge is disqualified when he cannot impartially hear a case, "including but not limited to" instances covered by the specific grounds listed.

Alternative C, like the current court rule, MCR 2.003, makes the list of grounds for disqualification *non-exclusive*, stating that "[d]isqualification of a judge is warranted for reasons that include, but are not limited to, the following . . . ."

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the State Court Administrator for the motion to be assigned to another judge for review de novo, as would be proper under MCR 2.003(C)(3).

[3] See Supreme Court internal operating procedures at <http://courts.michigan.gov/supremecourt/> (accessed on May 5, 2006), which provides in a disclaimer that the IOPs are unenforceable.

But, by contrast, both alternatives A and B restrict the possible grounds for disqualification of justices to those on the *exclusive* list in the proposed rule. Alternative A not only provides an exclusive list of grounds for disqualification, but also specifies that "[u]nless one of the conditions specified below is met, it is the duty of a justice to serve in every case and a justice is not mandatorily required to withdraw from serving on a case."

The list of grounds for disqualification of a justice should be *non-exclusive*. An exclusive list precludes a motion for disqualification when there is a valid reason to disqualify a justice that is not included on the list of grounds. Any situation not on the list of grounds, no matter how egregious it might be, would not require the disqualification of a justice.

3) SHOULD THERE BE A RULE THAT A JUSTICE IS DISQUALIFIED WHEN HE CANNOT IMPARTIALLY DECIDE A CASE?

The current court rule, MCR 2.003(B), provides that a judge is "disqualified when the judge cannot impartially hear a case . . . ."

Alternative A entirely omits this important language, thus narrowing the grounds for disqualification.

Alternative B and alternative C improve on the current language in MCR 2.003 by stating that disqualification of a judge, including a justice, is warranted whenever the judge's "impartiality might objectively and reasonably be questioned." This language is taken from the federal rules, and has been interpreted as meaning whether "an objective, disinterested observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt that justice would be done in the case." *Pepsico, Inc v McMillen*, 764 F2d 458, 460 (CA 7, 1985).

Fair, clear, and impartial disqualification rules are necessary to preserve the integrity of the judicial system. Preserving the integrity of the judicial system requires the Michigan Supreme Court and all judges to recognize that it is not just actual bias or prejudice that erodes public confidence. The appearance of bias or prejudice can be just as damaging. Thus, the language in alternatives B and C, that a judge should be disqualified whenever it appears that he cannot impartially hear a case, is an improvement over the current provision in MCR 2.003(B) that a judge is disqualified whenever he cannot impartially hear a case.

4) DOES THE PROPOSED RULE REQUIRE OR PERMIT A JUSTICE TO EXPLAIN HIS DECISION WHETHER OR NOT TO RECUSE HIMSELF, AND DOES IT REQUIRE OR PERMIT OTHER JUSTICES TO DISSENT?

Article 6, § 6 of the 1963 Michigan Constitution states that "[d]ecisions of the supreme court . . . shall be in writing and shall contain a concise statement of the facts and reasons for each decision . . . . " As I have previously stated, this provision applies to every decision of the Supreme Court, including a decision regarding a justice's participation or non-participation in a case.[4]

In obedience to Const 1963, art 6, § 6, alternative C requires that a justice's decision and reasons to deny a motion for his disqualification be

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[4] *Gilbert*, *supra* at 469 Mich 883, 883 n 2.

in writing. Further, when the full Court reviews a justice's decision to deny a motion for disqualification, in obedience to art 6, § 6, alternative C requires the Court to include the reasons for its grant or denial of the motion for disqualification.

By contrast, alternatives A and B do not require a written explanation of a justice's decision to deny a motion for his disqualification. Additionally, alternative B *forbids* statements by any justice when the full Court reviews a justice's decision to deny a motion for his disqualification. Forbidding the publication of reasons for a decision of the Court or a dissent to that decision clearly violates art 6, § 6.[5]

While not providing reasons for decisions to participate or not participate in a case may be consistent with the "unwritten traditions" of this Court, it is a traditional practice that does not conform with the requirements of Const 1963, art 6, § 6 and that does not adequately serve the Court or the public.

5) SHOULD BIAS AND PREJUDICE AGAINST AN ATTORNEY IN A PROCEEDING BE A GROUND FOR DISQUALIFICATION?

Alternatives A and B omit a provision found in both the current version of MCR 2.003 and alternative C that disqualification is warranted if the judge is biased or prejudiced for or against an *attorney* in the proceeding. Under alternative A, disqualification of a justice is required or warranted only if the justice "is actually biased against or for a *party* in the proceeding." Under alternative B, disqualification is warranted only if the justice "is actually biased or prejudiced against or for a *party* in the proceeding."

Bias and prejudice against an attorney in a proceeding is potentially just as serious as bias and prejudice against a party in a proceeding. This critical omission from alternatives A and B seems designed to forestall motions for disqualification from attorneys such as Geoffrey Fieger, who has filed motions for disqualification against various justices, including me, alleging that the justice cannot impartially hear the case because of bias and prejudice against attorney Fieger.[6]

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[5] The full text of Const 1963, art 6, § 6 reads:

> Decisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent.

[6] See, e.g., *Graves v Warner Bros*, 469 Mich 853 (2003), *Gilbert v DaimlerChrysler Corp*, 469 Mich 883 (2003), *Harter v Grand Aerie Fraternal Order of Eagles,* 693 NW2d 381 (2005), *McDowell v Detroit,* 474 Mich 999 (2006), *Stamplis v St John Health Sys*, 474 Mich 1017 (2006), *Heikkila v North Star Trucking, Inc,* 474 Mich 1080 (2006), and *Lewis v St John Hosp,* 474 Mich 1089 (2006).

6) SHOULD THERE BE OPPORTUNITY FOR REVIEW OF A JUSTICE'S DECISION NOT TO RECUSE HIMSELF?

Under MCR 2.003(C)(3), the party moving for a judge's disqualification can ask for review of that judge's decision to deny the motion. In a court having two or more judges, MCR 2.003(C)(3)(a) provides for review de novo by the chief judge of the court. In a single-judge court, or when the challenged judge is the chief judge, MCR 2.003(C)(3)(b) provides for review de novo by another judge assigned by the State Court Administrator.

Alternative C amends MCR 2.003(C)(3) to provide that the entire Supreme Court may review a justice's decision to deny a motion for his disqualification.

Alternative B allows for limited review of a justice's decision by the Chief Justice, or by the entire Court if the challenged justice is the Chief Justice. However, as noted above, alternative B prohibits any statement or dissent in connection with the Court's decision to affirm or reverse a justice's decision to deny the motion for his disqualification. This prohibition violates Const 1963, art 6, § 6, which requires that all decisions of the Supreme Court, and all dissents by a justice, shall be in writing and shall include the reasons for the decision or the dissent.

Alternative A does not provide for any review of a justice's decision not to recuse himself. Failing to provide for any review is wrong. It is a most basic truth that the person who may be the least capable of recognizing a justice's actual bias and prejudice, or appearance of bias and prejudice, is the justice himself.

7) IS THERE A "DUTY TO SIT" APPLICABLE TO MICHIGAN SUPREME COURT JUSTICES?

[On the rare occasion, which to my knowledge has only occurred once in the history of Michigan, that there is an issue before the Court that affects all state judges' abilities to be impartial, then the justices of the Michigan Supreme Court have a duty to participate pursuant to the common-law rule of necessity doctrine. Specifically, the one case in which this occurred was in 2008, *Citizens Protecting Michigan's Constitution v Secretary of State & Reform Michigan Government Now!(RMGN)*, 482 Mich 960 (2008), in which there was a challenge to a proposed constitutional amendment that would have reduced the salary of every judicial officer in the state, thereby affecting all Michigan judges' abilities to be impartial about the amendment. This necessity doctrine is different from the federal "duty to sit" espoused by Justices CORRIGAN, YOUNG, and MARKMAN and former Justice TAYLOR.]

Alternative A asserts that a justice has a duty to "serve in every case" unless one of the exclusive grounds for disqualification enumerated in alternative A exists. Neither the Michigan Constitution nor the Michigan Court Rules support alternative A's "duty to sit" premise.

Alternative A's "duty to sit" rationale was first publicly articulated in Chief Justice TAYLOR and Justice MARKMAN's written explanation, concurred in by Justices CORRIGAN and YOUNG, of their decision to participate in *Adair v Michigan,* 474 Mich 1027, 1040-1041 (2006). In my *Adair*

statement, I explained that there is no justification to impose the federal "duty to sit" doctrine on Michigan Supreme Court justices.[7]

Justice CORRIGAN has a lengthy statement attempting to refute an alleged "scheme to install temporary justices." But there is no such scheme. None of the proposals submitted for public comment provides for the replacement of a justice who recuses himself or is disqualified from a case. Therefore, it is irrelevant and unnecessary to discuss the issue here beyond noting that the "duty to sit" premise of alternative A is incorrect. For those interested, I have responded to Justice CORRIGAN's concurrence in section III of this statement.

8) SHOULD A JUSTICE BE ALLOWED TO RAISE THE ISSUE OF ANOTHER JUSTICE'S DISQUALIFICATION WITHOUT FILING A MOTION OR AN AFFIDAVIT?

Alternative B is unique in stating that any justice may raise the issue of a fellow justice's disqualification.[8] Such a rule would polarize the Court by allowing philosophically or politically motivated attacks on justices. Such a rule is also inappropriate because a challenging justice would not be a party to the proceedings before the Court.

The current court rule, MCR 2.003, requires that any party to a case wishing to raise a judge's disqualification must do so by motion[9] and that an affidavit must accompany the motion.[10] But under alternative B, a justice, who is not a party to the case, would be allowed to raise the issue without filing a motion. Neither the parties nor the public would know that one justice had raised the issue of another justice's disqualification in a case. Further, the challenging justice is not required by alternative B to file an affidavit supporting the motion, since subsection C(2) of alternative B only requires that an affidavit be filed with a motion for disqualification, and in alternative B no motion is required for one justice to challenge another justice's participation.

Thus, under alternative B, a justice could secretly raise the issue of a fellow justice's disqualification with no notice to the parties, no motion filed in the record, and no affidavit filed.

9) SHOULD A PARTY OR AN ATTORNEY BE PRECLUDED FROM BRINGING A MOTION FOR DISQUALIFICATION BASED ON STATEMENTS BY A JUSTICE WHEN THOSE STATEMENTS ARE MADE DURING AN ELECTION CAMPAIGN?

There is currently no reference to or special protection for campaign speech in the current court rule, MCR 2.003, nor is any such special protection proposed in alternatives A or C.

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[7] *Adair, supra* at 1044-1045.

[8] There is no need for such a provision. When a justice has doubts about the propriety of a fellow justice participating in a particular case, guidance is found in the Code of Judicial Conduct. Canon 3(B)(3) suggests that a justice can "take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware."

[9] MCR 2.003(A).

[10] MCR 2.003(C)(2).

However, alternative B excludes "campaign speech" from consideration in assessing a justice's impartiality. Alternative B states that "campaign speech protected by *Republican Party of Minnesota v White,* 536 US 765 (2002), [shall not] be a proper basis for the disqualification of a Justice."

Judicial candidates enjoy the right to free speech, and a judicial candidate has the right to state his views on a subject. Nevertheless, the Due Process Clause also requires that litigants have access to an unbiased and impartial decision maker.[11] Highly political and polarizing campaign speech by a judicial candidate or the candidate's campaign committees may raise legitimate questions regarding a justice's ability to impartially decide a case.

This language in Alternative B appears to be aimed at precluding the sorts of motions for disqualification that Chief Justice TAYLOR and Justices CORRIGAN, YOUNG, and MARKMAN have faced in response to campaign speech by themselves or their campaign committees:

- In a speech at the GOP State Convention on August 26, 2000, Justice YOUNG said that "Geoffrey Fieger, and his trial lawyer cohorts hate this court. There's honor in that." This statement was one of the grounds listed in the motion for disqualification filed against Justice YOUNG by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert v DaimlerChrysler Corp,* 469 Mich 883 (2003).

- A campaign ad paid for by "Robert Young for Justice," "Stephen Markman for Justice," and "Clifford Taylor for Justice" included the language "No wonder Geoffrey Fieger, Jesse Jackson and the trial lawyers support Robinson, Fitzgerald and Thomas" (who ran against Chief Justice TAYLOR and Justices YOUNG and MARKMAN in the 2000 Supreme Court election). This statement was one of the grounds listed in the motion for disqualification filed against Chief Justice TAYLOR and Justices YOUNG and MARKMAN by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert*.

- During his 2000 campaign, it was reported that Chief Justice TAYLOR made statements at a fundraiser about the cases that Mr. Fieger had pending in the appellate courts: "Geoffrey Fieger apparently has $90 million of lawsuit awards pending in the state Court of Appeals." *Justice Visits County,* The Sunday Independent, September 3, 2000, p 3. This statement was one of the grounds listed in the motion for disqualification filed against Chief Justice TAYLOR by the plaintiff's attorney, Geoffrey Fieger, in *Gilbert*.

- On February 20, 2006, the Committee to Re-elect Justice Maura CORRIGAN sent out a fundraising letter from former Governor John Engler stating that "[w]e cannot lower our

[11] *Crampton v Dep't of State,* 395 Mich 347, 351 (1975).

guard should the Fiegers of the trial bar raise and spend large amounts of money in hopes of altering the election by an 11th hour sneak attack." This statement was one of the grounds listed in the motion for disqualification filed against Justice CORRIGAN by the respondent, Geoffrey Fieger, in *Grievance Administrator v Fieger*, 475 Mich 1211 (2006).

10) SHOULD DISQUALIFICATION BASED ON A SPOUSE'S OR RELATIVE'S PARTICIPATION IN A CASE BE LIMITED TO CASES IN WHICH THE SPOUSE OR RELATIVE IS THE LAWYER "OF RECORD"?

Alternative B lowers the standard regarding motions for disqualification of a justice due to possible familial[12] bias or influence. MCR 2.003 requires that a judge be disqualified whenever a familial member is acting as a lawyer in a case. Alternative B provides that disqualification of a justice is required when the familial member is acting as a lawyer "of record" in the proceeding.

This proposed change from MCR 2.003(B)(6) appears to be in response to the motion filed in *Adair* asking for the disqualification of Chief Justice TAYLOR and Justice MARKMAN. Chief Justice TAYLOR's wife and Justice MARKMAN's wife are lawyers employed by the state Attorney General's office. Sharing a household and sharing income with a spouse who was given an at-will job by a public official whose office regularly appears before the Court formed the basis for the motion for disqualification filed against Chief Justice TAYLOR and Justice MARKMAN in *Adair*. The proposed new rule would preclude challenges such as the one made in *Adair* unless a justice's spouse is the "lawyer of record" in the case.

11) SHOULD THE TIME LIMIT FOR FILING A MOTION FOR DISQUALIFICATION BE SHORTENED TO WITHIN 14 DAYS OF THE TIME THAT THE GROUNDS FOR DISQUALIFICATION *SHOULD HAVE BEEN* DISCOVERED?

Alternatives B and C add a new constraint to the time within which a motion for disqualification must be filed. Alternatives B and C provide that such motions must be filed within 14 days after the moving party "should have discovered" the ground for disqualification. The existing court rule, MCR 2.003(C)(1), does not impose this heightened time constraint.

## II. Comparison Chart

For ease of comparison, below is a chart showing these essential questions raised by alternatives A, B, and C and the existing court rule, MCR 2.003.

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[12] Bias or influence would be "familial" if it involves the justice's "spouse, or a person within the third degree of relationship to either [the justice or the spouse], or the spouse of such a person . . . ." MCR 2.003(B)(6).

| | PROPOSED RULE A | PROPOSED RULE B | PROPOSED RULE C | MCR 2.003 |
|---|---|---|---|---|
| 1) What form does the proposed rule take? | New court rule | New court rule | Amendment to MCR 2.003 | — |
| 2) Is the list of grounds for disqualification exclusive or non-exclusive? | Exclusive | Exclusive | Non-exclusive | Non-exclusive |
| 3) Is there a rule that a justice is disqualified when he cannot impartially decide a case? | No | Yes | Yes | Yes |
| 4) Are reasons for a justice's decision whether or not to recuse himself required or permitted? | Not required | Not permitted | Required | Not required |
| 5) Is bias or prejudice against an attorney in a proceeding grounds for disqualification? | No | No | Yes | Yes |
| 6) Is there opportunity for review of a justice's decision not to recuse himself? | No | Yes | Yes | Yes |
| 7) Is there a "duty to sit" imposed on justices? | Yes | No | No | No |
| 8) Can a justice raise the issue of disqualification of another justice without filing a motion or an affidavit? | No | Yes | No | No |

| | | | | |
|---|---|---|---|---|
| 9) Can a motion for disqualification be based on campaign speech? | Yes | No | Yes | Yes |
| 10) Are the grounds for disqualification when the justice is related to a lawyer in a case limited to when the relative is the lawyer "of record"? | No | Yes | No | No |
| 11) Is the time for filing a motion shortened to 14 days after the grounds *should have been* discovered? | No | Yes | Yes | No |

III. Response to Justice CORRIGAN's Statement

Justice CORRIGAN asserts that "unlike judges who serve on other courts in this state, Justices of this Court cannot be replaced by another judge." And alternative A asserts that a justice has a duty to "serve in every case . . . ."

But neither the Michigan Constitution nor the Michigan Court Rules support this "duty to sit" theory. As I have previously explained, there is no justification to impose the federal "duty to sit" doctrine on Michigan Supreme Court justices. *Adair, supra* at 1044-1045. [On the rare occasion, which to my knowledge has only occurred once in the history of Michigan, that there is an issue before the Court that affects all state judges' abilities to be impartial, then the justices of the Michigan Supreme Court have a duty to participate pursuant to the common-law rule of necessity doctrine. Specifically, the one case in which this occurred was in 2008, *Citizens Protecting Michigan's Constitution v Secretary of State & Reform Michigan Government Now!(RMGN)*, 482 Mich 960 (2008), in which there was a challenge to a proposed constitutional amendment that would have reduced the salary of every judicial officer in the state, thereby affecting all Michigan judges' abilities to be impartial about the amendment. This necessity doctrine is different from the federal "duty to sit" espoused by Justices, CORRIGAN, YOUNG, and MARKMAN and former Justice TAYLOR.] A federal statute prohibits the temporary replacement of a United States Supreme Court justice by a retired federal

judge. 28 USC 294(d). However, when a Michigan Supreme Court justice does not participate in a case for any reason, the Michigan Constitution permits that justice to be replaced by an active or retired judge.

Article 6, § 23, as amended in 1968, granted the Supreme Court a new and discretionary power to "authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments."[13] This provision does not distinguish among, but rather addresses, all "judicial duties" performed by judges and justices in Michigan. The text of art 6, § 23 expressly limits whom this Court may authorize to perform judicial duties to "persons who have been elected and served as judges . . . ." It also provides that such authorizations must be for "limited periods or specific assignments." Thus, the 1968 amendment of art 6, § 23 allows this Court to ensure that judicial duties do not go unperformed.

Persons who have been "elected and served as judges" have already taken an oath of judicial office.[14] Thus, the grant of discretionary

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[13] Const 1963, art 6, § 23 provides:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

[14] Justice CORRIGAN asserts that judges, who have taken an oath of judicial office, and who could potentially perform judicial duties of a justice absent from this Court, "are not permitted to serve *as justices of this Court* unless they have been *elected to that position,"* Const 1963, art 6, § 2, or appointed by the Governor, Const 1963, art 6, § 23. Yet nothing in our state constitution specifically prohibits a judge from serving as a justice; thus her argument is unsupported. Had there been such an express provision, this question would not be before this Court.

Further, Justice CORRIGAN's application of art 6, § 2 to the last sentence of art 6, § 23 is in direct conflict with the first sentence of art 6, § 23, which she concedes allows the Governor to appoint a person as a justice who has not been "elected" to serve as a justice of the Supreme Court. Justice CORRIGAN fails to recognize that the more specific provisions of the first and last sentences of art 6, § 23 prevail as exceptions to the general statement of art 6, § 2. Art 6, § 2 establishes that the

authority in art 6, § 23 to the Supreme Court to "authorize persons" who have been elected and have served as judges to perform "judicial duties" is not a grant of an appointment power.[15] Rather, it is a power to

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Supreme Court "shall consist of seven justices elected at non-partisan elections as provided by law." This language establishes the general rule that the Supreme Court has seven justices who have been elected. Judges in all courts of this state are elected. See Const 1963, art 6, § 8 (pertaining to judges elected to the Court of Appeals), § 12 (pertaining to judges elected to circuit courts), and § 16 (pertaining to judges elected to probate courts). Art 6, § 23 then lists two exceptions to the general rules contained in art 6, §§ 2, 8, 12, and 16.

First, art 6, § 23 provides that when there is a vacancy "in the office of judge of any court of record," before that judge's term is over, that vacancy "shall be filled by appointment by the governor." Thus, art 6, § 23 contemplates that if a vacancy occurs before the completion of an elected judge's term of office, the Governor shall appoint a replacement judge. This gubernatorial appointment power applies to judges in "any court of record," which necessarily includes justices of the Supreme Court. Further, it operates as an exception to the general rules of elected judges, including justices, as set forth in art 6, §§ 2, 8, 12, and 16. While the first sentence of art 6, § 23 specifically authorizes the Governor to appoint a replacement judge for judicial "vacancies," the last sentence of § 23 grants the Supreme Court the power to authorize persons who have been elected and have served as judges to temporarily perform judicial duties in instances *other than judicial vacancies*.

Second, in those instances not involving a judicial vacancy, the Supreme Court, as opposed to the Governor, "may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." Thus, this last sentence of art 6, § 23 covers those instances when a need short of a judicial vacancy has arisen, for example, when a judge, including a justice, is ill, is on vacation, or is suspended, or when a judge, including a justice, decides to recuse himself. Justice CORRIGAN insists that this second exception, for something less than a judicial vacancy, only applies to judges and not to justices of the Supreme Court. Yet, there is no limiting language anywhere in the Michigan Constitution to that effect, and art 6, § 23 addresses those two primary instances when there is the need for judicial duties to be performed: in the first instance, because of the existence of a judicial "vacancy," and, in the second instance, because of the need to perform judicial duties for "limited periods or specific assignments."

[15] Thus, Justice CORRIGAN's concern that my interpretation of art 6, § 23 violates Const 1963, art 6, § 27 is mistaken. Moreover, even if the power to authorize a person who has been elected and has served as a judge to perform judicial duties is equated to a power of appointment referred to

authorize persons who have been elected and have served as judges to perform judicial duties for a limited period or specific assignment in circumstances in which a judicial duty would otherwise go unfulfilled, such as because of illness, disqualification, suspension, vacation, etc.

Article 6, § 23 does not distinguish or exclude from its scope the "judicial duties" performed by Supreme Court justices. The ratifiers of this constitutional language would have understood Supreme Court justices to both have and perform "judicial duties," and the term "judicial duties" would have been commonly understood to include the "judicial duties" of Supreme Court justices for a limited period or specific assignment. Article 6, § 23 thus allows this Court to assign persons "who have been elected and served as judges" to perform "judicial duties," including the "judicial duties" of Supreme Court justices.[16]

This interpretation of art 6, § 23 is supported by contrasting the language of the provision before the 1968 amendment with the language originally adopted in 1963. Before the 1968 amendment, there was no provision in art 6, § 23 for this Court to authorize a person who had been elected and had served as a judge to perform judicial duties unless a permanent vacancy occurred on a court. The Supreme Court was permitted to fill permanent vacancies in judicial offices "from the occurrence of the vacancy until the successor is elected and qualified."[17] Justice CORRIGAN's separate statement reveals her confusion regarding

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in art 6, § 27, there is no conflict because art 6, § 27 expressly permits this Court to make appointments "as provided in this constitution." As long as this Court exercises its power to authorize persons to perform judicial duties in conformance with the limitations of art 6, § 23, it acts within its constitutional authority.

[16] Similarly, in *Giannotta v Governor*, 71 Mich App 15 (1976), a Court of Appeals panel held that the ratifiers of the 1968 amendments of art 6, § 23 would commonly have understood that the amendment permitted the Governor to fill vacancies on the Supreme Court, as well as vacancies in other judicial offices. The panel rejected the notion that the ratifiers of the 1968 amendment would have understood the provision to exclude " 'justices' when using the term 'judge'." *Giannotta, supra* at 20. If this were not true, the Governor would have no power to make appointments to fill vacancies on the Michigan Supreme Court caused by death, resignation, or removal of a justice.

[17] Const 1963, art 6, § 23 formerly read:

> A vacancy in the elective office of a judge of any court of record shall be filled at a general or special election as provided by law. The supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy. [Emphasis added.]

the full scope of the 1968 amendment as it pertains to the authority of this Court. She focuses exclusively on the fact that the amendment restored the Governor's authority to fill vacancies on the courts by appointment.[18] Justice CORRIGAN fails to understand that the 1968 amendment created a new discretionary power in the Supreme Court to authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments. This new discretionary power added to art 6, § 23 by the 1968 amendment ensures that judicial duties critical to the proper and efficient functioning of the judiciary will not go unperformed because of circumstances such as illness, disqualification, suspension, vacation, etc.

I do not suggest that art 6, § 23 *requires* this Court to authorize a person who has been elected and has served as a judge to perform judicial duties every time an illness, disqualification, or other occurrence prevents judicial duties from being performed. And none of the three proposals submitted for public comment provides for the temporary replacement of a justice who recuses himself or is disqualified from a case.

But art 6, § 23 as amended in 1968 permits this Court to authorize a person who has been elected and has served as a judge to perform judicial duties when, in the exercise of its sound discretion, doing so is necessary.[19] The existence of this constitutional authority undermines the "duty to sit" theory in alternative A.

Further, nothing in the Michigan Constitution entitles litigants to seven participating justices. Nor is the "duty to sit" theory supported by the Michigan Court Rules. The people of Michigan are justified in the

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[18] Justice CORRIGAN suggests that Const 1963, art 6, § 2 prohibits the appointment of a judge to fill a temporary vacancy on the Supreme Court. Art 6, § 2 provides:

> The supreme court shall consist of seven justices elected at non-partisan elections as provided by law. The term of office shall be eight years and not more than two terms of office shall expire at the same time. Nominations for justices of the supreme court shall be in the manner prescribed by law. Any incumbent justice whose term is to expire may become a candidate for re-election by filing an affidavit of candidacy, in the form and manner prescribed by law, not less than 180 days prior to the expiration of his term.

It is clear that art 6, § 2 does not address vacancies at all, either temporary or permanent. Her reading of the provision fails to account for the fact that when the Governor appoints a person to fill a permanent vacancy on the Supreme Court, as provided by art 6, § 23, that person has not yet been elected at a nonpartisan election.

[19] In *Adair*, I offered comparisons to other states to demonstrate that there is nothing inherently wrong or unusual about a retired supreme court justice, lower appellate court judge, or trial court judge being authorized to sit for a non-participating state supreme court justice. The

expectation that a justice will participate in every case unless there is a valid, publicly known reason why the justice should not participate. However, our court rules anticipate that not every justice will participate in every case. MCR 7.316(C) permits just two justices to render a decision of the Court, providing simply that "a decision of the Supreme Court must be made by concurrence of a majority of the justices voting." MCR 7.316(C) also plainly permits "affirmance of action by a lower court or tribunal by even division of the justices . . . ." While it is certainly preferable to avoid *needless* disqualifications that result in an even split, an even split is permitted by the court rules. And it cannot be disputed that the decision-making process of this Court is seriously distorted when a justice who is biased or prejudiced or who appears to be biased or prejudiced against a party or attorney participates in a case.

For these reasons, the "duty to sit" rule in alternative A is not required, and its rationale is not supported by the Michigan Constitution or the Michigan Court Rules.

IV. Conclusion

There should be clear, fair, orderly, and public procedures concerning the participation or disqualification of justices. The rules should follow the mandates of the Michigan Constitution and should ensure that the standards governing the participation and disqualification of justices improve, not diminish, the public's trust and confidence in the Michigan Supreme Court and the entire judiciary.

CORRIGAN, J. (*concurring*). I concur in the publication for comment of three alternative proposals regarding the disqualification of Supreme

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fact, as Justice CORRIGAN points out in her separate statement, that many states have constitutional provisions allowing a judge to sit for a justice only proves my point. Justice CORRIGAN further argues that because some of the states I cited in *Adair* had express constitutional provisions authorizing judges to sit for non-participating supreme court justices, my argument was undermined. I note, however, that not every state has express provisions. I further note that my point in citing to those states was to make it clear that there is no inherent "duty to sit" requirement applicable to state supreme court justices. Other states, whether through express provisions or more comprehensive authorization, have acknowledged the need for occasional replacement of state supreme court justices and have rejected the federal "duty to sit" doctrine in the face of that need. Obviously, however, the Michigan Constitution controls our practice, and art 6, § 23 allows this Court "to authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments." It does not exclude from the judicial duties mentioned those that are borne by Michigan Supreme Court justices.

Court justices. I write separately to urge members of the bench and bar to carefully consider the proposals in light of the following observations.

*I. The decision whether to recuse is for the individual justice*

Initially, I note that this Court's 172-year tradition is that motions for recusal are decided by each justice without review by the other members of this Court, subject to appeal in the United States Supreme Court. This longstanding recusal procedure is consistent with the United States Supreme Court's policy for deciding recusal motions. Individual justices, rather than the full Supreme Court, decide whether recusal is warranted. *Cheney v United States Dist Court for the Dist of Columbia*, 541 US 913 (2004). Indeed, Justice Ginsburg explained the Court's recusal policy in a discussion transcribed in a law review article. See *The Day, Berry & Howard visiting scholar: An open discussion with Justice Ruth Bader Ginsburg*, 36 Conn L Rev 1033, 1039 (2004):

*Paul Berman*:

> And would the recusal decision solely be an individual decision by the Justice or is there ever any conversation among the Justices about recusal issues?

*Justice Ginsburg*:

> *In the end it is a decision the individual Justice makes*, but always with consultation among the rest of us. . . . [Emphasis added.]

Justice Ginsburg also stated that "[b]ecause there's no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves." *Id*. She explained that "on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. Some think that a recusal in the Supreme Court is equivalent to a vote against the petitioner." *Id*. Therefore, it is beyond dispute that this Court's traditional recusal practice is consistent with the United States Supreme Court's own practice regarding recusal motions.

*II. We should await the decision in* Caperton v Massey

Before we adopt any of the published proposals, we should await the decision in a case currently pending in the United States Supreme Court, *Caperton v Massey,* Docket No. 08-22. At issue in *Caperton* is whether recusal is constitutionally required where a state supreme court justice allegedly owed a debt of gratitude to a contributor to an independent committee over which the justice had no authority. The contributor's corporation was a party in a case before the court. The ultimate decision in *Caperton* may determine the proper content and scope of any recusal

rule that we adopt, given that we will be required to comply with any constitutional standards announced in *Caperton*.

In reviewing the oral argument transcript in *Caperton*, I note that many of the justices' questions expressed concerns regarding the potentially unlimited reach of a rule mandating recusal for a mere probability or appearance of bias, as opposed to actual bias. For example, Chief Justice Roberts asked:

> What about the United Mine Workers. If they give a contribution to somebody's campaign, is that judge then recused in every labor case? Or I don't know if they give contributions or not, but a group like Mothers Against Drunk Driving, because they think the judge is too lenient in DWI [driving while impaired] cases, so they give contributions. Is their preferred judge recused in every DWI case? [*Caperton* oral argument, p 13.]

Chief Justice Roberts further noted that a broad recusal requirement could lead to such abuses as making campaign contributions solely to disqualify a particular justice:

> What about protective donations? You actually give, not three million, but a couple hundred thousand to somebody you don't want deciding your case. And it comes up, and you say, you have to recuse yourself because . . . . [*Caperton* oral argument, p 55.]

Also, Justices Scalia and Kennedy each noted the difficulty of administering a system that would require recusal on the basis of a vague standard such as the mere perception or probability of bias. See *Caperton* oral argument, pp 15-16, 18.

Similar concerns could be raised regarding this Court's proposals B and C, both of which would require recusal when "[t]he judge's impartiality might objectively and reasonably be questioned." It is not clear how those proposed rules would be administered in Michigan, where anonymous donors may legally finance judicial campaign advertisements.

Consider, for example, our most recent election in 2008: the nonpartisan Michigan Campaign Finance Network (MCFN) found that anonymous donors dominated the campaign for the seat now held by Justice HATHAWAY. The MCFN indicated that more than 60 percent of the $6 million in spending will not be disclosed in any campaign finance report because Michigan law does not require disclosure of financing for advertisements that do not expressly advocate voting for or against a candidate.[1]

Quite understandably, then, Justice HATHAWAY may not even be aware of the identities of individuals or organizations that funded these advertisements. Yet if proposal B or C is adopted, a party may seek her recusal because the other party had funded an advertisement essentially

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[1] See the MCFN's November 19, 2008, press release at <http://www.mcfn.org/press.php?prId=77> (accessed March 12, 2009).

supporting her candidacy by attacking her opponent. Or what if the party seeking recusal had itself funded an advertisement that sought to define Justice HATHAWAY's character, qualifications, or record? Even though she does not know the donors and is not actually biased, could Justice HATHAWAY's impartiality "objectively and reasonably" be questioned under proposals B or C? How could she even comply with this mandatory recusal rule if she does not know the identities of the donors?

Indeed, these problems will not be limited to cases in which a campaign contributor is an actual party. As Chief Justice Roberts asked, what about campaign contributors that have publicly expressed views regarding a legal issue before the Court? Suppose that the Chamber of Commerce prefers a given interpretation of a tort reform law at issue in a case pending in our Court. If, as the MCFN found, the Chamber of Commerce funded advertisements that sought to define Justice HATHAWAY's record, could her impartiality "objectively and reasonably" be questioned whenever the chamber files an amicus brief? What if the chamber decides as a matter of strategy to file an amicus brief merely to obtain Justice HATHAWAY's recusal? And in future campaigns, might not the chamber, or any other organization interested in legal issues before this Court, fund advertisements that address an incumbent justice's record or character if it wishes to disqualify that justice in upcoming cases?

Given that proposals B and C would remove the recusal decision from the individual justice for the first time in our 172-year history, troubling questions arise regarding the procedure for the recusal decision. If the challenged justice's knowledge of the identities of anonymous donors is relevant to whether her impartiality could "reasonably and objectively" be questioned, and the justice herself is not entrusted to make this determination, what happens next? Would this Court appoint a master to make findings of fact? Would the master simply take the word of the challenged justice regarding her knowledge, or would the master call witnesses to ascertain what the justice knew and when she knew it? Would such wide-ranging investigations promote the collegiality necessary to the healthy functioning of a multi-member appellate court?

In short, the anonymity of donors under Michigan law only compounds the difficulty in complying with the open-ended recusal rule in proposals B and C. These questions warrant scrutiny before adopting a rule broader than that which this Court has required in its 172-year history.

*III. Justices of this Court cannot be replaced*

Another significant concern with the adoption of the broader recusal rule in proposals B and C is that, unlike judges who serve on other courts in this state, justices of this Court cannot be replaced by another judge. In her statement in *Adair v Michigan*, 474 Mich 1027 (2006), Justice WEAVER opined that a justice may be replaced by an active or retired judge.[2] She asserted in *Adair* that "[n]umerous other state supreme

[2] None of the proposed recusal rules provide for the appointment of temporary justices. On the contrary, proposals B and C expressly state

courts appoint a trial judge or court of appeals judge to sit on the supreme Court" when a justice is not participating or in other situations. *Id*. at 1045 n 4. Justice WEAVER then listed several states, but cited no authority for her claim.

My research indicates that, in most of the states Justice WEAVER listed, *the state constitution itself* provides for the temporary appointment of active or retired judges or retired justices to the state supreme court, or to "any court" in the state. Our constitution, by contrast, contains no analogous provision for the appointment of temporary justices.

Specifically, in the following states listed by Justice WEAVER, express constitutional provisions exist on this matter:

- *Arizona*: "Any retired justice or judge of any court of record who is drawing retirement pay may serve as a justice or judge of any court." Ariz Const, art 6, § 20.
- *Florida*: "When recusals for cause would prohibit the court from convening because of the requirements of this section, judges assigned to temporary duty may be substituted for justices." Fla Const, art 5, § 3(a).
- *Georgia*: "If a Justice is disqualified in any case, a substitute judge may be designated by the remaining Justices to serve." Ga Const, art 6, § 6, ¶ I.
- *Hawaii*: "The chief justice may assign a judge or judges of the intermediate appellate court or a circuit court to serve temporarily on the supreme court . . . . As provided by law, at the request of the chief justice, retired justices of the supreme court may also serve temporarily on the supreme court . . . ." Hawaii Const, art 6, § 2.
- *Maryland*: "[T]he Chief Judge of the Court of Appeals may, in case of a vacancy, or of the illness, disqualification or other absence of a judge or for the purpose of relieving an accumulation of business in any court assign any judge except a judge of the Orphans' Court to sit temporarily in any court except an Orphans' Court." Md Const, art 4, § 18(b)(2).[3]
- *Minnesota*: "As provided by law judges of the court of appeals or of the district court may be assigned temporarily to act as judges of the Supreme Court upon its request . . . ." Minn Const, art 6, § 2.
- *Missouri*: "The supreme court may make temporary transfers of judicial personnel from one court or district to another as the administration of justice requires, and may establish rules with respect thereto. Any judge shall be eligible to sit temporarily on any court upon assignment by the supreme court or pursuant to supreme court rule." Mo Const, art 5, § 6. "Any retired judge,

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that when a justice is disqualified, the case will be decided by the remaining justices. But I will nonetheless address this issue in light of Justice WEAVER's assertions in *Adair*.

[3] The Court of Appeals is the court of last resort in Maryland. Md Const, art 4, § 1.

associate circuit judge or commissioner, with his consent, may be assigned by the supreme court as a senior judge to any court in this state or as a special commissioner. When serving as a senior judge he shall have the same powers as an active judge." Mo Const, art 5, § 26(3).

- *Nebraska*: "The Legislature may provide that any judge of the Supreme Court or judge of the appellate court . . . who has retired may be called upon for temporary duty by the Supreme Court. Whenever necessary for the prompt submission and determination of causes, the Supreme Court may appoint judges of the district court or the appellate court to act as associate judges of the Supreme Court, sufficient in number, with the judges of the Supreme Court, to constitute two divisions of the court of five judges in each division. . . . The judges of the Supreme Court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute and all appeals involving capital cases and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise of any of the judges of the Supreme Court, the court may appoint judges of the district court or the appellate court to sit temporarily as judges of the Supreme Court, sufficient to constitute a full court of seven judges." Neb Const, art 5, § 2.
- *New Jersey*: "When necessary, the Chief Justice shall assign the Judge or Judges of the Superior Court, senior in service, as provided by rules of the Supreme Court, to serve temporarily in the Supreme Court." NJ Const, art 6, § 2, ¶ 1.
- *New York*: "In case of the temporary absence or inability to act of any judge of the court of appeals, the court may designate any justice of the supreme court to serve as associate judge of the court during such absence or inability to act." NY Const, art 6, § 2(a).[4]
- *Ohio*: "If any member of the [supreme] court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge." Ohio Const, art 4, § 2(A).
- *South Carolina*: "The General Assembly shall specify the grounds for disqualification of Justices and judges to sit on certain cases. The General Assembly shall also provide for the temporary appointment of men learned in the law to sit as special Justices and judges when the necessity for such appointment shall arise." SC Const, art 5, § 19.
- *South Dakota*: "The chief justice shall have power to assign any circuit judge to sit on another circuit court, or on the Supreme Court in case of a vacancy or in place of a justice who is disqualified or unable to act." SD Const, art 5, § 11.

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[4] The New York Court of Appeals is the court of last resort, and the appellate divisions of the supreme court constitute the intermediate appellate courts, in that state. NY Const, art 6, § 1(a).

- *Texas*: "When the Supreme Court, the Court of Criminal Appeals, the Court of Appeals, or any member of any of those courts shall be . . . disqualified to hear and determine any case or cases in said court, the same shall be certified to the Governor of the State, who shall immediately commission the requisite number of persons learned in the law for the trial and determination of such cause or causes." Tex Const, art 5, § 11.
- *Utah*: "If a justice of the Supreme Court is disqualified or otherwise unable to participate in a cause before the court, the chief justice, or in the event the chief justice is disqualified or unable to participate, the remaining justices, shall call an active judge from an appellate court or the district court to participate in the cause." Utah Const, art 8, § 2.
- *Vermont*: "The chief justice may appoint and assign a retired justice or judge with his or her consent or a superior judge or district judge to a special assignment on the Supreme Court." Vt Stat Ann, tit 4, § 22(a). "Special assignments may be made as a result of the disqualification, disability or death of a justice or judge, or because of the vacancy of a judicial office, or because the business of the court requires." Vt Stat Ann, tit 4, § 22(c).[5]
- *West Virginia*: "When any justice is temporarily disqualified or unable to serve, the chief justice may assign a judge of a circuit court or of an intermediate appellate court to serve from time to time in his stead." W Va Const, art 8, § 2.
- *Wyoming*: "If a justice of the Supreme Court for any reason shall not participate in hearing any matter, the chief justice may designate one of the district judges to act for such nonparticipating justice." Wy Const, art 5, § 4(a).

Unlike the constitutions in the states listed by Justice WEAVER, the Michigan Constitution does not authorize the appointment of temporary justices. On the contrary, Const 1963, art 6, § 2 states, "The supreme court *shall* consist of seven justices *elected at non-partisan elections as provided by law*" (emphasis added). By using the mandatory term "shall," Const 1963, art 6, § 2 provides for a state supreme court that *must* be comprised of seven justices chosen *by the people themselves* rather than by the members of this Court. Therefore, any argument for installing temporary justices would subvert the electoral system mandated by our constitution because it would reconstitute temporarily the membership of this Court.

I also note that Const 1963, art 6, § 27, provides: "The supreme court, the court of appeals, the circuit court, or any justices or judges thereof, shall not exercise any power of appointment to public office except as provided in this constitution." Thus, this Court has no appointive powers in the absence of an express constitutional authorization.

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[5] The Vermont provisions are statutory rather than constitutional enactments.

Justice WEAVER further opined in *Adair* that Const 1963, art 6, § 23, authorizes this Court to appoint temporary justices. That provision, as amended in 1968, states:

> A vacancy shall occur in the office of judge of any court of record or in the district court by death, removal, resignation or vacating of the office, and such vacancy shall be filled by appointment by the governor. The person appointed by the governor shall hold office until 12 noon of the first day of January next succeeding the first general election held after the vacancy occurs, at which election a successor shall be elected for the remainder of the unexpired term. Whenever a new office of judge in a court of record, or the district court, is created by law, it shall be filled by election as provided by law. The supreme court may authorize persons who have been elected and served as judges to perform judicial duties for limited periods or specific assignments.

The history of the enactment of § 23 offers some insight. Before the adoption of the 1963 constitution, the authority to fill judicial vacancies belonged to the Governor. Const 1850, art 6, § 14, provided: "When a vacancy occurs in the office of judge of the supreme, circuit or probate court, it shall be filled by appointment of the governor, which shall continue until a successor is elected and qualified." Similarly, Const 1908, art 7, § 20, stated: "When a vacancy occurs in the office of judge of any court of record, it shall be filled by appointment of the governor, and the person appointed shall hold the office until a successor is elected and qualified. When elected, such successor shall hold the office the residue of the unexpired term."

The 1963 constitution removed the Governor's power to fill judicial vacancies. Const 1963, art 6, § 23, prior to the 1968 amendment, provided:

> A vacancy in the elective office of a judge of any court of record shall be filled at a general or special election as provided by law. The supreme court may authorize persons who have served as judges and who have retired, to perform judicial duties for the limited period of time from the occurrence of the vacancy until the successor is elected and qualified. Such persons shall be ineligible for election to fill the vacancy.

The convention comment explained the reason for removing the Governor's historic authority to make vacancy appointments:

> The change is made in order to maintain consistency in the idea that this state should have an elected judiciary. The present system of appointment by the governor to fill vacancies, bestowing on the appointee the incumbency designation, has had an overwhelming tendency to insure the election of the appointee. This has created in effect an appointive judiciary. [2 Official Record, Constitutional Convention 1961, p 3388.]

But the elimination of the Governor's appointive authority in the 1963 constitution led to unintended consequences. "The unexpected occurred when, in practice, there were simply too few retired judicial officeholders to fill the vacancies which became available." *Giannotta v Governor*, 71 Mich App 15, 17 (1976).

Thus, the voters in 1968 approved an amendment of § 23 that restored the Governor's authority to fill vacancies. This amendment was ratified at a special election held on August 6, 1968. Although this amendment restored the Governor's appointive authority, it also included language in the last sentence allowing this Court to appoint judges "to perform judicial duties for limited periods or specific assignments."

In *Schwartz v Secretary of State*, 393 Mich 42, 47-48 (1974), this Court explained the purpose of the 1968 amendment:

> The language of the section makes two things abundantly clear. First, the people intended to rectify the mistake of the 1963 Constitution in its original form of having removed the historic constitutional authority of the Governor to appoint persons to fill judicial vacancies. This Court would blink the facts of life if it did not take judicial notice of the fact that this omission embarrassed the operation of government by leaving important judicial offices without their own regular incumbent for long periods of time. The first sentence of § 23, as amended, rectifies this error by restoring gubernatorial authority to appoint to fill judicial vacancies caused by the incumbent leaving office for one reason or another.
>
> Second, the people on the other hand intended to reserve to themselves the power to fill newly created judgeships by election "as provided by law." First, § 23, as amended, specifies such newly created judgeship "shall be filled by election." Second, examination of the language describing the type of vacancy to which the Governor may appoint makes it clear that newly created judgeships are precluded. Included are vacancies "by death, removal, resignation or vacating of the office." In other words there must have been a judge who, for one of the enumerated reasons, is no longer present. Again the reason for this can hardly escape judicial notice, namely the prevention of collusion between the Governor and the Legislature to create a new judgeship for a favored appointee.

See also *Attorney General v Riley*, 417 Mich 119, 132-134 (1983).

The 1968 amendment essentially recognized that the Governor has the authority to appoint judges to fill vacancies that arise from death, removal, resignation, or vacating of the office. The recusal of a justice does not create a vacancy because a recusal does not arise from death, removal, resignation, or vacating of the office. When a justice is disqualified in a case, the justice simply declines to participate, but his seat does not thereby become vacant. Plainly, the appointment provisions of art 6, § 23, do not authorize the appointment of a temporary justice to fill a seat that is not vacant.

Accordingly, after a review of the relevant authorities, I am unable to conclude that the installation of temporary justices to replace duly elected members of this Court has any basis in the history of this state or the traditions of this Court. The proponent of such a momentous and unprec-

edented change surely must bear the burden of presenting at least some evidence that a change is legally justified. Yet there is no indication that § 23 was ever understood to permit this Court to appoint temporary justices.

YOUNG, J. I write to urge members of the public and the bar to take a serious interest in the several proposals for a Supreme Court disqualification policy and to consider them in the historical context in which they are offered.

Having impartial jurists is one of the critical tenets of our judicial system. However, in a state such as Michigan, where the people have chosen to hold their judicial officers accountable to them in an elective system, the public is entitled to have their electoral choices be respected and not undermined by a disqualification process that incentivizes capricious or politicized removal of justices from participating in the cases before the Supreme Court.

For the entire existence of our Court, the justices of the Michigan Supreme Court have conscientiously striven to address questions of judicial disqualification—whether raised on motion by one of the parties or on the justice's own initiative. Members of this Court and our predecessors have done so under our unvaried practice that is codified in proposal A. In short, a justice confronted with a disqualification motion has typically consulted with members of the Court and made a determination whether participation in a particular matter was appropriate. Other than providing counsel, other members of the Court have not participated in the decision. This historic practice is very similar to the one followed by the United States Supreme Court. See Appendix A.

Until the last decade, no one has challenged, or apparently had reason to challenge, the Court's historical practice for addressing justice disqualification issues. However, with the judicial philosophical shift in the majority of this Court,[1] disqualification has taken on a new, more politicized, role.

This new tactical approach of altering the philosophical majority of this Court was explicitly raised in the March 2006 issue of the *Michigan Bar Journal*. In a letter to the editor, an attorney suggested that the judicial electoral process is an unsatisfactory solution for addressing

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[1] It is no secret that the philosophical majority of this Court changed with the election of Justice CORRIGAN, my appointment and that of Justice MARKMAN. The philosophical transformation of the Michigan Supreme Court, and the debate that has accompanied this transformation—a debate similar in some ways to that taking place within the federal judicial system—have resonated strongly in the electoral, political process that the Michigan Constitution has chosen as the method by which citizens of this State select their justices. Perhaps not surprisingly, those who have been most comfortable with the approach of the Michigan Supreme Court over the previous decades have been resistant to this transformation, and many have responded forcefully in political opposi-

what he believed to be this Court's then "unfavorable judicial philosophy" and decision-making. Therefore, he urged the use of motions to disqualify as a suitable *alternative* to elections to alter the philosophical balance of the Court. See March 2006 *Michigan Bar Journal* at 12. The last point is particularly relevant to the Michigan Supreme Court where justices cannot be replaced by another judicial officer and thus the improvident recusal of even one member may result in an evenly divided Court and the inability to render a binding decision.[2]

I believe that the evidence supports my contention that the current interest in disqualification is a manufactured crisis—and a political one at that. In 1999, when the judicial philosophy of the Court changed, disqualification motions became a tactic and were used in a politicized manner—as a means to seek to alter the decision-making and outcome of a particular case to better suit the preferences of the attorney. In fact, between January 1999 and December 2008, some 23,346 appeals were filed in this Court. During that period, only 17 disqualification motions were submitted. With the exception of one motion that initially included Justice WEAVER, but later dropped her, all of the motions were lodged against one or more members of the former philosophical majority. Of those 17 motions, 71 percent were filed by a *single* law firm.

With the 2008 election, the philosophical majority of the Court has changed yet again. As a result of this change wrought by the citizens in the last election, it is highly unlikely that the political impetus for using disqualification motions for frank political reasons will be as strong as it was previously. Given that the so-called crisis regarding disqualification has been an event essentially limited to one law firm and the motivation for using disqualification as a weapon for removing justices to achieve a different philosophical balance has abated with the last election, I question why a wholesale change at this time is warranted. Moreover, the pendency of the case currently before the United States Supreme Court, *Caperton v Massey,* Docket No. 08-22, means that this Court and all others may have to adjust disqualification practices to accommodate any new constitutional principle that Court might create.

For these reasons, it is my hope that members of the bar and the public will give these disqualification proposals more than reflexive and cursory attention.

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tion. The 2000 Supreme Court election, in which three members of the Court's then philosophical majority stood for election, was one of the most bitterly contested in the state's history. Despite a well financed and organized opposition, all three incumbents were returned to office by Michigan voters. As noted below, the philosophical majority has again shifted with the election of Justice HATHAWAY last November.

[2] Here too, the public should be mindful that two of our colleagues have made the radical proposal that justices *can* be replaced by other judicial officers. See *Adair v Dep't of Ed*, 474 Mich 1027, 1045, 1051 (2006). The constitutionality of such a replacement proposition, as well as its impact on the stability of this Court, are topics that warrant thoughtful comment from members of the bar and the public at large.

Appendix A

APPENDIX

FOR IMMEDIATE RELEASE
November 1, 1993

Supreme Court of the United States
Washington, D. C. 20543

STATEMENT OF RECUSAL POLICY

We have spouses, children or other relatives within the degree of relationship covered by 28 U.S.C. §455 who are or may become practicing attorneys. In connection with a case four Terms ago, the Chief Justice announced his policy (with which we are all in accord) regarding recusal when a covered relative is "an associate in the law firm representing one of the parties before this Court" but has "not participated in the case before the Court or at previous stages of the litigation." See Letter to Joseph Spaniol, Clerk of the Court, from the Chief Justice (Feb. 20, 1990), pertaining to Brutsche v. Cleveland-Perdue, No. 89-1167, cert. denied, 111 S. Ct. 368 (1990). We think it desirable to set forth what our recusal policy will be in additional situations—specifically, when the covered lawyer has participated in the case at an earlier stage of the litigation, or when the covered lawyer is a partner in a firm appearing before us. Determining and announcing our policy in advance will make it evident that future decisions to recuse or not to recuse are unaffected by irrelevant circumstances of the particular case, and will provide needed guidance to our relatives and the firms to which they belong.

The provision of the recusal statute that deals specifically with a relative's involvement as a lawyer in the case requires recusal only when the covered relative "[i]s acting as a lawyer in the proceeding." §455(b)(5)(ii). It is well established that this provision requires personal participation in the representation, and not just membership in the representing firm, see, e.g., Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1113 (CA5), cert. denied, 449 U. S. 820 (1980). It is also apparent, from use of the present tense, that current participation as a lawyer, and not merely past involvement in earlier stages of the litigation, is required.

A relative's partnership status, or participation in earlier stages of the litigation, is relevant, therefore, only under one of two less specific provisions of §455, which require recusal when the judge knows that the relative has "an interest that could be substantially affected by the outcome of the proceeding," §455(b)(5)(iii), or when for any reason the judge's "impartiality might reasonably be questioned," §455(a). We think that a relative's partnership in the firm appearing before us, or his or her previous work as a lawyer on a case that later comes before us, does not automatically trigger these provisions. If that were the intent of the law, the per se "lawyer-related recusal" requirement of §455(b)(5)(ii) would have expressed it. Per se recusal for a relative's membership in the partnership appearing here, or for a relative's work on the case below, would render the limitation of §455(b)(5)(ii) to personal work, and to present representation, meaningless.

We do not think it would serve the public interest to go beyond the requirements of the statute, and to recuse ourselves, out of an excess of caution, whenever a relative is a partner in the firm before us or acted as a lawyer at an earlier stage. Even one unnecessary recusal impairs the functioning of the Court. Given the size and number of today's national

APPENDIX

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law firms, and the frequent appearance before us of many of them in a single case, recusal might become a common occurrence, and opportunities would be multiplied for "strategizing" recusals, that is, selecting law firms with an eye to producing the recusal of particular Justices. In this Court, where the absence of one Justice cannot be made up by another, needless recusal deprives litigants of the nine Justices to which they are entitled, produces the possibility of an even division on the merits of the case, and has a distorting effect upon the certiorari process, requiring the petitioner to obtain (under our current practice) four votes out of eight instead of four out of nine.

Absent some special factor, therefore, we will not recuse ourselves by reason of a relative's participation as a lawyer in earlier stages of the case. One such special factor, perhaps the most common, would be the relative's functioning as lead counsel below, so that the litigation is in effect "his" or "her" case and its outcome even at a later stage might reasonably be thought capable of substantially enhancing or damaging his or her professional reputation. We shall recuse ourselves whenever, to our knowledge, a relative has been lead counsel below.

Another special factor, of course, would be the fact that the amount of the relative's compensation could be substantially affected by the outcome here. That would require our recusal even if the relative had not worked on the case, but was merely a partner in the firm that shared the profits. It seems to us that in virtually every case before us with retained counsel there exists a genuine possibility that success or failure will affect the amount of the fee, and hence a genuine possibility that the outcome will have a substantial effect upon each partner's compensation. Since it is impractical to assure ourselves of the absence of such consequences in each individual case, we shall recuse ourselves from all cases in which appearances on behalf of parties are made by firms in which our relatives are partners, unless we have received from the firm written assurance that income from Supreme Court litigation is, on a permanent basis, excluded from our relatives' partnership shares.

William H. Rehnquist

John Paul Stevens

Sandra Day O'Connor

Antonin Scalia

Anthony M. Kennedy

Clarence Thomas

Ruth Bader Ginsburg

MARKMAN J. (*concurring*). In place of a judicial disqualification process that has existed since 1837 on this Court—one that has been used by the United States Supreme Court, one that has been employed by most other state supreme courts, and one that has worked effectively over the decades to maintain a fair and impartial judicial system in Michigan—the majority would apparently replace it with a process that will almost certainly be heavily dominated by politics.

As the backdrop for these proposals, it is important to understand that *every* disqualification motion before this Court for the past six years has been directed toward the same four justices—former Chief Justice TAYLOR, Justice CORRIGAN, Justice YOUNG and myself—justices who share a similar judicial perspective. We have in our state a constitutional system in which justices must periodically submit themselves to the electoral process in order to retain their positions. The motions for disqualification had increasingly become a part of the political opposition to what until the most recent election had constituted the majority philosophy on this Court.

As the public, as well as the bench and bar, reviews these proposals, I raise the following questions:

(1) Will the integrity of the judicial process be enhanced by a procedure in which a justice who is the object of a disqualification motion is evaluated by another justice who has campaigned against that justice, or otherwise questioned that justice's overall philosophy? Is there an "appearance" problem under those circumstances in allowing a justice to compel the nonparticipation of a justice who has been elected by the people? At what point should a focus upon the circumstances of the justice who is the *object* of the disqualification motion be accompanied by a similar focus upon the circumstances of the justice *deciding* such motion?

(2) Will the integrity of the judicial process be enhanced by a procedure in which a justice who is the object of a disqualification motion by a particular party or attorney is evaluated by another justice who has benefitted from political support from that party or attorney? Is there an "appearance" problem under those circumstances in allowing a justice to compel the nonparticipation of a justice who has been elected by the people? At what point should a focus upon the circumstances of the justice who is the *object* of the disqualification motion be accompanied by a similar focus upon the circumstances of the justice *deciding* such motion?

(3) Will the integrity of the judicial process be enhanced by a procedure in which a justice who is the object of a disqualification motion is evaluated by another justice who has benefitted from political support from groups or organizations that might be advantaged by a justice's nonparticipation in a case? Is there an "appearance" problem in allowing a justice to compel the nonparticipation of a justice who has been elected by the people? At what point should a focus upon the circumstances of the justice who is the *object* of the disqualification motion be accompanied by a similar focus upon the circumstances of the justice *deciding* such motion?

(4) Will disqualification motions be incentivized, and the number of such motions be substantially increased, by a procedure in which decisions are no longer made by the justice who is the object of the disqualification motion but by the Court as a whole under circumstances identified in the previous three questions?

(5) Should disqualification determinations by this Court be triggered only by motions from parties or attorneys or, in the interests of consistency and uniformity and to avoid different standards being applied to different justices, must justices themselves be allowed to initiate such motions?

(6) Should disqualification decisions be undertaken only by public votes of this Court, following debate and discussion at regularly scheduled administrative conferences, in order to ensure that the people are allowed to scrutinize decisions by which justices that they have elected to this Court are denied the ability to participate in a case?

(7) Is there constitutional authority, as some justices seem to believe, to replace a disqualified justice with a person who has not been elected to this Court? If so, how is a replacement justice to be determined?

(8) In addition to the interests of businesses, labor unions, public policy groups, and individual litigants in the decisions of this Court, to what extent should conceivable interests of lawyers be cognizable in the process of judicial disqualification, e.g., in terms of conceivable interests in the growth of litigation and the recognition of new claims and causes of action?

(9) Should the fact that a party or an attorney has made contributions for or against a justice, by itself, constitute grounds for disqualification? If Justice A is disqualified on such grounds, should Justice B be disqualified because he or she did *not* receive such a contribution or because his or her judicial opponent *did* receive such a contribution? Even if Justice B should not be disqualified, should he or she be allowed to participate in deciding a disqualification motion against Justice A?

(10) If proposed changes in the disqualification procedure are adopted, does this counsel for or against the adoption of an "appearance of impropriety" standard to replace the current "actual impropriety" standard for determining when the disqualification of a justice is warranted?

*Staff Comment*: These three proposals would establish specific rules for disqualification of Supreme Court justices. The proposals vary considerably with regard to the procedure for disqualification, the grounds for determining whether disqualification is warranted, and the ability to review another justice's decision to recuse.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-04. Your comments

and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Orders Entered April 14, 2009:*

PROPOSAL TO REQUIRE A COURT TO SUBMIT A LOCAL ADMINISTRATIVE ORDER TO SCAO WHEN APPOINTING MAGISTRATES AND REFEREES.

On order of the Court, this is to advise that the Court is considering adoption of an administrative order that would require a court to submit local administrative orders to the State Court Administrative Office to identify individuals appointed as magistrates or referees in that court. Before the Court determines whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The schedule and agendas for public hearings are posted on the Court's website at www.courts.mi.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Courts are authorized by statute to appoint magistrates and referees to positions that allow those magistrates and referees to perform various functions. As the entity charged with supervision of the state's courts, it is essential that the State Court Administrative Office of the Michigan Supreme Court be aware of the identity of each of these appointed individuals. In addition, because the law with regard to magistrates allows the court that appoints the magistrate to establish the scope of the duties the magistrate will perform, and because immunity for the magistrate's actions extends only to those actions that are performed within the scope of the authority established by the court that appoints the magistrate, it is also essential that the Supreme Court be notified of the scope of authority granted by each court to its magistrate or

magistrates. Further, the Michigan Court Rules grant courts the authority to determine the specific types of hearings and proceedings to be heard by referees, and this information should likewise be submitted to the State Court Administrative Office.

Accordingly, on order of the Court,

A. Each court that appoints a magistrate or referee shall submit a local administrative order to the State Court Administrative Office that identifies an individual appointed as a magistrate or referee. The local administrative order shall include the name and contact information for the individual and the date the appointment is or was effective.

B. Further, each court that appoints a magistrate or referee shall describe the scope of the authority conferred by the court on the magistrate or referee.

C. It is the responsibility of a magistrate or referee to notify the State Court Administrative Office of changes in the individual's contact information during the course of the appointment.

*Staff Comment*: This proposed administrative order would require a court to submit a local administrative order to the State Court Administrative Office regarding the identity of magistrates and referees, as well as a description of the scope of the authority of magistrates and referees. These requirements would provide the State Court Administrative Office necessary information about who these individuals are and what functions they perform in the trial court. It would be the magistrate's or referee's responsibility to update his or her contact information.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar of Michigan and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by August 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments received within the public comment period will be posted on the Court's website at www.courts.mi.gov/supremecourt/resources/administrative/index.htm. When filing a comment, please refer to ADM File No. 2009-09.

PROPOSED AMENDMENTS OF RULES 6.302 AND 6.310 OF THE MICHIGAN COURT RULES.

On order of the Court, notice of the proposed amendments of Rules 6.302 and 6.310 of the Michigan Court Rules having been published for comment at 480 Mich 1236 (2008), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action.

*Order Entered May 19, 2009:*

PROPOSED ADOPTION OF RULE 1.15A OF THE MICHIGAN RULES OF PROFESSIONAL CONDUCT.

On order of the Court, this is to advise that the Court is considering the adoption of proposed new Rule 1.15A of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[This proposal is a new rule.]

RULE 1.15A. TRUST ACCOUNT OVERDRAFT NOTIFICATION.

(a) Scope. Lawyers who practice law in this jurisdiction shall deposit all funds held in trust in accordance with Rule 1.15. Funds held in trust include funds held in any fiduciary capacity in connection with a representation, whether as trustee, agent, guardian, executor or otherwise.

(1) "Lawyer" includes a law firm or other organization with which a lawyer is professionally associated.

(2) For any trust account which is an IOLTA account pursuant to Rule 1.15, the "Notice to Eligible Financial Institution" shall constitute notice to the depository institution that such account is subject to this rule. Lawyers shall clearly identify any other accounts in which funds are held in trust as "trust" or "escrow" accounts, lawyers must inform the depository institution that such other accounts are trust accounts for the purposes of this rule.

(b) Overdraft Notification Agreement Required. In addition to meeting the requirements of Rule 1.15, each bank, credit union, savings and loan association, savings bank, or open-end investment company registered with the Securities and Exchange Commission (hereinafter "financial institution") referred to in Rule 1.15 must be approved by the State Bar of Michigan in order to serve as a depository for lawyer trust accounts. To apply for approval, financial institutions must file with the State Bar of Michigan a signed agreement, in a form provided by the State Bar of Michigan, that it will submit the reports required in paragraph D of this rule to the Attorney Grievance Commission and the trust account holder when any properly payable instrument is presented against a lawyer trust account containing insufficient funds or when any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit is honored and irrespective of any overdraft protection or other similar privileges that may attach to such account. The agreement shall apply to the financial institution for all of its locations in Michigan and cannot be canceled except on 120 days notice in writing to the State Bar of Michigan. Upon notice of cancellation or termination of the agreement, the financial institution must notify all holders of trust accounts subject to the

provisions of this rule at least 90 days before termination of approved status that the financial institution will no longer be approved to hold such trust accounts.

(c) The State Bar of Michigan shall establish guidelines regarding the process of approving and terminating "approved status" for financial institutions, and for other operational procedures, to effectuate this rule. The State Bar of Michigan shall periodically publish a list of approved financial institutions. No trust account shall be maintained in any financial institution that has not been so approved. Approved status under this rule does not substitute for "eligible financial institution" status under Rule 1.15.

(d) Overdraft Reports. The overdraft notification agreement must provide that all reports made by the financial institution contain the following information in a form acceptable to the State Bar of Michigan:

(1) The identity of the financial institution

(2) The identity of the account holder

(3) The account number

(4) Information identifying the transaction item

(5) The amount and date of the overdraft and either the amount of the returned instrument or other dishonored debit to the account and the date returned or dishonored, or the date of presentation for payment and the date paid.

The financial institution must provide the information required by the notification agreement within five banking days of the date the item was paid or returned unpaid.

(e) Costs. Nothing in these rules precludes a financial institution from charging the lawyer for the reasonable cost of providing the reports and records required by this rule, but those costs may not be charged against principal, nor against interest or dividends earned on trust accounts, including earnings on IOLTA accounts payable to the Michigan State Bar Foundation under Rule 1.15. Such costs, if charged, shall not be borne by clients.

(f) Notification by Lawyers. Every lawyer who receives notification that any instrument presented against the trust account was presented against insufficient funds or that any other debit to such account would create a negative balance in the account, whether or not the instrument or other debit was honored, shall provide the Attorney Grievance Commission, in writing, within 21 days of issuance of such notification, a full explanation of the cause of the overdraft and how it was corrected.

(g) Every lawyer practicing or admitted to practice in this jurisdiction shall, as a condition thereof, be conclusively deemed to have consented to the requirements mandated by this rule and shall be deemed to have consented under applicable privacy laws, including those of the Gramm-Leach-Bliley Act, 15 USC 6801, to the reporting of information required by this rule.

*Staff Comment*: This proposal, submitted by the State Bar of Michigan, would require attorneys to maintain client trust accounts in approved financial institutions. The financial institutions would become

approved by, among other requirements, agreeing to notify the Attorney Grievance Commission and the lawyer if a lawyer's trust account is overdrawn. The lawyer then would be required to submit an explanation of the overdraft to the commission within 21 days. The proposal is intended to provide an early warning of improprieties so that corrective action may be taken.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-13. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Orders Entered May 20, 2009:*

PROPOSED AMENDMENTS OF RULES 2.112, 2.113, 3.101, AND 8.119 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.112, 2.113, 3.101 and 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(M) [Unchanged.]

(N) Consumer Debt Cases. A party whose cause of action is to collect a consumer debt as defined in the Michigan Debt Collection Act (MCL 445.251[a] and [d]) must also include the following information in its pleading: the name of the creditor on the alleged default date; the final four digits of the account number or identification number on the alleged default date or, if none is available, information sufficient to identify the alleged debt; and the balance due to date. A complaint in a consumer debt action must be substantially in the form approved by the state court administrator.

RULE 2.113. FORM OF PLEADINGS AND OTHER PAPERS.

(A)-(G) [Unchanged.]

(H) Supporting Documentation. In a consumer debt case as defined in MCL 445.251, the court may require additional documentation to verify any reassignment of debt after the date of filing; amounts for interest and costs stated in judgment documents; and amounts for interest, costs, and payments stated in postjudgment documents.

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)-(C) [Unchanged.]

(D) Request for and Issuance of Writ. The clerk of the court that entered the judgment shall issue a writ of garnishment if the writ complies with these rules and the plaintiff, or someone on the plaintiff's behalf, makes and files a statement verified in the manner provided in MCR 2.114(A) stating:

(1) that a judgment has been entered against the defendant and remains unsatisfied;

(2) the amount of the judgment; the total amount of the postjudgment interest accrued to date; the total amount of the postjudgment costs accrued to date; the total amount of the postjudgment payments made to date and the amount remaining unpaid;

(3) [Unchanged.]

(E)-(T) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(B) [Unchanged.]

(C) Filing of Papers. The clerk of the court shall endorse on the first page of every document the date on which it is filed. Papers filed with the clerk of the court must comply with the Michigan Court Rules, requirements contained in the Michigan statutes and the Michigan Supreme Court records standards. The clerk of the court may reject papers which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1).

(D) Rejection and Return of Documents. A chief judge may, in the best interests of the administration of justice, authorize court clerks to screen and reject documents that have been received for filing that do not comply with subsection (C) above. Authorization and the standards for screening and rejecting documents shall be in writing and shall be made available upon request. The party shall be notified of the nature of the noncompliance in writing. A party who has had documents returned under this section is entitled to prompt judicial review of the clerk's determination upon request. If the case has not been accepted for filing, the chief judge or another judge designated by the chief judge shall make the determination. A motion fee shall not be required.

(D)-(G) [Relettered (E)-(H), but otherwise unchanged.]

CORRIGAN, J. (*dissenting*). I respectfully dissent from the Court's order publishing the proposed amendment of Michigan Court Rule 8.119 for comment. I believe that publication is premature in light of significant issues regarding the propriety of the proposed rule's delegation of judicial authority. The proposal by the 46th District Court would revise MCR 8.119(C) to require that documents filed with court clerks comply with "requirements contained in the Michigan statutes." If an authorized court clerk determines that a filing does not comply with the requirement

in MCR 8.119(C), the clerk would be entitled to reject and return it under the proposed new language in MCR 8.119(D). In our order in *In re Credit Acceptance Corp*,[1] this Court held that returning deficient writs constitutes a sanction that must be ordered by a judge. The text of the proposed rule flatly contradicts our order and radically departs from the traditional ministerial functions performed by court clerks. To the extent that the proposed rule authorizes court clerks to reject pleadings, it improperly delegates judicial authority, in violation of the Michigan Constitution and caselaw. Because courts, and not court clerks, are entrusted with performing adjudicative functions and because basic questions concerning the merits of this proposal remain unanswered, I oppose publishing the proposed amendment of MCR 8.119 for comment.

The 46th District Court submitted its proposed amendment after an attorney brought an action for superintending control against the 46th District Court for rejecting the attorney's pleadings. Although the trial court dismissed the plaintiff's action, the Court of Appeals reversed the trial court's decision and concluded that MCR 3.101(D) does not allow a court to require that a judgment creditor provide information or documentation in addition to the verified statement required by that rule before the court issues a writ of garnishment.[2] The Court of Appeals explained, "MCR 8.119(C) does not give court clerks broad discretion to reject pleadings. Rather, it authorizes clerks to reject pleadings that fail to conform only to the caption requirements set forth in MCR 2.113(C)(1) and MCR 5.113(A)(1)."[3] On appeal, this Court affirmed, noting that "[t]he court's authority to sanction parties cannot be delegated to the court clerks."[4]

Our decision in *In re Credit Acceptance Corp* is not unique to the facts presented in that case. Judicial power is vested in the courts under our state constitution.[5]

> The judicial power of the state is vested *exclusively* in one court of justice which shall be divided into one supreme court, one court of appeals, one trial court of general jurisdiction known as the circuit court, one probate court, and courts of limited jurisdiction that the legislature may establish by a two-thirds vote of the members elected to and serving in each house. [Const 1963, art 6, § 1 (emphasis added).]

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[1] *In re Credit Acceptance Corp*, 481 Mich 883 (2008).

[2] *In re Credit Acceptance Corp*, 273 Mich App 594, 595 (2007).

[3] *Id*. at 600 n 2.

[4] *In re Credit Acceptance Corp*, 481 Mich 883, quoting *In re Huff*, 352 Mich 402, 415 (1958) (holding that the contempt power is " 'inherent and a part of the judicial power of constitutional courts' "); Const 1963, art 3, § 2; Const 1963, art 6, § 1 ("The judicial power of the state is vested exclusively in one court of justice . . . .").

[5] *Johnson v Kramer Bros Freight Lines, Inc*, 357 Mich 254, 258 (1959).

The Michigan Constitution also empowers the Supreme Court to "authorize persons who have been elected and have served as judges to perform judicial duties for limited periods or specific assignments."[6] In contrast, no constitutional authority grants a chief judge the power to authorize court clerks to perform adjudicative functions. Moreover, in *Carson Fischer Potts & Hyman v Hyman*,[7] the trial court appointed an "expert witness" to make "findings of fact, conclusions of law and a final recommendation and proposed judgment." The Court of Appeals held that the trial court lacked constitutional authority to delegate its judicial power to an expert witness.[8] The Court explained that "there is no constitutional authority for the trial court to delegate specific judicial functions to an 'expert witness.' "[9] Instead, "[i]t is within the peculiar province of the judiciary to adjudicate upon and protect the rights and interests of citizens and to construe and apply the laws."[10] In light of our state constitution and established caselaw, I question our rush to publish this proposed amendment.

We posed questions at the April 9, 2009, conference concerning the merits of this proposal. At conference, Judge William J. Richards appeared on behalf of the 46th District Court to discuss the proposed amendment of MCR 8.119. Judge Richards subsequently issued a thoughtful memorandum regarding this proposal on behalf of the entire 46th District Court.[11] I am grateful to Judge Richards for appearing at conference and for his ongoing input on this proposal. Nevertheless, I continue to have significant reservations about the proposed amendment of MCR 8.119. As an initial matter, the 46th District Court has not adequately explained why MCR 8.119 should be broadly amended to address the narrow problem identified by the court regarding garnishment requests. In my view, the 46th District Court would be well-advised to instead consider proposing amendments of MCR 3.101, which specifically involves garnishments after judgment. Similarly, careful consideration should be given about adopting language analogous to the language currently found in MCR 7.201(B)(2) and (3) such that attorneys could correct initial filing deficiencies within a set period, thereby lessening the likelihood of wrongful dismissals and malpractice claims.

Myriad questions remain about this proposal, and I believe that those questions should be answered before we solicit the public's reaction. Although I acknowledge that releasing a proposal for public comment does not bind the Court to adopt it, I disagree with publishing proposals

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[6] Const 1963, art 6, § 23.

[7] *Carson Fischer Potts & Hyman v Hyman*, 220 Mich App 116, 121 (1996).

[8] *Id*. at 121-122.

[9] *Id*. at 121.

[10] *Id*.

[11] See Appendix A for a copy of Judge Richards April 28, 2009, memorandum.

without sufficient scrutiny. I would ask the 46th District Court to answer the following questions regarding its proposal:

- Do the difficulties described by the 46th District Court about managing approximately 9,700 requested garnishments each year mirror the experiences of trial courts across the state? If so, what techniques have other courts implemented? If the 46th District Court is an anomaly, why should we revise our existing court rule to accommodate a single district?
- Why should the proposed amendment of MCR 8.119 apply to all cases, and not only requests for garnishment? On what basis did the 46th District Court conclude that clerks should be authorized to reject and return all documents received for filing? Why not limit the remedy to the problem identified, that is, the large number of garnishments filed in the 46th District Court?
- Are there specific flaws in the current language of MCR 8.119? If not, why depart from the present rule, which unambiguously states that clerks "may reject papers which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1)"?
- What effect will the proposed amendment have on attorneys who file pleadings in multiple courts? Is it not likely that attorneys would face varying standards in different districts concerning the screening and rejection of documents? Why should we encourage the development of inconsistent practices? Moreover, why make the standards adopted by each court available only upon request? Why not post the written standards so that attorneys are more likely to be aware of them?
- Has either the Michigan Creditors Bar Association (MCBA) or any other interested party voiced its support for this proposed amendment? How does the 46th District Court respond to those objections already raised by the MCBA?
- How would the "prompt judicial review of the clerk's determination" under the proposed new language in MCR 8.119(D) take place? Can an attorney immediately appeal the clerk's decision to the judge? Must an attorney make a formal motion in order to appeal? What if there is no judge available to hear the appeal? Is it possible that some filings later determined to be sufficient could nevertheless be late under the statute of limitations as the proposal is written now? What burdens will an automatic review process place on court resources?
- If the Court is asked to adopt a statewide court rule, would it not make more sense to conduct a comprehensive study of what court clerks may screen, and then revise MCR 8.119(C) to provide clerks with a specific list of minimum filing requirements? Further, what are the pitfalls in resolving problems concerning writs of garnishment in MCR 3.101, as opposed to granting broad authority to allow clerks to reject pleadings? Does not the broad approach favored by the 46th District Court invite inconsistency and variable enforcement?

I recognize that a court has inherent powers to manage its own affairs so as to achieve the orderly and expeditious disposition of cases. Moreover, in light of my own experience with managing the "housekeeping docket" as Chief Judge for the Court of Appeals, I empathize with the 46th District Court regarding its burdensome workload. Nevertheless, I am concerned that in attempting to dispose of requests for garnishment in an orderly fashion, the 46th District Court would grant its clerks and all clerks across the state overly broad authority, thereby allowing clerks to exercise an adjudicative function. Historically, this Court has refused to adopt proposed amendments that would delegate too much authority to clerks.[12] I see no appreciable distinction between such past proposals and the 46th District Court's current proposal. Additionally, I believe that further scrutiny of this proposal before publication would have yielded a less troubling product that satisfies my concerns about the improper delegation of judicial authority to clerks. Because I cannot support the Court's order publishing the proposed amendment of MCR 8.119 for comment prematurely, I respectfully dissent.

MARKMAN and YOUNG, JJ., concur with CORRIGAN, J.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2009, as P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. All comments will be posted on the Court's website. When filing a comment, please refer to ADM File No. 2005-32.

PROPOSED AMENDMENT OF RULES 2.112 AND 2.118 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 2.112 and 2.118 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also

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[12] See, e.g., ADM File No. 1993-46, concerning the Court of Appeals backlog. This Court did not adopt proposed MCR 7.201(B), which would have allowed the Court of Appeals clerk to dismiss appeals if the appellant failed to file required documents within 21 days of being notified. Similarly, we voted against adopting proposed MCR 7.217, which would have granted the Court of Appeals clerk discretion to dismiss appeals if the appellant failed to prosecute the appeal in accordance with the rules and failed to correct defects after being notified. Indeed, the current versions of both MCR 7.201(B) and MCR 7.217 expressly state that "[t]he Chief Judge or another designated judge may dismiss the appeal."

will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(K) [Unchanged.]

(1) In an action alleging medical malpractice filed on or after October 1, 1993, each party must file an affidavit as provided in MCL 600.2912d, 600.2912e. Notice of filing the affidavit must be promptly served on the opposing party. If the opposing party has appeared in the action, the notice may be served in the manner provided by MCR 2.107. If the opposing party has not appeared, the notice must be served in the manner provided by MCR 2.105. Proof of service of the notice must be promptly filed with the court.

(2) In a medical malpractice action, unless the court allows a later challenge for good cause:

(a) all challenges to a notice of intent to sue must be made at the time the defendant files its first response to the complaint, whether by answer or motion, and

(b) all challenges to an affidavit of merit or affidavit of meritorious defense, including the qualifications of the signer, must be made within 63 days of service of the affidavit on the opposing party. If the court finds that the affidavit is insufficient, it shall afford the party that filed the challenged affidavit to file a revised affidavit unless the information before the court shows that amendment would not be justified. See MCR 2.116(I)(5).

(M) [Unchanged.]

RULE 2.118. AMENDED AND SUPPLEMENTAL PLEADINGS.

(A)-(C) [Unchanged.]

(D) Relation Back of Amendments. An amendment that adds a claim or defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading. In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of original filing of the affidavit.

(E) [Unchanged.]

*Staff Comment*: The proposed amendments of MCR 2.112 and 2.118 would set a time limit on the period for raising challenges to affidavits of merit and meritorious defense and notices of intent in medical malpractice actions. The proposal also would allow amendment when an affidavit is found to be insufficient unless such amendment would be unjustified,

and would explicitly state that the amended affidavit of merit or meritorious defense relates back to the date of the affidavit's original filing.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by September 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-13. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Superintending Control Dismissed May 27, 2009:*

BOARD OF EDUCATION OF THE STANDISH-STERLING COMMUNITY SCHOOL DISTRICT V COURT OF APPEALS, No. 138105. The plaintiffs could have filed an application for leave to appeal the judgment of the Court of Appeals. MCR 3.302(D)(2); MCR 7.304(A).

SYAM V ATTORNEY GRIEVANCE COMMISSION, No. 138241. The Court is not persuaded that it should grant the requested relief. AGC: 0986/08.

*Superintending Control Denied May 28, 2009:*

COCHRAN V ATTORNEY GRIEVANCE COMMISSION, No. 138054; ACG: 2139/07.

*Superintending Control Denied June 23, 2009:*

DOWNING V ATTORNEY GRIEVANCE COMMISSION, No. 138503; ACG: 0284/09.

*Order Entered June 30, 2009:*

PROPOSED AMENDMENT OF RULE 6.302 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendment of Rule 6.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. All discussions regarding a defendant's plea must take place in open court and be placed on the record.

(2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

YOUNG, J. (*concurring in part and dissenting in part*). I concur in the order publishing for comment a proposal that would require that plea discussions occur on the record and in public. However, I dissent from the majority's decision to decline to publish for comment a proposal that would eliminate a defendant's right to withdraw a knowingly, voluntarily, and intelligently tendered guilty plea when a sentencing judge declines to follow a prosecutor's *nonbinding* sentencing *recommendation*. I would welcome the opinion of the bench and bar on this proposal rather than the majority's decision to shelve the proposal without further debate or input.

Our current court rule, MCR 6.310(B)(2)(a), states that when a defendant pleads guilty in exchange for a nonbinding prosecutorial sentencing recommendation, the defendant is *entitled* to withdraw the guilty plea whenever a judge declines to follow the prosecutor's suggestion. This court rule is premised upon *People v Killebrew*, 416 Mich 189 (1982). However, the *Killebrew* rationale categorically prohibited the court from "participat[ing] in discussions aimed at reaching a plea agreement." *Id*., 205.

*People v Cobbs*, 443 Mich 276, (1993), decided 11 years later, explicitly sanctioned judicial participation in formulating a sentencing agreement and undermined the foundational underpinnings of *Killebrew*. In a *Cobbs* plea, when the court is a participant in the plea agreement, the principles permitting withdrawal of a guilty plea simply

have no applicability to a *Killebrew* plea. MCR 6.310(B)(2)(a) essentially binds a judge to a sentencing agreement that the judge was not party to and to which he did not acquiesce. Otherwise, the defendant gets to withdraw his guilty plea and to begin the process all over again.

Where a defendant has obtained the full benefit of the bargain struck with the prosecutor—a *nonbinding* sentencing *recommendation*—there is no logical reason to permit a defendant to rescind his knowing, voluntary, and intelligent guilty plea when a court is unwilling to abide by the prosecutor's recommendation.

I would publish the complete proposal for comment, as attached, and favor amending MCR 6.302(C)(3) and MCR 6.310(B)(2)(a).

CORRIGAN, J. I concur with Justice YOUNG.

*Staff Comment*: The proposed amendment of MCR 6.302 would require all discussions regarding a defendant's plea agreement to occur in open court and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-11. Your comments and the comments of others will be posted at the following address: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

**APPENDIX A**

ADM File No. 2009-11

Proposed Amendment of
Rules 6.302 and 6.310 of
the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering amendments of Rules 6.302 and 6.310 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.302 PLEAS OF GUILTY AND NOLO CONTENDERE

(A)-(B) [Unchanged.]

(C) A Voluntary Plea.

(1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. All discussions regarding a defendant's plea must take place in open court and be placed on the record.

(2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may

(a) reject the agreement; or

(b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to ~~or recommended by the prosecutor;~~ or

(c) accept the agreement without having considered the presentence report; or

(d) take the plea agreement under advisement.

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow the sentence disposition~~it~~, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

(4) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 6.310 WITHDRAWAL OR VACATION OF PLEA

(A) [Unchanged.]

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

(1) [Unchanged.]

(2) the defendant is entitled to withdraw the plea if

~~(a)~~ the plea involves ~~a prosecutorial sentence recommendation or~~ an agreement for a specific sentence, and the court states that it is unable to follow the agreement ~~or recommendation~~; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea; or

(b) the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose.

(C)-(E) [Unchanged.]

*Staff Comment*: The proposed amendment of MCR 6.302 would require all discussions regarding a defendant's plea agreement to occur in open court and on the record to reduce the possibility that a defendant would be coerced into agreeing to a particular sentence. Further, the proposal would eliminate language in MCR 6.302 and MCR 6.310 that allows a defendant to withdraw a guilty plea if a prosecutor agrees to recommend a sentence but the judge refuses to sentence as recommended by the prosecutor.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by XXXXX, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2009-11. Your comments and the comments of others will be posted at the following address: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Order Entered July 8, 2009:*

PROPOSED AMENDMENT OF RULES 3.210 AND 3.211 OF THE MICHIGAN COURT RULES.

On order of the Court, this is to advise that the Court is considering amendments of Rules 3.210 and 3.211 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 3.210. HEARINGS AND TRIALS.

(A) In General.

(1) Proofs or testimony may not be taken in an action for divorce or separate maintenance until the expiration of the time prescribed by the applicable statute, except as otherwise provided by this rule.

(2) In cases of unusual hardship or compelling necessity, the court may, upon motion and proper showing, take testimony and render judgment at any time 60 days after the filing of the complaint.

(3) Testimony may be taken conditionally at any time for the purpose of perpetuating it.

(4) Testimony must be taken in person, except that the court may allow testimony to be taken by telephone or other electronically reliable means, in extraordinary circumstances.

(5) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course because the case is uncontested. Proofs in support of a judgment of divorce, separate maintenance, or annulment must be taken in open court, except as otherwise provided by statute or court rule.

(6) Proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been submitted to the court. If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it.

(B) ~~Default Cases~~ Uncontested Cases.

(1) ~~Default cases are governed by MCR 2.603.~~ The procedure in this subrule governs uncontested cases for an action listed in MCR 3.201(A). A case is uncontested if:

(a) a party fails to answer the complaint;

(b) the parties settle the case before trial; or

(c) a party fails to appear for a scheduled trial.

(2) ~~A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.~~ Unless the parties consent to entry of the proposed judgment, the party seeking entry of a judgment must serve a copy of the proposed judgment and any other required orders and papers on all other parties, with a notice to them that the proposed judgment will be submitted to the court for signing if no written objections to its entry are filed with the court clerk within 14 days after service of the notice. The party must file with the court clerk a copy of the proposed judgment and proof of its service on the other parties. If a party objects to entry of the proposed judgment or if the proposed judgment is a judgment of divorce, separate maintenance, or annulment, the court must hold a hearing or trial before it enters the judgment.

(3) ~~If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court.~~ The court may take proofs in a summary manner. The court may consider verified pleadings, exhibits, and other evidence, including, unless a party objects, evidence that otherwise would not be admissible, and may consider any uncontradicted factual allegations of the complaint as admitted.

(4) ~~If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion.~~ If the terms of a proposed judgment appear to the court to unfairly favor one party, the court may require the party who submitted the proposed judgment to provide evidence that the judgment is equitable. The court may also appoint a guardian ad litem to investigate whether a nonparticipating party has the mental and physical capacity to participate in the proceedings.

(5) If the court determines ~~not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it~~

that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment that conforms with the court's opinion.

(C)-(D) [Unchanged.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(E) [Unchanged.]

(F) Entry of Judgment or Order

(1) Unless the court has granted an extension, ~~Within 21~~ within14 days after the court renders an opinion following a hearing or trial, or after the settlement agreement is placed on the record, the moving party must submit a judgment, order, or a motion to settle the judgment or order.~~, unless the court has granted an extension.~~

(2) Unless the parties consent to entry of the judgment, the court may not enter a judgment in an uncontested case under MCR 3.210(B) unless the party seeking entry of the proposed judgment has served a copy of the proposed judgment and any other documents required to be served under this rule on all other parties at least 14 days before the judgment is presented to the court for entry. If no objection to the proposed judgment has been filed, the parties consent to entry of the proposed judgment, or the court holds a trial or hearing, and the court is satisfied with the proposed judgment, the court may enter the judgment.

(~~2-5~~3-6) [Renumbered, but otherwise unchanged.]

(7) A nonmilitary affidavit required by law must be filed before a judgment is entered in an action in which a party has failed to appear.

(G) [Unchanged.]

(H) Service of Judgment or Order.

(1) When a judgment or order is obtained for temporary or permanent spousal support, child support, or separate maintenance, the prevailing party must immediately deliver one copy to the court clerk. The court clerk must ~~write or stamp "true copy" on~~ file the order or judgment ~~and file it~~ with the friend of the court.

(2) The party securing entry of a judgment or order ~~that provides for child support or spousal support~~ must serve a copy ~~on the party ordered to pay the support, as provided in MCR 2.602(D)(1), even if that party is in default.~~on all other parties within 7 days after entry, and file a proof of service with the court clerk.

(3) [Unchanged.]

CORRIGAN, J. (*concurring*): While I generally agree with the Court's decision to publish this proposed amendment of MCR 3.210 for comment, I have three concerns about the proposal.

First, I do not think the case has been made, apart from the child support context, for relaxing the rules of evidence in domestic relations cases. Proposed MCR 3.210(B)(3) would allow trial courts to "consider verified pleadings, exhibits, and other evidence, including evidence that would not otherwise be admissible, and may consider any uncontradicted factual allegations of the complaint as admitted." I support the relaxation of the rules of evidence with respect to entry of child support orders. According to the Michigan Office of Child Support, there were 934,075

open cases in the Michigan child support system, 754,301 with court orders, as of the second quarter of fiscal year 2009. Neither the State Court Administrative Office nor local courts track the numbers of support orders that arise from default judgments. Courts currently impute income to obligors on the basis of local policy or accept default amounts when an obligor fails to appear in court or answer pleadings. There is no uniform statewide practice. The proposed amendment would allow trial courts to consider evidence that would not normally be admissible, such as notes from interviews with the parties, statements from employers, and income forms the parties have filled out. This would allow the court to more accurately determine income. Outside the child support context, however, the case has not been made for relaxing the rules of evidence. I would ask the Michigan Judges Association to explain the need for this change.

Second, I question the inclusion in proposed MCR 3.210(B)(4) of a provision that would allow the trial court to "appoint a guardian ad litem to investigate whether a nonparticipating party has the mental and physical capacity to participate in the proceedings." The Michigan Judges Association has not addressed why this provision is needed. Moreover, it is not clear who would pay the cost of a guardian ad litem appointed under this provision.

Third, proposed MCR 3.210(A)(6)—like current MCR 3.210(B)(5)—requires the court to "direct that the judgment fee be returned to the person who deposited it" if the court decides not to enter the judgment. The obligation to refund fees imposes an unnecessary burden on courts. This issue warrants legislative attention because the court rule stems from MCL 600.2529(d),[1] which imposes a fee for the entry of a judgment in a domestic relations case but does not address what is to be done with the fee if the court decides not to enter the judgment. The Legislature should consider requiring a standard fee upfront, rather than a specific domestic relations judgment fee.

MARKMAN and YOUNG, JJ., concur with CORRIGAN, J.

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[1] MCL 600.2529(d) provides:

> Before entry of a final judgment or order in an action in which the custody, support, or parenting time of minor children is determined or modified, the party submitting the judgment or order shall pay 1 of the following fees, which shall be deposited by the county treasurer as provided in [MCL 600.2530]:
>
> (*i*) In an action in which the custody or parenting time of minor children is determined, $80.00.
>
> (*ii*) In an action in which the support of minor children is determined or modified, $40.00. This fee does not apply when a fee is paid under subparagraph (*i*). The court may order a party to reimburse to the other party all or a portion of the fee paid by that other party.

*Staff Comment*: This proposal, submitted by the Michigan Judges Association, is intended to clarify and simplify the procedures courts use to grant judgments in domestic relations cases.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by November 1, 2009, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2008-09. Your comments and the comments of others will be posted at the following address: www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

*Superintending Control Denied July 10, 2009:*

JUVENILE LAW GROUP OF THE LEGAL AID AND DEFENDER ASSOCIATION, INC, OF DETROIT v CHIEF JUDGE OF THE WAYNE COUNTY CIRCUIT COURT, No. 139204. The Court is not persuaded that it should grant the requested relief. The motions for miscellaneous relief are denied.

*Superintending Control Denied July 17, 2009:*

COLBERT-OSAMEUDE v ATTORNEY GRIEVANCE COMMISSION, No. 139019; AGC: 09/000046-GA.

# Index-Digest

# INDEX–DIGEST


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CHILD PROTECTIVE PROCEEDINGS—*See*

PARENT AND CHILD 1

CONSTITUTIONAL LAW

CRIMINAL LAW

1. The prosecution generally may not refer at trial to the silence of a defendant who has been arrested and informed of his or her right to remain silent (US Const, Ams V, XIV). *People v Borgne*, 483 Mich 178.
2. The prosecution may not impeach a defendant's trial testimony regarding actions that occurred before the *Miranda* warnings were given by referring to the defendant's post-*Miranda* silence unless the defendant has falsely testified about his or her post-arrest, post-*Miranda* conduct (US Const, Ams V, XIV). *People v Borgne*, 483 Mich 178.
3. The prosecution generally may not refer at trial to the silence of a defendant who has been arrested and informed

of his or her right to remain silent (US Const, Ams V, XIV). *People v Shafier*, 483 Mich 205.

4. To determine whether the prosecution's improper use at trial of a defendant's silence constitutes prejudicial plain error, courts should consider the extent of the prosecution's references to the silence, the extent to which the prosecution attempted to tie the defendant's silence to his or her guilt, and the overall strength of the case against the defendant when considered in light of the degree to which the jury's assessment of the evidence might have been affected by the prosecution's references to the defendant's silence. *People v Shafier*, 483 Mich 205.
5. The statutory provision that authorizes the Department of Corrections to deduct 50 percent of a prisoner's funds that exceed $50 each month pursuant to a court order to pay a fee for that prisoner's court-appointed attorney without an assessment of the prisoner's indigency is not unconstitutional (MCL 769.1*l*). *People v Jackson*, 483 Mich 271.

EVIDENCE

6. An unavailable declarant's statement to the police is inadmissible testimonial hearsay if circumstances objectively indicate that the primary purpose of the questioning that elicited the statement was to establish the facts of a past event that may be relevant to later criminal prosecution rather than to enable police assistance in an ongoing emergency (US Const, Am VI). *People v Bryant*, 483 Mich 132.

## CONTRACTS

*See, also,* INDEMNITY 1, 2

WORDS AND PHRASES

1. A mutual and open account current exists where there is a mutual, reciprocal relationship between the parties with respect to an account that is left open for ongoing debit and credit entries until either party decides to settle and close the account, and generally does not exist where the parties' dealings are entirely governed by a special contract for the payment of money (MCL 600.5831). *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345.

## COURT-APPOINTED ATTORNEYS—*See*

CONSTITUTIONAL LAW 5

CRIMINAL LAW 1, 2, 3, 4

CRIMINAL LAW

*See, also,* CONSTITUTIONAL LAW 1, 2, 3, 4, 5

COURT-APPOINTED ATTORNEYS

1. A court is required to assess a defendant's ability to pay for a court-appointed attorney not when the fee is imposed, but when the imposition of the fee is enforced and the defendant claims to be indigent (MCL 769.1k). *People v Jackson*, 483 Mich 271.
2. A defendant is entitled to be notified when a court attempts to enforce the imposition of a fee for a court-appointed attorney and to be given an opportunity to contest the enforcement on the ground of indigency. *People v Jackson*, 483 Mich 271.
3. If a defendant timely objects to the enforcement of the imposition of a fee for a court-appointed attorney because of indigency, the court must determine whether forced payment would work a manifest hardship on the defendant at that particular time. *People v Jackson*, 483 Mich 271.
4. An order to remit a prisoner's funds to pay a fee for the prisoner's court-appointed attorney must be amended when the presumption of nonindigency is rebutted with evidence that enforcement of the order would impose a manifest hardship on the prisoner or his or her immediate family (MCL 769.1*l*). *People v Jackson*, 483 Mich 271.

TRIAL

5. *People v Williams*, 483 Mich 226.

DATE OF ACCRUAL OF CONTRACT CLAIMS AGAINST ATTORNEYS—*See*

LIMITATION OF ACTIONS 2

DEPARTMENT OF CORRECTIONS—*See*

PAROLE 1

SENTENCES 1

DETAINERS—*See*

PRISONS AND PRISONERS 1, 2, 3

DUE PROCESS—*See*

CRIMINAL LAW 2

DUTY—*See*

NEGLIGENCE 1

EVIDENCE—*See*

CONSTITUTIONAL LAW 6

EVIDENCE OF POST-ARREST SILENCE—*See*

CONSTITUTIONAL LAW 1, 2, 3, 4

FEES FOR COURT-APPOINTED ATTORNEYS—*See*

CONSTITUTIONAL LAW 5

CRIMINAL LAW 1, 2, 3, 4

HEARSAY—*See*

CONSTITUTIONAL LAW 6

IMPEACHMENT EXCEPTION TO INADMISSIBILITY OF POST-ARREST SILENCE—*See*

CONSTITUTIONAL LAW 2

INDEMNITY

CONTRACTS

1. The statutory provision abolishing joint liability in actions seeking damages for personal injury, property damage, or wrongful death does not apply to actions seeking to enforce contracts (MCL 600.2956). *Zahn v Kroger Co of Michigan*, 483 Mich 34.
2. The exclusive-remedy provision of the Worker's Disability Compensation Act does not preclude an employer from voluntarily assuming liability for negligence through a contractual arrangement (MCL 418.131[1]). *Zahn v Kroger Co of Michigan*, 483 Mich 34.

INDIAN CHILD WELFARE ACT—*See*

PARENT AND CHILD 2, 3, 4

INDIGENCY DETERMINATIONS—*See*

CONSTITUTIONAL LAW 5

CRIMINAL LAW 3, 4

INTERSTATE AGREEMENT ON DETAINERS—*See*

PRISONS AND PRISONERS 1, 2, 3

INTERPRETATION OF WILLS—*See*

WILLS 1

JOINDER OF CRIMINAL OFFENSES FOR TRIAL—*See*

CRIMINAL LAW 5

JOINT LIABILITY—*See*

INDEMNITY 1

LIMITATION OF ACTIONS

ATTORNEY AND CLIENT

1. A client's claim for a breach of contract against an attorney who moved to withdraw from representation accrues on the date that a court terminates the attorney-client relationship (MCL 600.5807[8]). *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345.
2. An attorney's performance of follow-up or ministerial services for a client after the attorney-client relationship has been terminated does not change the date on which a claim for breach of contract accrues (MCL 600.5807[8]). *Seyburn, Kahn, Ginn, Bess, Deitch and Serlin, PC v Bakshi*, 483 Mich 345.

LOCATION OF DETAINERS—*See*

PRISONS AND PRISONERS 3

MUTUAL AND OPEN ACCOUNTS CURRENT—*See*

CONTRACTS 1

NEGLIGENCE

DUTY

1. Unless a nonparty owed an injured party a duty, its conduct cannot be a proximate cause of the damage sustained by the injured party, and it cannot be considered a nonparty at fault for purposes of MCR 2.112(K), the court rule permitting a court to assess the fault of a nonparty. *Romain v Frankenmuth Mut Ins Co*, 483 Mich 18.

NONPARTIES AT FAULT—*See*

NEGLIGENCE 1

NOTICE OF CHILD PROTECTIVE PROCEEDINGS—*See*

PARENT AND CHILD 1

NOTICES TO COURTS AND PARTIES REGARDING SENTENCING ERRORS—*See*

SENTENCES 1

## PARENT AND CHILD

CHILD PROTECTIVE PROCEEDINGS

1. The state may not terminate a person's parental rights without having made adequate attempts to provide the person notice of the pretermination proceedings and, when appropriate, the opportunity to participate in services available for parents in those proceedings (MCL 712A.1 *et seq*.; MCR 3.900 *et seq*.). *In re Rood*, 483 Mich 73.

TERMINATION OF PARENTAL RIGHTS

2. The Indian Child Welfare Act requires the Department of Human Services to undertake a thorough, contemporaneous assessment of the services provided to a parent in the past and the parent's response to those services before seeking to terminate parental rights without having offered additional services; the act does not categorically require the department to provide services each time it commences a new termination proceeding against a parent, but services provided too long ago to be relevant to a parent's current circumstances do not establish by clear and convincing evidence that the department made the active efforts to prevent the breakup of the Indian family that the act requires and raise a reasonable doubt about whether continued custody by the parent is likely to result in serious emotional or physical damage to the child; the court must judge the timing of the services by reference to the grounds for seeking termination and their relevance to the parent's current situation (25 USC 1912[d], [f]). *In re JL*, 483 Mich 300.
3. The Indian Child Welfare Act does not require that active efforts to prevent the breakup of the Indian family must always have been provided in relation to the child who is the subject of the current proceeding to terminate parental rights; the question is whether the

efforts made and the services provided in connection with the parent's other children are relevant to the parent's current situation and abilities so that they permit a current assessment of parental fitness as it pertains to the child who is the subject of the current proceeding (25 USC 1912[d]). *In re JL*, 483 Mich 300.

4. Any policy or practice of providing no services to the parent of an Indian child when the petition to terminate the parent's rights to that child is based on a prior termination of parental rights to another child does not withstand the heightened standard of the Indian Child Welfare Act, which requires active efforts to prevent the breakup of the Indian family; even if services were provided to the parent in the past, the Department of Human Services or the tribe must conduct a thorough and contemporaneous review of those services and the parent's progress or lack of progress in response; only if active efforts have been made and it appears that the provision of additional services is unlikely to prevent the need for termination may the department or the tribe pursue termination without providing additional services (25 USC 1912[d]). *In re JL*, 483 Mich 300.

PAROLE

DEPARTMENT OF CORRECTIONS

1. The Michigan Department of Corrections does not have the authority to revoke a final order of parole discharge (MCR 6.429[A]). *People v Holder*, 483 Mich 168.

PAROLE REVOCATION AFTER DISCHARGE—*See*

PAROLE 1

PLAIN-ERROR REVIEW—*See*

CONSTITUTIONAL LAW 4

POST-ARREST SILENCE—*See*

CONSTITUTIONAL LAW 1, 2, 3, 4

PREJUDICE TO A CRIMINAL DEFENDANT—*See*

CONSTITUTIONAL LAW 4

PRESUMPTION OF NONINDIGENCY—*See*

CRIMINAL LAW 4

PRISONS AND PRISONERS

DETAINERS

1. A complaint must be dismissed with prejudice pursuant to the Interstate Agreement on Detainers when a prosecutor fails to bring a defendant against whom a detainer has been lodged to trial within 180 days of receiving a request for a final disposition that the defendant made while serving a term of imprisonment (MCL 780.601). *People v Swafford*, 483 Mich 1.
2. The Interstate Agreement on Detainers applies to a case in which a detainer was lodged against a defendant who was not serving a term of imprisonment, as long as the defendant was serving a term of imprisonment when the out-of-state charges were pending and when the request for a final disposition was made (MCL 780.601). *People v Swafford*, 483 Mich 1.
3. A detainer that the prosecutor initially filed with another institution, but that nevertheless reaches the institution in which the defendant is serving his sentence, is a valid detainer for purposes of the Interstate Agreement on Detainers (MCL 780.601). *People v Swafford*, 483 Mich 1.

PROXIMATE CAUSE—*See*

NEGLIGENCE 1

REIMBURSEMENT OF FEES FOR COURT-APPOINTED ATTORNEYS BY DEFENDANTS—*See*

CONSTITUTIONAL LAW 5

CRIMINAL LAW 1, 2, 3, 4

RIGHT OF CONFRONTATION—*See*

CONSTITUTIONAL LAW 6

RIGHT TO REMAIN SILENT—*See*

CONSTITUTIONAL LAW 1, 2, 3, 4

SENTENCES

DEPARTMENT OF CORRECTIONS

1. Notices that the Department of Corrections sends to the courts and parties regarding sentencing errors are merely informational, and any requests contained therein are only advisory. *People v Holder*, 483 Mich 168.

SENTENCING ERRORS—*See*
SENTENCES 1

SEVERANCE OF CRIMINAL OFFENSES FOR TRIAL—*See*
CRIMINAL LAW 5

STATUTES—*See*
INDEMNITY 1, 2
PRISONS AND PRISONERS 1, 2, 3

TERMINATION OF PARENTAL RIGHTS—*See*
PARENT AND CHILD 1, 2, 3, 4

TESTIMONIAL STATEMENTS—*See*
CONSTITUTIONAL LAW 6

TIMING OF DETAINERS—*See*
PRISONS AND PRISONERS 2

TRIAL—*See*
CRIMINAL LAW 5

WILLS
INTERPRETATION OF WILLS
1. *In re Raymond Estate*, 483 Mich 48.

WORDS AND PHRASES—*See*
CONTRACTS 1

WORKER'S DISABILITY COMPENSATION ACT—*See*
INDEMNITY 2